ADVERTISEMENT.

THE Second and Third Volumes of this Abridgment, which compleat the Whole, being entirely finiſhed by the Author, are actually in the Preſs, and will be publiſhed in Michaelmas-Term next, 1725. And that all Gentlemen may be ſatisfied thereof, a conſiderable Number of the Sheets already printed may be ſeen at the Publiſhers of this Volume.

152.g

AN ABRIDGMENT OF THE COMMON LAW:

BEING A

Collection of the Principal CASES Argued and Adjudged in the ſeveral Courts of *Weſtminſter-Hall.*

The Whole being digeſted in a clear and Alphabetical METHOD, under Proper Heads, with ſeveral Diviſions and Numbers under each Title, for the more ready finding any Judgment or Reſolution of the LAW CASES

Whereby the Opinion and Judgment of the Courts may be ſeen in an exact Series of Time, and what Alterations have been made in the Law by ſubſequent Statutes and Judgments, brought down to the Year 1725.

By *WILLIAM NELSON*, of the *Middle Temple*, Eſq;.

VOL. I.

In the *SAVOY:*

Printed by E. and R. NUTT and R. GOSLING (Aſſigns of *Edw. Sayer*, Eſq;) for R. Gosling at the *Middle Temple Gate*, W. Mears at the *Lamb* near *Temple Bar*, T. Ward in the *Inner Temple Lane*, and J. Hooke at the *Flower de Luce* againſt *St. Dunſtan's* Church in *Fleet-ſtreet*. MDCCXXV.

MVSEVM
BRITANNICVM

THE

PREFACE.

SINCE the Modern Dedications of Books to great Men are full of the most servile Flattery, I thought it more agreeable to prefix a Short Preface concerning the following Work.

As to Abridgments of the Common Law *in general, the most learned* Lord Verulam *tells us, that there were two in his Time, but he approved of neither of them, tho' they were written by* two Chief Justices, *who were reputed the most eminent Lawyers in their Time; probably it might be, because those were Abridgments of the* Year-Books, *which seem to be a* Rhapsody *of antiquated Law, written in a barbarous and unpolished Language, serving to little other Purpose than to confine the best Reasoning within the narrow Limits of a Tongue invented in the Ignorance of former Ages; but yet that Great Man wished a good Abridgment might be made of all the Law Cases; so that it was his Opinion, an Abridgment might be useful, if it was a good one.*

'Tis true, my Lord Coke, *who is our Oracle in the Law, was of another Opinion, for he tells us, that* Compendia sunt dispendia; *one would wonder so great a Lawyer should affect a Jingle; but 'tis no Wonder that he did not approve an Abridgment, since he himself was so* Voluminous a Commentator.

But notwithstanding the Opinion of this great Man, I cannot help saying, that I have taken the Advice of a * *Greater in the following Work,* (viz.) *to abridge all the Cases published in the several Volumes of Reports,* (except those of Keble) *ever since the Year-Books were abridged by those two great Lawyers,* Fitzherbert *and* Brook; *and for the most Part in Order of Time as they were severally adjudged, not thinking it necessary to abridge any Thing which was already done by those great Men; because it would have made this Work too Voluminous; for which Reason I have likewise omitted all those Cases which are not Law, and all* Adjournaturs *and*

* The Lord Chancellor *Verulam.*

Quæ-

Quære's, quid inde venit, *as the Lawyers call it, and all Caſes of* Aid Prayer, *of* giving Colour, *of* Occupancy, *of* Raviſhment, *of* Remitter, *of which I have read but one, and no more, in all the Reports ſince* Croke, *and but two of* Warrantia Chartæ; *ſo that tho' there are only few of thoſe Caſes, eſpecially in the new Books, yet they are all obſolete, and are now ſupplied with other Titles in the Law; ſuch as* Caſes upon Bills of Exchange, (*of which there is not one in the old Books,*) Copyhold Caſes, Deviſes, Ejectments, *&c.*

And where the ſame Caſe is publiſhed in ſeveral Books, I have abridged that where it is reported in the cleareſt Manner, and in the Margin there are References to the other Books, where that Caſe may be found; and ſometimes there are ſeveral Points of Law reſolved under one Caſe, which ſeveral Reſolutions I have placed under diſtinct and proper Titles, that each of them may readily be found, which would have been very difficult, if all of them had been comprehended under one improper Head.

And all ſuch Caſes which are very long, and reported in an obſcure and tedious Manner, I have reduced into a compendious Method, and with ſo much Clearneſs and Perſpicuity, as to make them uſeful and intelligible to a Common Reader, that being what I have chiefly intended throughout the whole Abridgment, which is now compleat and finiſhed, and may be not only uſeful to a Student, but pleaſant for him to read; and likewiſe a Repertory for a Lawyer, where, as often as he ſhall be conſulted for his Opinion, or to form an Argument upon any difficult Point, he may eaſily find ſome parallel Caſes already reſolved, to ſupport his own Opinion and Judgment in the Law.

And laſtly, I have ſhewed what Caſes have been denied to be Law by later Reſolutions of the Courts in Weſtminſter-Hall, *and what Alterations have been made in the Law by ſubſequent Statutes, to this Time.*

April 19th 1725. **William Nelſon.**

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(A)

By Miſnoſmer and not. See *Miſnoſmer* per Totum.

1. THE Writ was *Ad reſpondendum* to the Husband, and *Fidei* his Wife; the Defendant pleaded in Abatement, that her Name was *Faith*, and upon Demurrer to this Plea it was adjudged ill; ſo where the Name of the Wife was *Troth*, and in *Latin* ſhe was called *Trothia*, it was held good. *Gouldſ.* 86.

2. *Dethick* was by Letters Patents created *Principalis Rex Armorum*, which being a Name of Dignity, is Part of his Name, and if 'tis omitted the Writ ſhall abate. *Owen* 61. *Clarenceux* and *Dethick*. Davis's Rep. 60. a. S. P.

3. The Defendant, being ſued by the Name of *Robert Boyle* Eſq; pleaded the Statute of Limitations; the Plaintiff replied, that he filed an Original againſt him within ſix Years, and outlawed him by that Name: The Defendant *Proteſtando*, that there was no ſuch Original, for Plea ſaid, that he was then a *Knight*. The Plaintiff ſurrejoined, that the Defendant reverſed the Outlary by the Name of *Robert Boyle, Eſq*; and upon Demurrer he had Judgment; for ſince the Defendant came in *gratis* by the Name of *Robert Boyle, Eſq*; and reverſed the Outlary by that Name, he is eſtopped now to ſay, that he was a *Knight*, eſpecially, ſince he pleaded *Et prædict' Robertus Boyle*, which Words affirm him to be the ſame Perſon. *Style* 440. *Boyle* verſus *Scarborough*. *See* 1 Ed. 6. cap. 7. Cro. Car. 104, 372.

4. An Action of Debt was brought againſt the Defendant by the Name of Sir *William Hicks, Knight and Baronet*; he pleaded in Abatement, that he was never *Knighted*, and having put in Bail by the Name of *William Hicks Baronet*, the Plaintiff could not amend his Declaration, but muſt arreſt him again. 1 *Vent.* 154. Sir *William Hicks*'s Caſe.

(B)

By the Act of the Party, and by his own Shewing.

1. IF the Plaintiff after Appearance be *Nonſuit*, *Diſcontinue*, or be made a *Knight*, theſe are his own Acts, and ſhall abate the Writ. 7 *Rep.* 27. *Portman's* Caſe.

2. The Plaintiff claimed Tithe Corn in *Right of his Wife*, and in an Action of Treſpaſs brought againſt the Defendant for Taking and Carrying it away, he laid the Treſpaſs to be done 27 *Aug.* 29 *Eliz.* Upon Not guilty pleaded, it appeared upon the Evidence, that the Plaintiff had a Licence to be married, dated 28 *Aug.* which was a Day after the Treſpaſs, and that he was married on that Day, and not before: Adjudged, that the Writ ſhall abate, becauſe at the Time of the Treſpaſs the Plaintiff had no Title to the Corn. *p.* 30. *Eliz.* 1 *Leon* 104. *Pawlet* verſus *Lawrence*.

3. *Jointenants for Years*; one of them ſuffered another to uſe his Moiety jointly with him, the other *Jointenant* brought a *Writ of Partition* againſt his Companion, and the Perſon who uſed the Moiety with him, ſuppoſing that he had granted the ſame to that Perſon; but he ſhewed, that he was only Tenant at Will to him, and thereupon the Writ was abated: But adjudged, that he might have a new Writ of *Partition* againſt his Companion alone, by *Journies Accompts*. 2 *Cro.* 218. *Beedle* verſus *Clerke*.

(C)

By the Demiſe of the King, and Diſcontinuance, and where not. See *Evidence*, (D) 10.

1. IF an Original is *Teſte* in the Reign of a King, who dieth before the Return, 'tis gone, and ſhall not be returned in the Reign of another; and yet a Writ of Extent on a Statute, returnable *Quinden' Martini* (before which Time Queen *Mary* died) was returned, and a *Liberate* granted in the Reign of her Succeſſor. *Dyer* 165, 206.

2. Information *Tam pro Domino Rege quam pro ſeipſo*; the Defendant demurred, and before it was argued the King died, the Action is not abated by his Death, for he cannot diſcharge it, 'tis properly at the Suit of the Party. *Hutt.* 82. *Farringdon* verſus *Arundel*. 7 *Rep.* 29. Cro. Car. 7.

3. By the Statute 1 *Ed.* 6. *cap.* 7. All Proceſs on Originals, depending in any Courts of Record at *Weſtminſter*, may be executed and returned in the Reign of the Succeſſor; but this Statute doth not extend to Suits in Inferior Courts. 7 *Rep.* Caſe of *Diſcontinuance of Proceſs.*

4. The Sheriffs Office, not being of Inheritance, or by Charter, is determined by the Demiſe of the King, and ſo are all Informations preferred by him; that is, all the Proceedings upon ſuch Informations, but the Information it ſelf ſhall ſtand good, and the Succeſſor may proceed, becauſe 'tis a Record for the King; and there are ſome Statutes which require, that Informations ſhall be exhibited within a certain Time; but if the King bring an Original, and die, 'tis loſt; if one plead to an Indictment, and the King die, he ſhall plead *de novo*; but if he be convicted, in ſuch Caſe Judgment may be given in the Time of the Succeſſor, by the Statute 1 *Ed.* 6. and not before. 7 *Rep.* 29. *Caſe of Diſcontinuance of Proceſs.*

5. Adjudged, that the Patents of *Judges*, *Sheriffs*, *Eſcheators*, Commiſſioners of *Oyer* and *Terminer* and Gaol-Delivery, and of Juſtices of the Peace, are determined by the Demiſe of the King, but not the Office of Coroners, who are choſen by Writ, and that an Original Writ not returned at the Death of the King, is not helped by the Statute. 1 *Ed.* 6. *cap.* 7. *M.* 1 *Eliz. Dyer* 165. 7 *Rep.* 30. S. P.

6. *Informations* for the King alone, and likewiſe Informations *Tam pro Domino Rege quam pro ſeipſo*, do not abate upon the Demiſe of the King, but ſhall be continued by Reſummons or Reattachment, and the Defendants ſhall plead *de novo*; likewiſe Informations in Engliſh Courts ſhall not abate, becauſe there are no Continuances in them. *Moor* 748. 2 *Cro.* 14. S. P. *Cro. Car.* 10.

7 *A Writ of Error* is a Suit, and the Plaintiff may be Nonſuit in it, and when the Writ is brought, it will not be diſcontinued by the Demiſe of the King. *H.* 20 *Jac. Latch.* 110. *Cole's* Caſe.

Poſtea placito 9.

8. *Prohibition* awarded out of the King's Bench to the Spiritual Court, is diſcontinued by the Demiſe of the King; but if there is an Attachment upon the Prohibition, and the Writ is returned and the Party appeareth and putteth in Bail, then 'tis become the Suit of the Party, and is not diſcontinued by the Demiſe of the King; nor an Action *De Scandalo Magnatum*, tho' 'tis *Tam pro Domino Rege quam pro ſeipſo*, becauſe the Contempt to the King is collateral. *p.* 2 *Car. Latch* 114.. See *placito* 9. S. P.

Noy. 77. 3 Bulſt. 314. Latch 114. *See* placito 5.

9. Suit in the Spiritual Court for a Legacy; the Defendant pleaded, that he had not Aſſets, which Plea being refuſed, a Prohibition was granted, and ſoon afterwards the King died, and the Queſtion was, whether that was a Diſcontinuance? Adjudged, that it was, this being only a Commiſſion prohibitory to the Spiritual Court, and granted by *B. R.* upon a Suggeſtion, not on Record, as 'tis when granted by the Court of *C. B.* 'tis true, if an Attachment had iſſued out of *B. R.* for a Contempt, or if the Defendant had appeared and pleaded, or put in Bail, then it had been a Suit between the Parties, and not diſcontinued by the Demiſe of the King; but a bare Prohibition only without any other Proceedings, is not diſcontinued, *&c.* *Palm.* 422. *Dix* verſus *Brown.*

(D)

Of the Writ by the Death of either Party. See (E) *placito* 6, 7. and *Death of either Party* per Totum.

1. A Verdict was given againſt *Ibgrove*, who brought an Attaint againſt the Jurors, and pending the Writ *Ibgrove* died, yet the Writ ſhall not abate. *Heydon's* Caſe. *Dyer* 131.

2. A Verdict for the Plaintiff in Replevin; it was moved in Arreſt of Judgment, that *after the laſt Continuance* one of the Defendants died, yet the Plaintiff had his Judgment. *Sackvile's* Caſe. *Dyer* 175.

3. The Grantees of the next Avoidance of a Church bring a *Quare Impedit* on a Diſturbance, and pending the Action one of them died, the Writ ſhall abate. *Dyer* 279.

4. He in Reverſion was received in Default of the Tenant for Life, and in a Writ of Entry upon Diſſeiſin he pleaded to Iſſue, and it was found for him, and before the *Day in Bank* the Tenant for Life died, 'tis a *Quære* if the Writ ſhould abate. *Earl of Suſſex's* Caſe. *Dyer* 258.

5. *Sci. fa.* by the Husband and Wife on a Judgment in an Action of Debt, and pending the Writ, the Husband died, the *Sci. fa.* ſhall abate, for 'tis in Nature of an Original Writ to revive the Judgment; and in Original Writs, the Death of one of the Parties always abates the Writ. *Norton* verſus *Symms.* *Brownl.* 64.

6. If the Recovery is in a *Perſonal Action*, and a Writ of Error is brought to reverſe the Judgment, and one of the Defendants in Error dieth, the Writ ſhall not abate; but if the Recovery had been in a *Real Action*, it ſhall abate, becauſe the Party is to be reſtored to the Land. *Hobbie* Sir *Edw. Godb.* 66.

7. Debt againſt three Executors, one of them died pending the Action, the Writ ſhall abate. *Knight's* Caſe. 1 *Leon.* 44.

8. In Judgments upon *Nil dicit*, or upon *Demurrer*, and a Writ of Enquiry brought, and before the Return thereof the Defendant dieth, the Writ ſhall not abate, but the Executor ſhall be charged. 1 *Leon.* 263.

9. In

9. In a Writ of Right of Advowſon againſt three Coparceners, one of them died *after the laſt Continuance*, and this was pleaded in Abatement, and it being in a Real Action againſt Coparceners or Jointenants, the Writ ſhall abate for this Cauſe; but in Aſſiſe of *Novel Diſſeiſin* or *Mortanceſtor*, it ſhould not, as long as there is a Tenant living, becauſe every one of them is a Tenant to the Freehold. *The King* verſus *Dryden*. 1 *Cro.* 415, 423. *Goldſ.* 98.

10. Action againſt Husband and Wife, *as Heir* to Sir *Tho. Watſon*, and pending the Action the Husband died, the Writ ſhall not abate, becauſe the Action being againſt the Wife, as *Daughter and Heir*, the Land is Aſſets, and the Husband had nothing in it. *Holman* verſus *Sir Tho. Pope*. *Winch* 102.

11. A Verdict in *Ejectment* againſt two Defendants, and before Judgment one of the Defendants died, the Writ ſhall not abate, but only againſt him who is dead. *Cleyton* verſus *Lawſon*. *Goldſ.* 80. 43. *Cro. Eliz.* 701. *Hogebert* verſus *Hokely* S. P. *Moor* 469. *Griffin* v. *Lawrence* S. P.

12. Treſpaſs, *Quare clauſum fregit* againſt Husband and Wife; there was a Verdict for the Plaintiff, and between the Day of *Niſi prius* and the Day *in Bank*, the Husband died, the Writ ſhall abate, but the Wife ſhall be chargeable with the Treſpaſs. 1 *Cro.* 366.

13. *Writ of Error* in the Exchequer-Chamber on a Judgment in *B. R.* one of the Parties died the Writ ſhall abate. *Goldſ.* 98. See *Poſtea*, *placito* 28.

14. After the *Teſte* of the Writ of Covenant and the *Dedimus poteſtatem* to take a *Fine* of a Feme Sole, and before the Day in Bank, to record and engroſs it, ſhe died; adjudged, that the Writ of Covenant ſhall abate. 8 *Eliz.* *Dyer* 246.

15. In Aſſiſe of Novel Diſſeiſin againſt four, after Verdict one of them died, this ſhall not be pleaded in Abatement of the Writ, but upon a Writ of Error brought, the Writ ſhall be abated. *Bendlos* 2. *Greenfeild* verſus *Stredwick*.

16. *Aſſumpſit* againſt two, the Plaintiff had a Verdict, and before the *Day in Bank* one of the Defendants died, afterwards Judgment was entered, and the ſurviving Defendant brought a Writ of Error *in the ſame Court where the Judgment was given*, and aſſigned this *Error in Fact*; it ſeemed to the Court, that *Aſſumpſit* differs from *Treſpaſs*, for where a Promiſe is made by many, *'tis joint* and not ſeveral, but where many commit a Treſpaſs, 'tis a ſeveral Treſpaſs in each of them; but it was doubted, whether the Court could reverſe their own Judgment. 2 *Leon.* 54. *Megat* verſus *Davis*. *Poſtea*, *placito* 17. S. C.

17. *Aſſumpſit*, *&c.* againſt Two, the Plaintiff had a Verdict, and before the Judgment one of them died; adjudged, that the Writ ſhall abate. *Cro. Eliz.* 105. *Meggot* verſus *Broughton*.

18. Information *tam quam*, *&c.* upon a Penal Law, and before the Defendant pleaded, the Informer died; adjudged, that the Attorney-General might proceed for the Queen. *Cro. Eliz.* 583. *Hammond* verſus *Griffith*.

19. Debt upon Bond conditioned, that if *W. R.* performed the Award of *J. N.* (if any ſuch were made) before *Eaſter*, and if none be made, then if he come to *Guild-Hall* at *Whitſontide*, and there ſuffer himſelf to be arreſted at the Suit of ſuch a Perſon, if any ſuch Suit ſhall be commenced, or pay to the Plaintiff at *Michaelmas* following ten Pounds, then the Bond to be void; the Defendant pleaded, that no Award was made before *Eaſter*, and that *W. R.* died before *Whitſontide*, but ſaid nothing as to the reſt of the Condition, and yet adjudged a good Plea, becauſe he was hindered from appearing at *Guild-Hall* by the Act of God, and ſo the Obligation is ſaved, tho' he did not pay the 10 *l.* for he had his Election, either to do one or the other. *Cro. Eliz.* 277. *Trapp* verſus *Bedingfield*.

20. *In Replevin* againſt Two, they were at iſſue, and afterwards one of them died, and thereupon the other moved the Court, that the Writ might abate; but adjudged, that it ſhould not abate, but ſtand good againſt him. *Cro. Eliz.* 574. *Withers* verſus *Rook*. *Moor* 17. *S. P.*

21. In a *Writ of Diſceit* upon a Fine levied of Lands in *Antient Demeſne*, and pending the ſaid Writ the Cognizee died; adjudged, that this Writ of Diſceit ſhall not abate, becauſe 'tis in Nature of a Treſpaſs, 'tis not to recover the Lands but to puniſh the Diſceit. *Moor* 13. *The Queen* v. *Dewe*. 3 Leon. 3.

22. Where there is Judgment *by Confeſſion* or Demurrer in an Action on the *Caſe*, or in *Treſpaſs*, and before the *Return* of the *Writ of Enquiry* the Defendant dieth, the Writ ſhall not abate, becauſe the very Awarding it is a Judgment; ſo *in Accompt*, where the firſt Judgment is *quod computet*, and then he accompts, and is found in Arrears and dieth, the Writ ſhall not abate, but Judgment ſhall be given, that the Plaintiff recover the Arrears, and the Executor of the Defendant ſhall be charged, tho' the original Action of Accompt would not lie againſt an Executor. 3 *Leon.* 68.

23. *In Replevin*, *&c.* the Defendants *avowed as Bailiffs* of the Queen for an *Amerciament*, *&c.* and before Judgment one of them died, the Queſtion was, whether the Writ ſhould abate, and adjudg'd it ſhould not; but 'tis otherwiſe where *two Lords* or *two Tenants in Common* make *Coniſance* in their own Right, but not when an *Avowry* is made by Two in Right of another. *Moor* 395. *Short* verſus *Tucker*.

24. *In Accompt*, If the Plaintiff die before the ſecond Judgment, the Writ ſhall abate, and if the Defendant die, no *Sci. fa.* lies for the *Executor*. *Brownl.* 25.

25. In *Trover* brought by *two Plaintiffs*, the Defendant pleaded, that pending the Action one of the Plaintiffs *died*; adjudged, that the Action ſurvives to the other, for the Trover being brought for the Goods of both, the Survivor may proceed, tho' the other is dead. 2 *Bulſt.* 262. *Spring* verſus *Barrett*. *Read* verſus *Redman*.

26. The Husband had a Title to preſent, in the Right of his Wife, they bring a *Quare Impedit*, and before the Return of the *Ve. fa.* to try the Iſſue, the Wife died, the Writ ſhall not abate

by her Death, becauſe the Avoidance was a Chattel veſted in the Husband in the Life-time of his Wife. *Winch* 73. *Blunt* verſus *Hutchinſon.*

27. *B.* had Judgment for 300 *l.* and made *E.* his Executrix and died, and before any Execution the Executrix died Inteſtate, then *A.* adminiſtred to the Goods of *B.* and married *J. D.* the Huſband and Wife brought ſeveral *Scire facias's* againſt ſeveral Tertenants, and ſome appeared, and Judgment againſt them, and ſome did not; and the Writs being returned, but no Execution done, the Husband died, the Writ ſhall abate againſt them all. *Hob.* 287. *Whittingham* v. *Lord Darby.*

28. Husband and Wife acknowledged a Fine by *Dedimus*, 26 *Martii*, and the Wife died the very next Day, and in the ſame Month; afterwards the Writ of Covenant was compounded in the Alienation-Office, and the *King's Silver* was entered as of *Hillary-Term* before, ſo as the Fine was paſſed and engroſſed; the Heir of the Wife would have avoided it as not duly acknowledged and levied; but upon Debate it was adjudged a good Fine. *Hob.* 330. *Farmer's* Caſe.

29. Judgment in an Action on the Caſe againſt Two in *C. B.* and a Writ of Error brought in *B. R.* and before the Errors were argued, one of the Plaintiffs in Error died; adjudged, that the Writ ſhall abate, and thereupon a *Sci. fa.* may be brought againſt the Executor of the dead Man, 'tis true, the Writ of Error was to diſcharge him of the Judgment, yet if 'tis affirmed, the Charge will fall upon the Executor of him who is dead as well as upon the other who is living, for he ſhall not be charged alone. *Yel.* 208. *Spencer* verſus *Earl of Rutland.*

30. *In Dower*, there was Judgment by Default, and a Writ of Inquiry if the Husband died ſeiſed, and of what Eſtate, either in Fee or Tail, and Judgment thereon, and a Writ of Error brought, and the Record being removed, the Widow died; adjudged, that the Writ ſhall not abate, and thereupon the Plaintiff in Error proceeded and aſſigned Errors. *Yel.* 112. *Bromley* verſus *Littleton. Poſtea Error F.* 18. *S. C.*

31. In a *Writ of Right of Advowſon* againſt three Defendants, a Special Verdict was found, and afterwards and before Judgment, one of the Defendants died, and this was alledged on Record, in Abatement of the Writ, and that the Defendants were Coparceners; the *Attorney-General* alledged, that they were *Jointenants and not Coparceners: Sed per Curiam*, whether Coparceners or Jointenants, the Writ ſhall abate. *W. Jones* 452. *The King* verſus *Kingſmill & al'.*

32. *Caſe* for Words by Husband and Wife, againſt the Defendants Husband and Wife, and pending the Action the Defendant's Husband died, and the Widow married again, the Writ ſhall abate. *White* verſus *Whorewood. Style* 138.

33. *Writ of Covenant* againſt three, one dies, the Writ is abated againſt him alone, and abateable as to the Reſt. *Jones* verſus *Graves*, *Style* 421.

34. *Treſpaſs, &c.* againſt four Defendants, one of them died before the Verdict, and the Jury found them all guilty, and aſſeſſed Damages, *&c.* the Court was moved, that the Plaintiff might have Judgment againſt the other three, which was granted, upon his relinquiſhing the Damages as to him who was dead. *M.* 1651. *Style* 299. *Preſton* verſus *Mortled.*

35. *Caſe for ſcandalous Words* brought againſt Husband and Wife, for Words ſpoken by the Wife; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Writ was abated by the Death of the Husband, after the laſt Continuance: But adjudged, that this Action is like a *Treſpaſs*, which is joint and ſeveral, and ſhall not abate by the Death of the Defendant; that in this Action the Husband was named only for Conformity for the Words were ſpoken by the Wife, and ſhe was only the Wrong doer, but it might have been otherwiſe if ſhe had died. *Hardres* 151. *Brumrigg* verſus *Hanger & Ux'.* See *Action of Slander. G.* 32. *S. C.*

36. *Caſe*, &c. *againſt the Sheriffs of London* for an Eſcape on *Meſne Proceſs*, after a Verdict for the Plaintiff at the *Niſi Prius*, and before the Day in Bank one of the Sheriffs died; and this was ſuggeſted by *Affidavit*, without entring it on the Roll, becauſe no Roll is made till after the Term, and then it would be too late; and upon this *Affidavit* it was moved, that the Suit ought to abate, like an Action of Debt, or Accompt or Caſe againſt two upon a *joint Contract*, or againſt Executors, where one dies, the Writ ſhall abate: But the better Opinion was, that an *Eſcape* is in Nature of a *Treſpaſs* and Wrong, and committed by both, and * each of them, for they are diſtinct Perſons, tho' but one Officer; and 'tis not like a Contract, which is entire and cannot be ſeparated, but like *Treſpaſs* againſt Husband and Wife, which, tho' but one Perſon in Law, yet if the Husband dies, the Suit ſhall proceed againſt the Wife. *Hardres* 161. *Harris* v. *Phillips* and *Biggs.*

* *See* Dyer 175. 2 Cro. 19. 356.

37. In a *Writ of Error*, if the Defendant die, the Writ is not abated; but 'tis otherwiſe if the Plaintiff in Error die; but in the Caſe of *Thynn* and *Corie*, the Defendant in Error died, and a *Scire facias ad audiendum Errores* went againſt the Executors. 1 *Vent.* 34.

Moor 701. S. P. Yel. 113, 209.

38. *Judgment* was entered as of *Trinity-Term*, and a Writ of Inquiry returnable in *Michaelmas-Term*, and the Plaintiff died in the long Vacation; adjudged, this being but an interlocutory Judgment, the Action abated by the Death of the Plaintiff. 1 *Mod.* 5.

Sid. 419. S. P.

39. *Covenant, &c.* brought by the ſurviving Truſtee againſt an Heir, who pleaded *Riens per Deſcent* on the Day of the original Writ brought by the Plaintiff, who replied, that he and the other Co-Truſtee, 12 *Julii*, 29 *Car.* 2. did file an Original in Covenant againſt the Defendant, returnable *tres Mich.* that the Defendant not appearing, the Sheriff returned *Nihil habuit*, and ſo an *alias Capias*, and Continuances till *Octab. Hill.* 31 *Car.* 2. that then the Plaintiffs declared, *&c.* and there was a Judgment by Default, and a Writ of Enquiry returnable *Quinden' Paſ.* and ſo Continuances from Term to Term, the laſt whereof was from *Octab. Hill.* to *Cro. Aſcenſionis Domini*, which is the laſt Return in *Eaſter-Term*, and that before *Cro. Aſcenſionis Domini (viz.) 7 Martii* 32 *Car.* the other *Truſtee died*, whereupon the Plaintiff being the Survivor, and the

original Writ being abated by the Death of the other, he (the Plaintiff) on the *14th Day of July*, 33 *Car.* 2. *Recenter* brought another Original againſt the Defendant, and declared in Covenant; and the Sheriff having, as before, returned that Writ *Nihil habuit*, a *Capias* was awarded againſt the Defendant, to which he appeared, and thereupon the Plaintiff declared againſt him as aforeſaid, and averred, that he had Aſſets *die impetrationis* of the firſt Original by both the Truſtees; and likewiſe averred, that the Actions were the ſame: The Defendant rejoined, that the firſt Original being continued to *Cro. Aſcenſionis Domini*, and there being no Continuances afterwards, *Loquela remanſit ſine die*, that *Cro. Aſcenſionis Domini was on the 13th Day of May* in that Year, and that the ſecond Original was brought on the *14th Day of July* following, and not before; and upon Demurrer, the Court ſeemed to incline, that this ſecond Original was not brought in due Time, becauſe it was not brought till the *14th Day of July*, which is four Months after the laſt Continuance, that being to *Cro. Aſcenſionis Domini*, which was on the *7th of March* before. *Lutw.* *Gifford* verſus *Young*.

40. Before the Statute 8 & 9 *Will.* 3. *cap.* 3. The Death of the Plaintiff, before Judgment, did always abate the Writ; but now by that Statute 'tis enacted, that if there are two or more Plaintiffs or Defendants, and one of them die, and the Cauſe of Action doth ſurvive to the other Plaintiff, or againſt the other Defendant, the Writ ſhall not abate, but that ſuch Death being ſuggeſted on the Record, the Action ſhall proceed.

(E)

What ſhall be a Plea in Abatement and not in Bar, and when to be pleaded. See *Pleas* (M) per totum.

1. TWO were Plaintiffs in an Action of Debt upon a Bond; the Defendant pleaded, that the Bond was made to them and *to another*, and that all three had brought an Action of Debt againſt him, which was ſtill depending, and concluded his Plea, by demanding Judgment *ſi actio*, which made it a Plea in Bar; and upon Demurrer to the Plea it was objected, that the Bond made to Two, upon which this Action was brought, could never be intended the Bond made to Three; and if this ſhould be a good Plea, it ought to be in Abatement and not in Bar, and ſo it was adjudged. * *Cro. Eliz.* 202. *Iſham* verſus *Hitchcock*. See *Bar.* A. 6. * *See* Adminiſtration K. 13. 11 Rep. 52.

2. *Debt* againſt an Executor, who pleaded, that there was another Executor who had adminiſtered, and was ſtill living, and not named in the Writ, and concludes his Plea in Bar, (*viz.*) *Judgment ſi actio*, the Plaintiff replied in *Abatement*, *quod Billa caſſari non debet*, and adjudged good, tho' the Plea was in Bar to the Action, and therefore the Replication ſhould be *præcludi ab actione non debet*. *Moor* 692. *Onely* verſus *Foutleroy*.

3. A *Plea in Abatement* is never allowed after an *Imparlance*. *Style* 180. *Weſton* verſus *Plowden*. *See* Placito 2, 11.

4. Adjudged, that a Plea may be good in Abatement, tho' it contain Matter in Bar. 1 *Mod.* 214. *Major* verſus *Bird*. See 2 *Roll. Rep. Salkell* verſus *Skelton*. *S. P.*

5. In a *Quare Impedit* againſt the Patron and againſt *Richard Biſhop of Lincoln*, Ordinary, and againſt the Incumbent, who pleaded, that at the Day of the Writ brought there was no ſuch *Richard Biſhop of Lincoln* living; adjudged a good Plea to abate the Writ. *Trin.* 16 *Jac.* *Coppledike* verſus *Tanſey*. *Hutt.* 31. *Quare Impedit*. *E.* 19. *S. C.* Quare Impedit E. 19.

6. Debt in the Court of Common Pleas upon an Eſcape, after Execution, the Defendant having made a full Defence, *& ſalvis ſibi omnibus advantagiis quoad Billam præd. petit licentiam interloquendi, &c.* and then pleaded his Privilege as Marſhal of the King's Bench, and the Plea was adjudged good, becauſe the ſpecial Imparlance was *quoad Billam* only. *Hardres* 365. *Clapham's* Caſe.

7. *In Trover* after an *Imparlance*, the Defendant pleaded in Abatement, that the now Plaintiff, with two more, joined with him, brought a former Action of Trover againſt him for the ſame Goods, which Action is ſtill depending; the Plaintiff replied, that the other Two were dead before this Action brought; and upon a Demurrer it was adjudged, that in all Actions, where one of the Plaintiffs dies, the Writ abates, except in Actions brought by two Executors; but in *Treſpaſs* againſt two Defendants, if one die, the Writ ſhall not abate. 1 *Vent.* 235. *Dacres* verſus *Duncomb*. *Antea* (D) 40. 2 Lev. 82. *See the* Stat. 8 & 9 Will. 3. for preventing frivolous Suits.

8. The Defendant pleaded in Abatement, that the Plaintiff died in ſuch a Place before the Action brought, the Court doubted whether this Plea was good, but upon View of * Precedents, two Judges held it a good Plea, but the other ſaid, that this Precedent in *Raſtal* was, where there were two Plaintiffs, ſo that tho' one died, yet an Iſſue might be taken, which of them was living; but by the Replication in that Precedent it appeared, that the Attorney for the Plaintiff, who was averred to be dead, *Nomine & pro ipſo* T. S. *Magiſtro ſuo dicit quod breve prædict' ratione præallegata caſſari non debet quia dicit quod prædict' T. S. ſuperſtes eſt & in plena vita exiſtit.* 2 *Vent.* 196. *Markes* verſus *Nottingham*. * Raſt. Ent. 161. Placito 6.

9. In Aſſault and Battery, the Defendant *imparled ſpecially*, and having made a full Defence, he afterwards pleaded an *Outlary* in Abatement to the Action; and upon a Demurrer to this Plea it was adjudged, that he ſhould Anſwer over, becauſe ſuch a Plea is never allowed after a *Special Imparlance and full* Defence. 1 *Lutw.* 5. *Gawen* verſus *Surby*. *Hardres* 365. S. P. *Style* 273. S. P. *See* Placito 2, 3, 4.

10. So

10. So where the Plaintiff brought an *Indebitatus Aſſumpſit*, and the Defendant *imparled generally*, and afterwards pleaded in Abatement, that before the Action brought ſhe was *married*, and that her Husband was living, and for that he is not named in the Declaration; the Defendant *petit judicium ſi ipſa ad actionem præd' reſpondere debeat*; the Plaintiff replied, that he had declared in this Action againſt the Defendant, and that ſhe had *imparled* generally, and for that a *Plea in Abatement* is not to be allowed after ſuch an *Imparlance*, he demurred to this Plea; adjudged a good Cauſe of Demurrer. 1 *Lutw.* 22 *Bartelott* verſus *Burton.*

11. Debt in the Common Pleas upon a Bond and Judgment, the Defendant imparled ſpecially, *(viz.) Salvis ſibi omnibus & omnimodis exceptionibus, &c. tam ad juriſdictionem Curiæ quam ad Breve & narrationem*, and then pleaded his Privilege in Abatement, as he was one of the Clerks of the Exchequer; but it was adjudged, that after ſuch an Imparlance, a Plea in Abatement was not good, if it had been *Salvis omnibus advantagiis quibuſcunq*; it might have been good, but this being *tam ad Breve quam ad narrationem*, 'tis otherwiſe, becauſe thoſe muſt be ſuch Exceptions as the Law allows to that very Writ and Declaration, ſo that by acknowledging ſuch Manner of Proceedings, the Juriſdiction of the Court was affirmed. 1 *Lutw.* 43 *&* 640. *Wentworth* v. *Squibb.*

12. *In Treſpaſs, &c.* The Defendant *Ven' & defend' vim & injuriam quando, &c. & dicit quod ipſe, &c. reſpondendum compelli non debet*, and ſo pleaded an *Outlary* in Abatement, and upon Demurrer it was held, that the Plea was Informal, for there ought not to be a full Defence in a Plea in Abatement; but in a Plea in Bar 'tis otherwiſe. 2 *Lutw.* 1529. *Ford* verſus *Edgcomb.*

1 Salk. 212. Poſtea placito, 14.

13. Upon a Demurrer to a Plea in *Abatement*, the Faults in the Declaration are not afterwards to be examined. 2 *Lutw.* 1589. in *Bellaſis*'s and *Heſter*'s Caſe.

14. *In Trover*, for Taking 6000 Load of Oar; the Defendant pleaded, that the Plaintiff had nothing in the ſaid Oar, *niſi conjunctim & pro indiviſo*, with two others, and ſo concludes in Abatement: The Plaintiff replies, that before the Action was brought *Partition* was made, *per quod* he became ſolely poſſeſſed, and traverſed, that after the Partition he had any Thing *conjunctim* with another, there was a Rejoinder and Demurrer, and the Defendant had Judgment; for tho' he concluded his Plea in Abatement, yet becauſe he ſheweth, that the Plaintiff had no Cauſe of Action it ſhall be taken in Bar. 2 *Mod.* 63. *Stubbings* verſus *Bird.*

2 Lutw. Bellaſis *verſus* Heſter, S. P. Antea placito, 13.

15. *Caſe, &c.* for Beer and for Wages; the Defendant pleaded in Abatement, *& petit judicium de Billa, & quod Billa prædict' caſſetur* for ſeveral Incertainties in the Declaration; *Sed per Curiam*, the Defendant cannot take Advantage of any Miſtakes in a Declaration upon a Plea in Abatement, he ought to have demurred. 1 *Salk.* 212. *Hartopp* verſus *Holt.*

Abeyance.

(A)

Where the Freehold ſhall be in Abeyance, where not.

1. TEnant for Life, Remainder in Tail, Remainder in Fee, he in Remainder in Tail was attainted of Felony; adjudged, that the King ſhould have the Fee during the Life of the Tenant for Life, becauſe it cannot veſt in any Body elſe, and it ſhall not be in Abeyance; it cannot veſt in the chief Lord, becauſe the Tenant for Life is living, it cannot veſt in the Remainder Man in Fee, becauſe the Remainder Man in Tail is living, and it cannot revert to the Donor before the Remainder Man in Tail is dead without Iſſue; but upon the Attainder of the Remainder-Man he is dead as to the King, and therefore the Fee ſhall veſt in him, but if it could veſt in any other Perſon, then the King ſhould only have the Profits during his Life. 2 *Leon.* 123. *Venables* verſus *Harris.* 3 *Leon.* 185. S. C.

Of Rent, confirmeth the Leaſe or other Thing. (A)
Of Rent, ſhall not affirm the Leaſe. (B)
Of Rent after Aſſignment of the Term. (C)

Acceptance.

Of one Eſtate, ſhall not deſtroy another. (D)
Of one Thing, ſhall be a good Bar to demand another. (E)
Muſt be with Satisfaction. (F)
Of Money, diſcharges a Bond. (G)

(A)

Where Acceptance of Rent confirmeth the Leaſe, or other Thing, and doth not deſtroy it; and of Acquittance and Avowry for Rent.

See *Avowry*. (B) per Totum. and *Fines*. (A) 15.

1. TEnant in Tail made a Leaſe for Years, rendring 20 *s.* Rent, and afterwards releaſed 19 *s.* and died, the Iſſue in Tail accepted the 12 *d.* Rent; the better Opinion was, that by the Acceptance of the Shilling for Rent he had affirmed the Leaſe, and could not diſtrain for the 19 *s.* Rent. *Dyer.* 304.

2. Tenant for Life, Remainder in Tail, a Stranger levies a Fine to him in Remainder, who leaſed the Lands to the Conuſor, rendring Rent, the Tenant for Life died, and the Iſſue in Tail accepted the Rent; adjudged, that by the Fine and Acceptance of the Rent the Leaſe was affirmed. *Dyer* 299. See *Smith* verſus *Stapleton*. *Plowd.* 418, 434.

3. Tenant in Tail, the Reverſion in the King, the Tenant in Tail made a Leaſe for Years, and died, his Iſſue being then of full Age; the King entered and avoided the Leaſe by his *primier Seiſin*, (which was a Prerogative he had to take the Rents and Profits of the Lands which were held of him in *Capite*, until the Heir (if of full Age) did *Homage*, and now taken away by the Statute 12 *Car.* 2. *cap.* 24) the Iſſue of full Age ſued his Livery, and afterwards accepted the Rent, and not long after was attainted of Treaſon; adjudged, that by the Acceptance of the Rent after Livery by the Iſſue in Tail, the Leaſe was affirmed, becauſe it was avoided by the King but for Part of the Term, (*viz.*) till the Iſſue had done Homage. 2 *Mar. Dyer* 119. *Auſtin's* Caſe.

4. *Lord and Tenant*; the Rent is behind many Years, the Tenant made a Feoffment in Fee, and the Lord accepted the Rent of the Feoffee which became due in his Time; adjudged, that by ſuch Acceptance he ſhall looſe all the Arrearages, and cannot avow for the ſame. 3 *Rep.* 65. *Penant's* Caſe.

5. Leaſe for Years, rendring Rent, with a Clauſe of Re-entry; the Leſſee paid the Rent, which the Leſſor accepted, and *put it into a Bag*, but afterwards finding Braſs Money amongſt it, he refuſed to carry it away, and entered for the Condition broken; but adjudged unlawful, becauſe after he had accepted the Rent he is barred. 5 *Rep.* 113. *Wade's* Caſe. *Vane* and *Studley's* Caſe. *Ibidem.*

6. Leaſe for Years, rendring Rent at *Lady-Day*, *&c.* with a Clauſe of Re-entry for Non-payment, the Rent was not paid at the Day, afterwards the Leſſor accepted it, and then entered; adjudged, that his Entry was lawful, becauſe the Rent was due before the Condition broken. 1 *Leon.* 262 *Green's* Caſe. *Poſtea Acceptance*, (B) 7. S. C.

(B)

Where an Acceptance of Rent ſhall not make the Leaſe good.

1. IF a Parſon or Tenant for Life make a Leaſe for Years, there no Acceptance can make the Leaſe good, becauſe the Leaſe is void by their Death. *Dyer* 46. See *Penant's* Caſe. 3 *Rep. Dyer* 239. *Hodgkis* verſus *Tucker*. 7 *Rep. Earl of Bedford's* Caſe.

2. A Biſhop made a Leaſe for Years to two, not confirmed, afterwards he made another Leaſe to one of them, which was confirmed by the *Dean and Chapter* and died, the Acceptance of the Rent by his Succeſſor did not affirm the firſt Leaſe, becauſe it was void, and the ſame was in Prejudice of the ſecond Leaſe. *Dyer* 46.

3. If before the Statute 38 *H.* 8. the Husband and Wife had made a Parol Leaſe, rendring Rent, and the Husband died, and the Wife accepted the Rent, it did not make the Leaſe good, becauſe ſhe muſt conſent to the Making a Leaſe of her Land, and ſhe could not conſent by Parol, but by Deed; but ſince it hath been adjudged contrary. *Dyer* 91. *Moſley* verſus *Gilbert*. *Dyer* 46. *Villers's* Caſe. 4 *Rep. Vernon's* Caſe.

4. *Tenant in Tail* made a Leaſe for Years, rendring Rent to him and his Heirs, and died; his Son and Heir accepted the Rent, and was afterwards executed for Treaſon, leaving Iſſue a Son, the King accepted the Rent, but that did make the Leaſe good, the Lands being in his Hands by the Attainder, and not in the Reverter. *Dyer* 115. Sir *Tho. Wiatt's* Caſe.

5. Tenant

5. Tenant in Tail made a Leaſe for Years *to commence after his Death*, rendring Rent, there the Acceptance of the Rent by the Iſſue ſhall not bar him, becauſe the Leaſe did not take Effect in the Life-Time of his Anceſtor. *Plowd.* 418. *Smith* verſus *Stapleton.*

6. A Grant of Lands to a Parſon and his Succeſſors to find Lights, the Rent was employed to that Purpoſe: after the *Stat.* 1 *Ed.* 6. *of Chantries*, the Parſon *Anno* 28 *H.* 8. made a Leaſe for Life of the Lands, and died, and his Succeſſor accepted the Rent, the King after the Statute granted the Lands to another; here the Acceptance of the Rent was void as to make the Leaſe for Life good. *Dyer* 337.

7. Leaſe for Years, rendring Rent at *Lady-Day*, *&c.* with a Clauſe of Re-entry for Non-payment; the Rent was not paid at the Day, afterwards the Leſſor accepted it and entered: Adjudged, that his Entry was lawful; but if he had accepted another Quarter's Rent, then he had affirmed the Leaſe, and admitted the Leſſee to be his Tenant. *Green's* Caſe. 1 *Leon* 262. Antea *Acceptance* (A) 6. S. C.

Poſtea placito, 12. S. P.

8. *Leaſe for Years*, with Condition, that the Leſſee ſhall not *Alien or Aſſign*, without the Aſſent of the Leſſor, and if he did, that then the Leſſor ſhould re-enter; he aſſigned Part of the Land without Aſſent, *&c.* and then the Leſſor, *before Notice* of the Aſſignment, accepts the Rent, and afterwards entered for the Condition broken, and adjudged lawful; for the Condition being *Collateral*, he might aſſign the Land ſo ſecretly, that it may be impoſſible for the Leſſor to know it. 3 *Rep.* 65. *Pennant's* Caſe. *Cro. Eliz.* 453. *S. C. Moor* 456. *S. C.* By the Name of *Harvey* verſus *Oſwold.* 2 *And.* 90. *S. C.*

9. Leaſe is made on Condition, that the Leſſee ſhall do no Waſte, if he doth Waſte, and afterwards the Leſſee accepts the Rent, he cannot enter. *Godb.* 47.

10. The *Provoſt of Wells* was Parſon Imparſonee of the Parſonage of *W.* and made a *Leaſe of the Tithes*, rendring Rent, which Leaſe was confirmed by the Dean and Chapter, but not by the Patron and Ordinary, the Provoſtſhip was united to the Deanery, the *Provoſt* died, and the Dean accepted the Rent; adjudged, that this Leaſe was void by the Death of the *Provoſt*, and the Acceptance of the Rent did not confirm it, becauſe the Patron and Ordinary did not join in the Leaſe. 7 *Eliz. Dyer* 239.

11. *In Ejectment*, The Caſe upon the Pleadings was, a Leaſe was made for Years, rendring Rent at *Michaelmas and Lady-Day*, by equal Portions; *Proviſo*, if the Rent be Arrear for one Month after either of thoſe Days, and not paid then, the *Leaſe ſhall be void*; the Rent was arrear, but afterwards it was paid and accepted, and ſo likewiſe ſeveral Times after it was arrear; Adjudged, that this *Proviſo made a Limitation*, and that the Leaſe was abſolutely void, and if ſo, it ſhall never be revived by the Acceptance of the Rent. *Moor* 291. *Finch* Sir *Moile* verſus *Throgmorton.* *Poſtea* Proviſo, (C) 8. *S. C.*

2 And. 42.

12. Leſſee for Years of an Houſe and Lands, rendring Rent, provided that the Leſſee ſhall *not parcel out any Part of the Land from the Houſe*, afterwards he did parcel out the Land from the Houſe; then the Rent was in Arrear, the Leſſor demanded it, and tho' he had a Title to re-enter for the Condition broken, yet he afterwards accepted the Rent which became due after he had a Title to enter, and then he re-entered, and adjudged, that tho' he accepted the Rent, as aforeſaid, yet his Entry was lawful. *Noy* 7. *March* verſus *Curtis.* *Moor* 425. *S. C.* *Poſtea* Proviſo, (A) 14. *S. C.*

13. Leaſe for twenty-one Years, rendring Rent, *&c.* on Condition, that if the Leſſee did let any Part of it for above three Years, then the *Leaſe to be void*, and that the Leſſor might enter; he let it for three Years, and ſo from three Years to three Years, during the Term of twenty-one Years, if he ſo long lived; the Leſſor accepted the Rent of the Aſſignee, and afterwards entered, this was a Breach of the Condition, and the Acceptance afterwards did not diſpenſe with it, becauſe the Original Leaſe was *void and determined.* *Cro. Car.* 368. *Mulcarry* verſus *Eyres.*

(C)

Acceptance of Rent after the Aſſignment of the Term.

1. LEſſee for Years aſſigned his Term and died Inteſtate, the Leſſor brought Debt againſt his *Adminiſtrator*, who pleaded the Aſſignment, and that the Plaintiff had *Notice*, and had accepted the Rent of the Aſſignee; adjudged, that by the Death of the Leſſee the Privity of Contract was determined, and the Action would not lie againſt the *Adminiſtrator.* *Marrow* verſus *Turpin.* *Cro. Eliz.* 715. and cited in *Walker's* Caſe, 3 *Rep.* 24.

2. Debt for Rent; the Defendant pleaded in Bar, that before the Action brought he aſſigned the Leaſe to *R. B.* and that the Leſſor had accepted the Rent of the Aſſignee, which became due after the Aſſignment; adjudged, that ſuch Acceptance was ſufficient *Notice* of the Aſſignment, and that the Plaintiff could not reſort to the firſt Leſſee. 2 *Bulſt. March* verſus *Brace*, 151.

(D.) *Where*

(D)

Where Acceptance of one Eſtate ſhall deſtroy another, where not.

1. A Leaſe for Years was made to Husband and Wife; they entred, and afterwards the Leſſor made a *Feoffment* in Fee to the Husband; adjudged, that by the Acceptance of the *Feoffment* the Husband had made a Surrender of the Term, and that it was extinguiſhed; but if the Conveyance had been by Bargain and Sale enrolled, or by a Fine inſtead of a *Feoffment*, it had not been extinguiſhed. *Cro. Eliz.* 912. *Downing* verſus *Seymour.*

2. A Man in Conſideration of a Marriage to be had with *M. R.* made an Eſtate to her *for Life* of certain Lands in full Satisfaction of her Dower; afterwards they married, and the Husband died, and the Widow brought a Writ of Dower againſt the Heir, who pleaded in Bar the *Acceptance of the Eſtate for Life*; adjudged no good Plea, for ſuch *Acceptance, &c.* did not bar her of Dower at the Common Law, becauſe ſhe had no Title of Dower when the Acceptance was made; and beſides no collateral Acceptance can bar any Right of Inheritance or Freehold. 4 *Rep.* 1. *Vernon's* Caſe. Poſtea, (E) 5. S. C.

3. A Man made a Leaſe of a Manor for thirty Years, *excepting the Wood, &c.* and afterwards made a Leaſe of the Woods to the ſame Leſſee for ſixty Years, and a Third Leaſe to him of the Manor for thirty Years, without any Exception; reſolved, that by the Acceptance of this future Leaſe, the Leaſe for ſixty Years was ſurrendered; becauſe by ſuch Acceptance the Leſſee had affirmed, that the Leſſor had Authority to make a new Leaſe. 5 *Rep.* 11. *Ives's* Caſe. 2 And. 51. Cro. Eliz.

4. Leſſee for Years *without Impeachment of Waſte*, if he accepts a greater Eſtate, or if he aſſign his Term, the *Privilege* is deſtroyed. 11 *Rep. Lewis Bowles's Caſe at the End.*

5. In a ſpecial Verdict in Treſpaſs, the Caſe was, a Leaſe was made to Husband and Wife for their Lives, and afterwards they accepted a new Leaſe, *&c.* for themſelves and their Son, *Habendum* to all three of them, *a die datus Indenturæ*, for the Term of their Lives, *&c.* with a Letter of Attorney to make Livery; adjudged that the Acceptance of the ſecond Leaſe to commence *a die datus, &c.* was a Surrender of the firſt, and this by the expreſs Agreement in Writing of the Leſſees themſelves, for otherwiſe the Leſſor had no Power to make a new Leaſe. *Moor* 636. *Mellow* verſus *May.*

6. A Widow had Judgment in Dower, and upon a Writ to the Sheriff he returned, that he had delivered eighty-four Acres to her of the Lands mentioned in the Declaration, afterwards the Widow brought a *Scire facias* againſt the Tertenant, ſuggeſting, that ſixty Acres, Parcel of the eighty-four, were the Lands of another Perſon not mentioned in the Writ, and therefore prayed another Diviſion; the Tenant pleaded, that the other twenty-four Acres were Parcel of the Lands recovered in Dower, and that the Widow had entered, and accepted thoſe twenty-four Acres; and upon Demurrer to this Plea the Tenant had Judgment, becauſe by this Entry and Acceptance, tho' of a leſſer Part, the Widow had barred her ſelf of the Thirds of the Whole in the Declaration. *Moor* 679.

7. Leaſe for Years to *R. B.* rendring Rent, the next Year another Leaſe was made of the ſame Lands to the *Lady P.* for ninety-nine Years; the next Year the ſame Lands were demiſed to the ſaid *R. B.* for forty-one Years, who *accepted the Leaſe*, but that did not extinguiſh his firſt Leaſe; becauſe the Leſſor by making the *intermediate Leaſe* to the *Lady P.* had only a Reverſion, and could not afterwards give any Intereſt to *R. B.* but if it had not been for this *intermediate Leaſe*, then the Acceptance of the ſecond Leaſe for forty-one Years had been a Surrender of the firſt. *Hutt.* 104. *Watt* verſus *Maidwell.*

8. If a Man hath a Leaſe for Years, which is good in Law, and afterwards accepts a new Leaſe of the ſame Lands, which is void in Law, this is no Surrender in Law of the good Leaſe. *Hutt.* 101. *Baker* verſus *Willoughby. Wells* verſus *Whitewood, ibidem S. P.*

(E)

Where the Acceptance of one Thing ſhall be a good Bar to demand another, where not. See *Adminiſtration.* (V) 9. *Bonds.* (N) 20.

1. Where the Condition of a Bond is *Collateral*, there the Acceptance of another Thing is no * Bar; as if the Condition be to *make up an Accompt* in an Action of Debt on the Bond, the Defendant cannot plead, that he made a Leaſe for Years to the Plaintiff of Lands, which he *accepted. Dyer* 1. * 1 Roll. Rep. 297. Forewood *ver.* Dicton. S. P.

2. Where the Condition is to *pay Money*, there the Acceptance of another Thing is good; as in an Action of Debt on a Bond conditioned to pay 10 *l.* at ſuch a Day, the Defendant pleaded, that before the Day he gave the Plaintiff a *Horſe* in Satisfaction of the Money, which he *accepted*, and held good. *Dyer* 56.

3. If a Man is *bound in* 200 *Quarters of Corn*, with a Condition to pay 20 *l.* the *Obligor* may by Agreement, give the *Obligee* any other Thing in Satisfaction of the Money; but if the Condition had been *to pay* 100 *Quarters of Corn*, there the Acceptance of *Money*, or any other *See* Accord. (A) 5.

Thing, had not been good, becauſe the Contract was not made for *Money*, but for a collateral Thing. *Peytoe*'s Caſe 9 *Rep.* 79.

4. The *Wife*, whilſt *ſole*, in Conſideration the Plaintiff had expended 1500 *l.* about her Suits, promiſed to pay, *&c.* and in an Action on the Caſe againſt *Husband and Wife*, they pleaded, that the Plaintiff did not expend 10 *l.* and that the Heir made a Leaſe for Years to the Plaintiff to the Uſe of the Wife, *to commence after her Death*, in Recompence of her Dower, and that they agreed the Plaintiff ſhould retain the Leaſe to his own Uſe, and Satisfaction of his Expences, which he *accepted*; and upon Demurrer to this Plea it was held ill, becauſe the Agreement to accept the Leaſe, being at a Time to come, was not *executed*, but *Executory*. *Dyer* 356. *Onely* verſus *Earl Rivers*. *Poſtea Action on the Caſe* (M) 2.

5. Where a Woman hath a Title to an Eſtate of Inheritance, as Dower, *&c.* ſhe ſhall not be barred by the Acceptance of any collateral Satisfaction or Recompence. 4 *Rep. Vernon*'s Caſe.

6. The Acceptance of a *Statute-Staple*, in Satisfaction of a Debt on a *Bond*, is not good, for they are both Obligations, 'tis true one is of Record, but both are Voluntary. 6 *Rep.* 44. *Higgins*'s Caſe. *Cornwallis* verſus *Branthwaite*, S. P.

Palm. 272. 7. The *Coniſee of a Statute* took a Leaſe of the Reverſion, and likewiſe of a Rent reſerved upon a former Leaſe, the Leſſee attorned, and the Coniſee aſſigned over his Leaſe to another; afterwards another Coniſee of a ſubſequent Statute extended this Rent and Reverſion, and then the firſt Coniſee extended it in like Manner; but it was adjudged, that by his Acceptance of the Leaſe of the Rent and Reverſion, and Aſſigning it to another, his Extent was ſuſpended during that Term, and that the laſt Coniſee might well extend againſt him. 2 *Cro.* 424. *Harrington* verſus *Garaway*.

8. Debt upon Bond, conditioned for the Obligor to make an Aſſurance of ſuch Lands *to ſuch Uſes* as in the Condition mentioned, *&c.* The Defendant pleaded, that he had made a Feoffment of the ſame Lands *to other Uſes* than in the Condition expreſſed, which the Obligee had *accepted*; and upon Demurrer it was adjudged an ill Plea, for the Obligor ought not to vary from the *Uſes* ſet forth in the Condition. 1 *Brownl.* 60. *Potter* verſus *Thompſon*.

9. Acceptance of a *Leſſer Sum* may be in Satisfaction of a *Greater Sum*, if it be *before the Day* on which the Money becomes due. 3 *Bulſt.* 301. *Thompſon* verſus *Butcher*.

10. *Debt on Bond*; the Defendant pleaded Payment of the Money *according to the Condition*, *&c.* upon which they were at Iſſue, and the Evidence was, that the Defendant had paid the Money *before the Day* appointed by the Condition, and that the Plaintiff had *accepted* it; adjudged, this was a good Diſcharge of the Bond, if it had been Specially pleaded, but as the Defendant had pleaded, it muſt be found againſt him, and ſo it was. *M.* 24 *Eliz. Godbolt* 10. *Moor* 366. S. P.

11. Leaſe of a Manor for ſeventeen Years, rendring Rent, the Leſſee was bound in a Bond to the Leſſor, conditioned to pay the Rent yearly to the Leſſee, *if ſhe ſo long lived, and he or his Aſſignes ſhould or might ſo long enjoy the Premiſſes*; the Leſſor died, and left an Executrix who married, and then ſhe and her Husband brought an Action of Debt upon this Bond againſt the Leſſee, who pleaded, that after the Demiſe, and *before any Rent was due*, he *ſurrendered* the Term to the Leſſor, who *accepted* it, and averred, that at the Time of the *Surrender* there was no Rent due; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Acceptance of the *Surrender* was no Concluſion againſt this collateral Payment to the *Husband*, who was a Stranger, nor to the Executrix his Wife; and that the Defendant might ſtill have enjoyed the Manor, if it had not been for his own Act to ſurrender it. *Moor* 597. *Ford* verſus *Holborne*.

12. Debt upon Bond; the Defendant pleaded, that the Plaintiff had *accepted* a Bill under Hand and Seal, for the ſame Money, after the Bond made; adjudged this is no good Plea. *Moor* 872. *Beard* verſus *Heynes*. *Hob.* 68. S. C. *Poſtea Bonds* (N) 20. S. P.

5 Mod. 86. 13. *Aſſumpſit*, *&c.* the Defendant pleaded, that he *gave* the Plaintiff a Beaver Hat *in Satisfaction of the Promiſe*, and that the Plaintiff *accepted it in Satisfaction*; the Plaintiff replied *Proteſtando*, that the Defendant did not *give* the Hat in *Satisfaction*, and traverſed, that he (the Plaintiff) *accepted it in Satisfaction*; and upon Demurrer to this Replication, it was objected, Firſt, that the Plea was ill, becauſe it was pleaded in Satisfaction of the *Promiſe*, when it ſhould be in Satisfaction of the *Damages*; but adjudged, that a Releaſe of the *Promiſe* had been a good Plea in Bar to this Action; that if the Defendant had pleaded a *Gift*, without ſhewing that the Plaintiff *accepted it*, this would have been an ill Plea, becauſe the *Acceptance* is as material as the *Gift*, and either is *traverſable*; but this Replication is ill, becauſe the Plaintiff neither admitted or confeſſed the *Gift*, but by a *Proteſtando*; and if there was no *Gift*, then there could be no *Acceptance*. 2 *Salk* 627. *Young* verſus *Ruddle*. See *Hob.* 178. See *Poſtea* (F) *placito* 8.

14. *Debt upon Bond*, the Action was laid in *London*; the Defendant pleaded in Bar, that he made a Feoffment to the Plaintiff of Lands in *H.* lying in the County of *Wilts*, which he accepted in Satisfaction in *H.* aforeſaid; and upon a Special Demurrer it was objected, that the *Acceptance* ought to be laid in *London*, where the Action was laid; but adjudged, that the *Acceptance* muſt be laid were the Feoffment was made, it being *local*; but in ſuch Caſes it ought not to be put in without Oath of the Truth of it. *Mod. Caſes* 82. *Williams* verſus *Farrer*.

(F)

Where Acceptance muſt be with Satisfaction, and where Acceptance of Money diſcharges a Bond.

1. ADjudged, that where the Obligor is bound to pay Money *on a certain Day and Place*, and he paid it *before the Day*, and at *another Place*, which the Obligee accepted; he is now diſcharged of the Bond; and if in ſuch Caſe the Bond ſhould be put in Suit, and the Obligor ſhould plead *Solvit ad Diem*, yet the Jury are not bound to find for the Plaintiff, becauſe the Truth is otherwiſe. *Paſch.* 5 *Eliz. Dyer* 213. and *M.* 29 *Eliz. Godbolt. Plympton's* Caſe, S.P.

2. *Debt upon Bond*; the Defendant pleaded, that it was agreed between the Plaintiff and the Creditors of the Defendant, that he ſhould by *Indenture* convey Lands to the ſaid Creditors to be ſold by them, and the Money to be ſhared amongſt them, and ſays *De facto*, that by *Indenture* he ſold the Lands to them, and aſſigned to them a *Leaſe* for Years of certain Cuſtoms of Wines and Sums of Money, which they accepted; adjudged, that this Indenture ſounds in Nature of a *Covenant*, the Breach whereof muſt be ſatisfied by Damages, which are incertain, and ſhall not be accepted or pleaded in Satisfaction of the Debt on this Bond, which is certain; and if it had been in Satisfaction, yet, it being not performed, it ſhall be no Bar, tho' accepted by the Creditors. *Cro. Car.* 192. *Simonds* verſus *Medewſworth.* See 6 *Rep.* 44. in *Blake's* Caſe.

3. *Debt upon Bond* for the Payment of 7 *l.* upon the Birth of the Plaintiff's next Child; the Defendant pleaded, that before the Birth of the Child it was agreed between them, that the Plaintiff ſhould have a *Load of Lime* of the Defendant, for which he would be indebted to him, (the ſaid Defendant) and that he would acquit him (the Plaintiff) of the ſaid Debt, and the Plaintiff accepted it *in Satisfaction of the Bond*; and upon Demurrer, it was inſiſted, that nothing could be taken in Satisfaction of the 7 *l.* becauſe it was not a Duty, but a Sum payable upon a Contingency, and that the *Lime* could not be accepted in Satisfaction of the *Bond*, becauſe the Bond it ſelf could not be diſcharged without a Specialty, and therefore he ought to have pleaded, that the Plaintiff accepted it in Satisfaction of the Money mentioned in the Condition, *&c.* and this laſt was adjudged a material Exception. 2 *Cro.* 254. *Neal* verſus *Sheffield.* 1 Bulſt. 66. 1 Brownl. 109. Yelv. 192.

4. *Debt upon Bond*; the Defendant pleaded, that he gave a *new Bond* at the Day of Payment, which the Plaintiff *accepted in Satisfaction* of the old one; the Plaintiff replied, that he did not *accept it in Satisfaction &c.* upon which they were at Iſſue, and a Verdict for the Defendant; and yet the Plaintiff moved for Judgment, becauſe the Bond on which the Action was brought, and the Action it ſelf, was not denied, but in a Manner confeſſed by the Defendant; for he only pleads, that it was diſcharged by the Acceptance of the *new Bond* in Satisfaction of it, which is no good Plea in Law, and ſo it would have been adjudged, if the Plaintiff had demurred to it: on the other Side it was inſiſted, that by the Statute 32 *H.* 8. *cap.* 30, Judgment ought to be given according to the Verdict. *Hob.* 69. *Rawden* verſus *Strutter.*

5. *Debt on a Bond* of 100 *l.* conditioned for the Payment of 52 *l.* 10 *s.* on a *certain Day*; the Defendant pleaded, that *at the Day, &c.* he and his Son gave a *new Bond* of 100 *l.* conditioned for the Payment of 52 *l.* 10 *s.* *at another Day* then to come, which the Plaintiff *accepted* in Satisfaction of the *old Bond*; and upon Demurrer it was adjudged for the Plaintiff, becauſe the *Acceptance of the new Bond* to pay the Money *at another Day*, could not be a preſent Satisfaction for the Money due *on the Day* when it was to be paid on the *old Bond. Hob.* 68. *Lovelace* verſus *Cocket.*

6. Adjudged, that the *Acceptance* of one Bond cannot be pleaded in Satisfaction of another Bond. *Cro. Car.* 85. *Moore* 872. *Cro. Eliz.* 716, 727. 2 *Cro.* 579. *See Poſtea* 14. *See* Bonds (N) 20.

7. *Debt upon Bond*, conditioned to pay 8 *l. &c.* Defendant pleaded Payment of 5 *l.* *before the Day* mentioned in the Condition, which the Obligee accepted in Satisfaction of the Bond, and upon Demurrer this was adjudged a good Plea, upon this Difference, that where a *leſſer Sum* is paid *before 'tis due*, and the Payment is *accepted*, it ſhall be good in Satisfaction of a *greater Sum*; but after the Money is due, then a *leſſer Sum*, tho' accepted, ſhall not be a Satisfaction for a *greater Sum. Moor* 677. *Penny* verſus *Core. Poſtea* 10. *S. P.* 5 Rep. 117. Pinnell's Caſe.

8. The Condition of a Bond was, that if the Defendant compounded with *W. E.* for his Lands, then he ſhould pay to the Plaintiff 20 *l.* in an Action of Debt brought on this Bond, the Defendant pleaded, that he had not compounded with *W. E.* the Plaintiff replied, that *W. E.* did grant a Rent-charge in Fee to the Defendant, in Satisfaction of his Title, and ſo he made a Compoſition, *&c.* the Defendant *proteſtando*, that *W. E.* did not grant a Rent-charge, for Plea ſaid, that he did not *accept it* in Satisfaction, *&c.* this was adjudged good upon Demurrer, without traverſing the Grant, becauſe there could be no Compoſition unleſs the Parties conſented to it, and this depended upon the *Acceptance*, which the Defendant denied to be in Satisfaction of his Title; ſo in *Young* and *Rudd's* Caſe, *(quod vide)* if there was no Acceptance, then the Thing was not in Satisfaction, *&c.* ſo that the beſt Way of Pleading an Accord is to ſhew, that it was executed by *giving and receiving*, otherwiſe 'tis no good Plea in Bar to the Action. *Hob.* 178. *Earl* v. *Tuck.* See *Pinnel's* Caſe. Antea placito 2.

9. *Debt* upon Bond of 16 *l.* conditioned to pay 8 *l.* 10 *s.* on a certain Day; the Defendant pleaded, that before that Day, he, at the Requeſt of the Plaintiff, *paid to him* 5 *l.* which he *accepted* Moor 677.

cepted in Satisfaction of the Debt, and upon Demurrer the Plaintiff had Judgment, becauſe the Defendant had pleaded the Payment of the 5 *l. generally*, without alledging, that it was *in Satisfaction of the Debt*, 'tis true, he ſets forth, that it was *accepted in Satisfaction* of the Debt, but it ought likewiſe to be paid in Satisfaction. 5 *Rep.* 517. *Pinnel's* Caſe.

10. *Aſſumpſit, &c.* in Conſideration the Plaintiff would accept 12 *l.* in diſcharge of all Reckonings, and ſeal an Acquittance *to the Uſe of* T. he the ſaid Defendant promiſed, that *T.* ſhould ſeal another Acquittance to the Plaintiff; then he alledged that he accepted the 12 *l.* and *delivered an Acquittance to one* Smith *for the Uſe of* T. but that the Defendant had not procured *T.* to ſeal another Acquittance to the Plaintiff; it was objected, that the Plaintiff ought to have ſet forth *what Acquittance he had ſealed*, that the Court might judge whether it was good, or not, and that the Delivering it to *Smith for the Uſe of* T. was not ſufficient, becauſe *Smith, being a Stranger*, he might never deliver it over to *T.* and for this Reaſon the Declaration was held ill. *Cro. Car.* 19. 192.

2 Mod. 136. 11. *Debt upon Bond* againſt the Defendant as *Heir, &c.* he pleaded, that his Anceſtor, the Obligor, died Inteſtate, and that *W. R. adminiſtered*, who gave the Plaintiff another Bond in Satisfaction of the former, there was a Verdict for the Defendant; and it being moved in Arreſt of Judgment, this Diſtinction was made, that if the Obligor, who gave the firſt Bond, had likewiſe given the Second, it would not have diſcharged the firſt; but in this Caſe the ſecond Bond was not given by him who gave the firſt, but by his Adminiſtrator, which had mended the Security, becauſe he may be chargeable *de Bonis propriis*, and for that Reaſon the ſecond Bond was held to be a Diſcharge of the firſt. 1 *Mod.* 225. *Peek* verſus *Hill.* See *antea* 10. *Poſtea* 13.

12. *Debt upon Bond* againſt an *Executor*, who pleaded he gave another Bond to the Plaintiff in diſcharge of the other Bond given by his Teſtator; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe one Bond cannot be given in Satisfaction of another; and yet the Book takes Notice, that the ſecond Bond charged the Defendant *de Bonis propriis*, when by the firſt he was only chargeable *de Bonis teſtatoris*, which is contrary to the Caſe laſt mentioned. 3 *Lev.* 55. *Poſtea* Accord. (A) 9.

13. *Debt upon Bond* conditioned, that in Conſideration the Plaintiff had paid 12 *l.* to the Defendant, he became bound to pay the Plaintiff 12 *l.* if he lived one Month after the Date of that Bond, and if not paid at that Time, then to pay to him 14 *l. if he lived ſix Months after the Date of the Bond*; the Defendant pleaded, that *after the ſix Months*, he paid the Plaintiff 8 *l.* and then gave him *another Bond* in the Penalty of 20 *l.* conditioned to pay him 10 *l.* on a certain Day, in full Satisfaction of the other Bond, and that the Plaintiff did accordingly *accept* the ſaid Bond; upon a Demurrer to this Plea it was held ill, for admitting that one Bond might be given in Satisfaction of another, yet it cannot be *after the other is forfeited*, (as it was in this Caſe) becauſe after the *Forfeiture* the Penalty is veſted in the Obligee, and a leſſer Sum cannot be a Satisfaction for a greater. 1 *Lutw.* 464. *Geang* verſus *Swaine.*

14. *Debt upon Bond*, conditioned for Payment of 50 *l.* and Intereſt on the 2*d Day of March*, 31 *Car.* 2. the Defendant pleaded in Bar, that after the Making the ſaid Bond he *entered into another Bond* to the Plaintiff of the ſame Penalty, conditioned for Payment of the like Sum, as in the firſt Bond, which ſecond Bond the Plaintiff did *accept in full Diſcharge and Satisfaction* of the firſt; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe the Defendant did not alledge that he *gave the ſecond Bond* in Satisfaction of the Firſt, but only that the Plaintiff *accepted it, &c.* 1 *Lutw.* 501. *Girle* verſus *Feild.*

Acceſſary.

(A.)

1. IN Appeal of the Death of his Brother brought againſt *B. G.* of *R.* as Principal, and *R. L.* as *Acceſſary*, whereas the Name of the *Principal* was *W. G.* the Acceſſary pleaded *Nul tiel perſona in rerum Natura as B. G.* at the Time of the Writ brought, or any Time ſince; in this Caſe it was adjudged, that if there was ſuch another Perſon as *B. G.* yet if he was not of *R.* or if he was dead before the Writ brought, that 'tis good. *Dyer* 338. 18 *Eliz.*

2. One *Everet* was convicted for *Horſe-ſtealing* and reprieved after Judgment; he was again indicted for Stealing *another Horſe* before his Attainder, and the *Vicar of R.* was indicted as *Acceſſary* before the Felony; *Everet* did not plead his firſt Attainder, as he might, but confeſſed the ſecond Indictment, and was executed; the Acceſſary was found guilty, and had the ſame Judgment as the Principal, but his Execution was reſpited, there being ſome Doubt, whether he ought to be arraigned as *acceſſary*, ſince *Everet* might have pleaded his former Attainder, and if ſo there had been no Principal in the ſecond Felony, and by Conſequence no Acceſſary; but the Judges were very clear in Opinion, that the Arraignment of the Acceſſary and the Conviction were good, ſince *Everet*, who was the Principal, did not take any Advantage by Pleading his former Attainder. *Poph.* 107. *Everett's* Caſe.

3. The

3. The Caſe was upon the Statute 4 & 5 *Ph. & Mar.* by which it is enacted, that he who ſhall *Command, Hire or Council* another to commit Murder, ſhall not have the Benefit of his Clergy; the Defendant was indicted as *Acceſſary to a Murder before the Fact*, for that he *malitioſe excitavit, movit & procurabat* T. S. to commit the Murder; now thoſe are not the Words of the Statute, (*viz.*) *Command, Council or Hire*, ſo that this Indictment is not warranted by the Statute; but adjudged, that the Defendant ſhould not have his Clergy, for to *excite, move and procure*, is the ſame in Senſe as to *Command and Council*, tho' they are not the very Words of the Statute. 1 *And.* 194. *Grevil's* Caſe.

4. If the *Principal* is pardoned or hath his Clergy, the *Acceſſary* cannot be arraigned, and none can be a Principal before he is adjudged ſo by Law, either by Verdict, Confeſſion, or Outlary; but if the Principal is pardoned after Attainder, in ſuch Caſe the Acceſſary may be arraigned, becauſe it appears judicially that there was a Principal. 4 *Rep.* 43. *Syer's* Caſe.

5. In an *Appeal of Murder* by the Appellant againſt *B.* as Principal, and *R.* as Acceſſary before, and *D.* as Acceſſary after the Fact; upon Not guilty pleaded, the Principal was found guilty of *Manſlaughter*, and had his *Clergy*; adjudged, that having his *Clergy* before Judgment, the Acceſſary ſhall be diſcharged, for there can be no Principal in Law, unleſs he be ſo adjudged upon a Judgment after Verdict; and here *B.* having his Clergy before Judgment, tho' after the Verdict, the Acceſſaries ſhall not be arraigned. 4 *Rep.* 44. *Bibithie's* Caſe. *Cro. Eliz.* 540. S. C. reported by the Name of *Goffe* and *Bibithie.*

6. *An Appeal* by the Brother and Heir againſt *B. B.* as Principal, and *R. R.* and *W. W.* as Acceſſary before and after the Murder of his Brother; upon Not guilty pleaded by the Principal, he was found guilty of *Manſlaughter*, and thereupon the Court diſcharged the Acceſſary before the Fact, becauſe there can be no ſuch Acceſſary in Manſlaughter, but the Acceſſary after the Fact ſhall Anſwer. *Moor* 461. *Gooſe's* Caſe.

7. If the Principal be erroneouſly attainted, it muſt ſtand good till 'tis reverſed, and 'tis a good Record till then; and in ſuch Caſe, if the Acceſſary be attainted and executed, and afterwards the Attainder of the Principal is reverſed, the Heir of the Acceſſary may be reſtored by Entry or Action. 9 *Rep. Lord Sancher's* Caſe.

8. Adjudged, that where the Principal is not attainted, but burn'd in the Hand upon having his Clergy, and diſcharged, in ſuch Caſe the Acceſſary ought to be diſcharged without his Clergy or Burning in the Hand, altho' he was convicted of the Offence; becauſe he ought not to be condemned but where the Principal is attainted; and in this Caſe the Principal was only convicted. *Cro. Car.* 566. 5 Annæ, cap. 9.

9. The Law as to the laſt Caſe is now altered by the Statute 5 *Annæ*, by which 'tis enacted, that where the Principal is convicted of Felony, or ſtands mute, or challenge above Twenty of the Jury, it ſhall be lawful to proceed againſt the Acceſſary before or after the Fact, in the ſame Manner as if the Principal had been *attainted*; and notwithſtanding ſuch Principal ſhall be admitted to his Clergy, pardoned, or delivered before his Attainder, and ſhall ſuffer the ſame Puniſhment as if the Principal had been attainted.

10. The Principal was *tried and attainted* for a *Burglary*, and afterwards pardoned, *&c.* and now at a Seſſions in the *Old Bailey*, the *Acceſſary* after the Fact was indicted for the ſame, and ſhe prayed that ſhe might be diſcharged; but adjudged, that tho' where the *Principal hath his Clergy, or is acquitted or pardoned before Judgment*, the Acceſſary ſhall not be queſtioned; yet if the *Principal is attainted*, (tho' he is afterwards pardoned) the Acceſſary muſt anſwer the Indictment. *Raym.* 477.

11. Upon a Conviction of *Deer-ſtealing* on the Statute 3 & 4 *Will.* 3. *cap.* 10. the Queſtion was, whether *one not preſent*, but procuring, perſuading, or adviſing the Perſon to kill the Deer, and lending him Dogs or Guns for that Purpoſe, or Horſes to carry it away, before the Fact committed, ſhall be ſaid to be *abetting and aiding* within that Statute; three Judges held that it was, but *Holt* Chief Juſtice of another Opinion; 'tis true, where a Statute makes an Act Felony, which was not ſo at Common Law, in ſuch Caſe *Acceſſaries* are within the Statute, tho' not named; but where an Offence at Common Law is made more Penal, *Aiders and Abetters* are not to be underſtood ſuch, who aid or abet either before or after the Fact, but only ſuch who were actually preſent when the Fact was done; 'tis true, in Property of Speech theſe may be called Principals, by their being preſent when the Fact was done, and in a legal Underſtanding they are Principals in the Treſpaſs, but not as to Incurring the Penalty of the Statute; as for Inſtance in parallel Caſes, a Man aiding and aſſiſting upon the *Statute of Stabbing* ſhall have his Clergy, but he who actually commits the Fact ſhall not; ſo where one breaks into a Houſe, and the other ſtood without upon a Ladder and received the Goods, he ſhall have his Clergy, but the other ſhall not; now Deer-ſtealing was an Offence at Common Law, but made more Penal by this Statute, not under a general Denomination of the Crime, but by a particular Deſcription of the Fact; 'tis as if the Statute had enacted the Penalties againſt them as Treſpaſſers, therefore he who is not actually preſent cannot be *aiding and aſſiſting*, and the rather becauſe this Statute is to be conſtrued ſtrictly, for it takes away the Trial by Jury, by appointing the Conviction in a ſummary Way. 2 *Salk.* 542. *The King* verſus *Naſh*, *Idem* verſus *Whiſtler.*

Accompt.

Accompt againſt the Defendant as Bailiff. (B)
——— Againſt him as Receiver. (C)
Of the firſt Judgment. (D)
Where Accompt lies, where not. (E)
Pleas in Bar, and before Auditors. (F)

(A)

1. THIS Action is almoſt diſuſed, the Proceſs in it is *Summons*, *Pone*, and *Diſtreſs*, and upon a *Nichil* returned, the Plaintiff may proceed to the Outlary.

2. There are *two Judgments* in this Action, the firſt is *Quod computet*, and in this Judgment the Plaintiff recovers neither Coſts or Damages, but a *Capias ad computandum* lies, and upon a *Non eſt inventus* he may proceed to the Outlary, and if he is taken he muſt give Bail, and ſhall accompt before Auditors appointed by the Court, before whom he muſt appear from Day to Day till the Accompt is determined; but if *Iſſue ſhall be joined before the Auditors*, or any *Demurrer*, they muſt certify the ſame to the Court, who ſhall try the Iſſue, or give Judgment upon arguing the Demurrer; if the Plaintiff, after Appearance of the Defendant, ſhall make Default, or not proſecute, or if the Defendant ſhall not Anſwer, he may be committed, and if the Plaintiff hath a Verdict he ſhall have Coſts and Damages, and a *Fi. fa. Elegit*, or *Ca. Sa.* ſhall be awarded. 1 *Brownl.* 24.

3. An *Auditor General* to take Accompt of all his Bailiffs and Receivers, cannot be made without *Deed*, but an *Auditor* to take an Accompt of a particular Receiver *pro hac vice*, may be made by Parol. 1 *Leon.* 219. *Ganton* verſus *Lord Dacres*.

4. In Accompt, the Defendant moved for a farther Day to give his Accompt; but it was ruled, that the Matter being referred to *Auditors*, they are to give a farther Day, for they are Judges whether the Delay is wilful or not; and if they find the Parties negligent, they muſt certify to the Court that they will not accompt. 1 *Mod.* 40. *Williams* verſus *Lee*.

(B)

Againſt one as Bailiff.

2 Leon. 194. S.C.

1. THE Defendant was charged in Accompt as *Bailiff* of the Plaintiff's Shop, *curam habens & adminiſtrationem bonorum*, the Defendant anſwered as to the Goods only and not to the *Shop*: He ought to anſwer to the Whole, if the Defendant is charged *as Bailiff* of Goods *ad Merchandizandum*, he ſhall anſwer for the Encreaſe and be puniſhed for Negligence; but if he is charged *as Receiver ad computandum*, he ſhall anſwer only for the Money or Thing delivered. *Godb.* 55. *Gomerſall* verſus *Gomerſall*.

Winch 5. Poſtea (D) placito 2. S. C.

2. Accompt againſt *W. R.* as *Bailiff*, *for* 100 *l.* The Defendant pleads he was *never Bailiff*, which was found againſt him, and thereupon he was adjudged to Accompt *before Auditors*, who having aſſigned a Day *ad computandum*, the Defendant made Default, whereupon it was adjudged *quod querens recuperet valorem bonorum præd.* (*viz.*) 90 *l.* 5 *s.* it was moved in Arreſt of Judgment, that a Writ of Inquiry ought to have been awarded to aſcertain the Value: *Sed per Curiam*, where the Defendant makes Default, as in this Caſe, the Court ſhall take the Value as the Plaintiff had declared, and may give Judgment without a Writ of Inquiry; but the Declaration in this Caſe being for 100 *l.* and the Judgment for 90 *l.* 5 *s.* it was held that the Judgment was ill, becauſe not purſuant to the Declaration. *Cro. Eliz.* 806. *Williams* verſus *White*.

1 Roll. Rep. 421.

3. In Accompt by Husband and Wife as Executrix of *R. B.* againſt the Defendant as *Bailiff* of the Teſtator *R. B. ex quacunq; cauſa & contractu ad communem utilitatem* of the ſaid *R. B.* and one *W. P.* of certain Merchandize of the ſaid *R. B. &c.* here the Demand was againſt the Defendant as *general Bailiff* of one, when by the Plaintiff's own ſhewing he was Bailiff; *ex quacunq; cauſa ad communem utilitatem* of Two, and ſo ſhould have joined the other in the Action, but it was held good. 2 *Cro.* 410. *Hackwell* verſus *Euſtman*.

4. Accompt againſt *T. S.* as *Bailiff*, who pleaded, that he never was Bailiff, upon which they were at Iſſue, and the Plaintiff had a Verdict, and Judgment *quod computet*; and upon the Accompt, the Defendant pleaded a Diſcharge, upon which they were at Iſſue again, and a Verdict for the Plaintiff; then the Defendant craved an Allowance for a third Part as Dower in the Right of his Wife, *&c.* but adjudged this Matter ought to have been pleaded, and ſhall not be allowed in Accompt. *Palm.* 512. *Briggs* verſus *Wilſon*.

(C)

Againſt the Defendant as Receiver.

1. A Man delivered Money to *deliver over* to another, and in Accompt againſt him he pleaded, that he never was his Receiver *to render accompt*, and gave this Matter in Evidence; but adjudged he was *Receiver* conditionally, (*viz.*) if he did not deliver the Money; and that he ought to have pleaded the Special Matter in Bar to the Accompt, and not have given it in *Evidence*. *Dyer* 196. *Hungerford*'s Caſe.

2. Accompt againſt the Defendant as Receiver, who pleaded, that he never was *Receiver*, and upon this Iſſue he gave a *Releaſe* in Evidence, but it was diſallowed. 1 *Brownl.* 24. *Willoughby* verſus *Small.*

3. *R. B.* owed the Plaintiff 200*l.* who deſired the Defendant to receive the Money, and he demanding it, *R. B.* deſired him to borrow it of another and to pay it to the Plaintiff; accordingly the Defendant borrowed it of *R. W.* and afterwards *R. B.* gave Bond for it, and the Money not being paid to the Plaintiff, he brought an Action of Accompt againſt the Defendant as Receiver of the Money by the Hands of *R. B.* who pleaded he never was Receiver *to render accompt*; and this Matter being found ſpecially, it was adjudged, that the Action was well brought, for the Defendant received it as lent to *R. B.* and it became his Money by giving Bond for it. *Hob.* 36. *Harrington* verſus *Dean.* 1 *Brownl.* 26. *S. C.* Moor 802, 862.

4. Accompt againſt a *Receiver*, Iſſue was joined, that he was never Receiver to *render an accompt*, there was a Judgment *quod computet*, afterwards he pleaded before Auditors, that by the Appointment of the Plaintiff he had paid the Money to *B. B.* adjudged an ill Plea, becauſe it was directly contrary to the firſt Iſſue, wherein it was ſaid, that he never was Receiver to *render accompt*. *Hutton* 133. *Hughes* verſus *Drinkwater.*

5. Accompt againſt the Defendant as *Receiver*, to render accompt of 204*l.* the Defendant ſhewed to the Auditors, that he had diſburſed the 204*l.* to ſeveral Perſons, by the Order of the Plaintiff, and 600*l.* more; and ſo *Petit allocari* the Surpluſage; and upon a Demurrer to this Plea, as to the Surpluſage, and upon an Iſſue taken as to the reſt, it was adjudged, that the Defendant ſhould have no Allowance of the Surpluſage, becauſe he was charged as *Receiver* and not as *Bailiff*; and upon the Iſſue it was found, that 30*l.* Part of the 204*l.* was not paid by the Order of the Plaintiff, whereupon the Defendant prayed that it might be allowed out of the Surpluſage, but it was denied, 1 *Roll. Rep.* 87. *The Earl of Suffolk* verſus *Floyd.*

6. Accompt againſt the Defendant as Receiver *from ſuch a Time to ſuch a Time*; the Defendant pleaded, that the 20*l.* in Demand was received by him of the Plaintiff, to deliver over to ſuch Perſons as Sir *G. M.* ſhould think fit; and he appointed, that it ſhould be delivered over to one *Hatchell*, and traverſed, that he was his Receiver *aliter, vel alio modo*, there was a Verdict againſt the Defendant, and Judgment *quod computet*, afterwards he pleaded the Act of Oblivion before Auditors; and upon Demurrer to this Plea the Court inclined, that it was a good Plea in Diſcharge, but ill as to the Time, for he being charged as Receiver from ſuch a Time to ſuch a Time, he ought to anſwer that preciſely. *Raym.* 57. *Southcot* verſus *Rider.* See *Hopton* verſus *Offall. Latch.* 59.

7. In Accompt, Judgment was given *quod computet*, then the Defendant pleaded before Auditors, that the Goods for which he was to give an Accompt were *bona peritura*, and much worſe, and that they remained in his Hands for Want of Buyers, and being likely to be worſe, he ſold them upon Credit to a Perſon beyond-Sea; and upon Demurrer to this Plea the Plaintiff had Judgment; for where a Merchant delivers Goods to his Factor *ad merchandizandum*, he cannot ſell them upon * Credit, unleſs he hath a particular Commiſſion ſo to do. 2 *Mod.* 100. *Anonymus.* Poſtea (D) Placito 6.

(D)

Of the firſt Judgment in Accompt.

1. IN Accompt againſt Two, there was Judgment *quod computent*, and they making Default, there was a *Capias* and *Exigent*, then one appeared, and the other was outlawed; adjudged, that he who appeared ſhould accompt alone; and ſo if one dieth, the other ſhall accompt. 1 *Brownl.* 25.

2. *Accompt* againſt the Defendant as Bailiff, for Goods *to the Value of* 100*l.* the Judgment was *quod computet*, and at the Day he made Default, and the Court gave Judgment that the Plaintiff ſhould recover 92*l.* 10*s.* againſt the Defendant; and upon a Writ of Error the Judgment was reverſed, becauſe it ought to have been given for the Value for which the Plaintiff had declared. *Winch* 5. *White* verſus *Williams. Cro. Eliz.* 806. *S. C.*

3. Judgment *quod computet*, and the Defendant was taken upon a *Capias ad computandum*, and bailed pending the Action; before the Auditors he made Default again, adjudged, that a new *Capias ad computandum* ſhall iſſue. 1 *Leon.* 87.

1 Roll. Rep. 84. 4. A *Writ of Error* will not lie after the firſt and before the ſecond Judgment, becauſe the firſt Judgment is but an Award, and no final Judgment till he hath accompted before the *Auditors*; and the Death of either Party, before the ſecond Judgment, ſhall abate the Writ. 2 *Cro. Metcalf* verſus *Wood.* 11 *Rep. Metcalfe's* Caſe. *S. C.*

5. In Accompt, *&c.* Damages were given by the Jury; it was objected, that it ought not to be done, for the Judgment is only to accompt; but by the Opinion of *Coke*, Damages may be given *ratione implacitationis*, not *Retentionis*. *Trin.* 31 *Eliz.* 1 *Leon.* 302. *Harris* verſus *Baker.*

Yelv. 202. *See* Antea (C) 8. S.P. 6. In Accompt againſt a Factor for a Jewel, the Defendant pleaded, that he ſold the Jewel to the *King of Barbary*, for the Plaintiff's Uſe; and upon Demurrer to this Plea it was adjudged ill, for where a Factor hath only a bare Authority to ſell, he muſt receive the Money upon the Sale and Delivery of Goods, and hath no Power to give Credit. 1 *Bulſt.* 103. *Saddock* verſus *Barton.*

(E)

Where, and for what an Action of Accompt will lie, and for what not, and where an Aſſumpſit will lie. See *Covenant.* (B) 20.

1 Roll. Rep. 52. 1. AN Action of *Accompt* will not lie againſt an *Executor or Adminiſtrator*, but an Action of Debt for Money delivered, *&c.* but if Money is delivered to one to deliver over to another, and 'tis not delivered accordingly, there an Action of Accompt, and not Debt, will lie. *Dyer* 20. *Core* verſus *Woodye:* This is altered by the Statute 4 *&* 5 *Annæ, (viz.)* that the Action will lie, and alſo by one Jointenant and Tenant in Common againſt the other, as Bailiff.

2. Leſſee for Years deviſed his Eſtate to another for his own Life, Remainder over, and made the Deviſee his Executor, and died; the Deviſee entered and made his Will, and died, his Executor entered and took the Profits for a Year, and he in Remainder brought an Action of Accompt againſt that Executor as *Bailiff*, and adjudged that it did not lie; for tho' the Deviſe be good to him in Remainder as an executory Deviſe, yet becauſe he never was in Poſſeſſion of the Land, the Action will not lie for Want of *Privity*. *Dyer* 277, 367. 10 *Rep. Lampitt's* Caſe.

Moor 452. 3. Feme Covert Legatee, ſhe and her Husband made a Letter of Attorney to *B.* to receive the Money, who received it of the Executor to the Uſe of the Wife, then the Husband and Wife died, and the Adminiſtrator of the Husband brought an Action of *Accompt* for the Money, and adjudged it did lie, and that if the Husband alone had made the Letter of Attorney, the Action would lie; ſo where Money is delivered to one to deliver over to another, that other ſhall have an Action of Accompt, tho' he had no Property in the Money before; ſo where there is a Debt due to a Feme Sole on Bond, and ſhe marrieth, and her Husband maketh a Letter of Attorney to another to receive the Money, and he receive it, the Husband alone ſhall have an Action of Accompt *Goldſ.* 158. *Huntly* verſus *Griffith.*

4. The Plaintiff was Leſſee of a Parſonage, and the Tithes being ſet out, the Defendant carried them away without any Manner of Claim or Intereſt, and in Accompt brought againſt him, it was adjudged the Action would not lie, for 'tis a Wrong, and ſuch are always without Privity; he may have an Action of *Treſpaſs. Owen* 35. *Tottenham* verſus *Bodington.*

5. Two are Partners of Merchandizes in one Ship, one of them makes *B.* a Factor of all his Goods, both of them may have ſeveral Actions of Accompt againſt him, or they may join. *Godb.* 90. So if Money is delivered unto *R. B.* for the Uſe of *W. R.* he may have either an Action of Debt or Accompt for the ſame. *Godb.* 210. *Clark's* Caſe. 2 *Leon.* 30. *S. C. Poſtea* Property. (A) 1. *S.C.*

6. Two were charged in Accompt as Receivers, one of them pleaded, that he never was Receiver, without traverſing, that he and his Companion were Receivers. *Godb.* 43.

1 Roll. Rep. 52. 7. The Defendant, by his Deed did acknowledge, that he had received 100 *l.* of the Plaintiff, to be employed by him in Merchandize, and covenanted to give him a ſufficient Accompt at his Return from the *Indies*; adjudged, that upon the Defendant's Receipt the Plaintiff might have an Action of Accompt, and that the Covenant did not take away that Action. 2 *Bulſt.* 256. *Hawkins* verſus *Parker.*

8. If one hath a Debt due to him for Wares delivered, and cannot recover it becauſe of the *Statute of Limitations*; yet if the Parties afterwards come to an Accompt, and one is found indebted to the other in ſo much for Wares, he may then have an Action of Debt upon an Accompt, and declare, that the Defendant is indebted to him upon Accompt, *pro diverſis Mercimoniis, &c. Trin.* 17 *Car.* . *C. B. White* verſus *Grubb.*

9. It doth not lie for *Rent alone*, becauſe that is certain, and 'tis in the Realty; but if *Rent* is mixed with other Things, the Action lieth; if one receive Money due to the Plaintiff on Bond, he may have an Action of Debt or Accompt. *Style* 287. *Hamond* verſus *Ward.*

10. *Aſſumpſit, &c.* in which the Plaintiff declared, that he intending to go beyond Sea, delivered a Box full of Goods to the Defendant, which *he promiſed to diſpoſe of*, and to give the Plaintiff an Accompt thereof at his Return: The Defendant pleaded in Abatement, that he was Bailiff to the Plaintiff *ad mercandizandum* the ſaid Goods, and that he ought to bring an Action of Accompt, and not an *Aſſumpſit*; and upon Demurrer it was adjudged, that here being an expreſs Promiſe on which the Action is founded, that an *Aſſumpſit* will lie as well as Accompt, and that where-ever one Acts as *Bailiff* he promiſeth to render an Accompt. 1 *Salk.* 9. *Wilkin* verſus *Wilkin.*

11. *Indebitatus Aſſumpſit* for Money *received* by the Defendant *ad computandum*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that where the Defendant *receives Money* to a ſpecial Purpoſe, as to *Merchandize or to Accompt*, there it can never be demanded as *a Duty* till he has neglected to apply it according to the Truſt on which he received it, and that the Plaintiff in his Declaration muſt ſhew a Miſapplication or Breach of the Truſt, or that the Defendant refuſed to accompt, and therefore the Plaintiff in this Caſe having not ſo declared, this Action will not lie, but an *Accompt*, which is very true, but 'tis *cured by the Verdict*; for now it ſhall be intended, that at the Trial Proof was made, that the Defendant refuſed to *accompt*. 1 *Salk.* 9. *Poulter* verſus *Cornwall.*

(F)

Pleas in Bar to an Action of Accompt, and Pleas before Auditors, good, and not good.

1. IN an Action of Accompt for *Tin* delivered to the Defendant, to render an Accompt, *&c.* he pleaded in Bar, that he had ſold the *Tin* and took Bond for the Money, adjudged this was not a good Plea to bar the Action, but it might be good for his Diſcharge before Auditors. *Dyer* 29.

2. Auditors were aſſigned by Commiſſion to take an Accompt of a Receiver in *Ireland*, who found him 2000 *l.* in Arrears, thereupon an Information was exhibited againſt him by the Attorney-General in the King's Bench, to which he pleaded *Nil debet per Patriam*, and upon Demurrer this was held a good Plea, but that the Defendant might not *Wage his Law*. *Paſch.* 4 *M. Dyer* 145.

3. So if Debt is brought upon Arrearages of Accompt found before Auditors, it is a good Plea for the Defendant to ſay *Non computavit*, but 'tis not a good Plea to ſay, that he gave a Bond to the Plaintiff for the Arrears, becauſe that doth not change the Nature of the firſt Debt. *Paſch.* 2 *M. Dyer* 151. and *Mich.* 33 *H.* 8. *Dyer* 51.

4. In Accompt, the Defendant pleaded in Bar, that upon Receipt of the Money he gave the Plaintiff a Bill under his Hand for it, and adjudged no good Plea; ſo if he is found in Arrears before Auditors, and he gave Bond for it, 'tis no Bar of the Accompt. *Dyer* 20, 21.

5. Judgment againſt the Defendant in a perſonal Action, is a good Plea in Bar to an Action of Accompt afterwards brought for the ſame Thing. *6 Rep. Ferrer's* Caſe.

6. In Debt for Arrears on an Accompt, the Defendant pleaded, that before the Accompt, the Plaintiff of his own Wrong impriſoned him, and then aſſigned *Auditors* to him in Priſon, and ſo the Accompt was made by *Dureſs*, 'tis a good Plea in Bar. 4 *Leon.* 91. *Earl of Northumberland's* Caſe.

7. In Accompt againſt the Defendant as *Receiver* of his Money by the Hands of a Stranger, the Defendant pleaded in Bar a Gift of the Money to him, the Plea is good; but 'tis certainly ſo before Auditors. *Winch.* 9. *Harrington* verſus *Harrington.*

8. Judgment *quod computet*, and in Accompt before the Auditors, the Defendant pleaded an Award of 10 *l.* in Diſcharge of all Accompts, which he had paid, this ought to have been pleaded in Bar to the Action, and therefore ſhall not be allowed to be pleaded before the Auditors. *Cro. Car.* 82, 161. *Taylor* verſus *Page.*

9. The Wager on a Horſe-race was put into the Hands of *B.* to be delivered to the Winner, according to Articles made between the Plaintiff and another, *A.* ſuppoſing he had won, demanded the Money of *B.* who had delivered it over to the other, ſuppoſing he had won; an Action of Accompt was brought againſt *B.* who pleaded, that as to Part of the Wager he never was Receiver, upon which he was adjudged to accompt; and then before the Auditors he pleaded, that he had delivered the Money over to another; adjudged, this had been a good Plea in Bar to the Accompt, but it was not good before the Auditors. *Style* 353. *Boynton* verſus *Cheek.*

10. Judgment *quod computet*, and before the *Auditors* the Defendant pleaded, that he had delivered over Part of the Money; upon Demurrer this was held no good Plea, becauſe it was contrary to the Verdict on the firſt Judgment, (*viz.*) that he ſhould accompt *for the Whole*, and by this Plea he would accompt only *for Part*; beſides, 'tis no good Plea before Auditors, for it ought to have been pleaded in Bar to the Accompt, and not by Way of Diſcharge before Auditors. *Style* 410. *Pendarvis* verſus *St. Aubin*.

11. Accompt againſt the Defendant as *Receiver*, and Judgment *quod computet*, and he pleaded before the Auditors, that he received the Money of the Plaintiff to deliver over, which he had accordingly done; adjudged, that if he had pleaded that he had paid it over by the Conſent of the Plaintiff, it had been good before the Auditors. *Style* 430. *Kirk* verſus *Lucas.*

12. Accompt againſt the Defendant as Receiver of Goods and Merchandize *ad computum inde reddend'*, and ſo declares of ſeveral Goods, but did not ſhew *by whoſe* Hands he received them; there was Judgment by Default *quod computet*, and the Defendant pleaded an inſufficient Plea before the Auditors, to which the Plaintiff demurred, and had Judgment, and a Writ of Enquiry of Damages; and now the Defendant objected, that the Declaration was ill, becauſe it charged the Defendant as *Receiver*, and did not ſay *by whoſe Hands*; beſides, he ought not to be charged as *Receiver*, but as *Bailiff*, for he was to *merchandize* with the Goods, and ſo was to have his Ex-

pences and Factorage allowed, and a Judgment in Accompt as *Receiver* is no Bar to an Action of Accompt as *Bailiff*, which is very true; and tho' he ought in this Case to be charged as *Bailiff*, yet 'tis too late now to object that Matter, he should have demurred to the Declaration, which he cannot do now, because of the Judgment *quod computet*. 2 *Lev.* 127. *Burdett* versus *Thrule*.

Accord.

(A)

Where 'tis a good Plea, where 'tis not. See *Acceptance*. (F) 6.

1. IN all personal Actions where Damages are to be recovered, Accord with Satisfaction is a good Plea; 'tis likewise good in a *Ravishment of Ward*, upon the Statute *Westm.* 2. *c.* 35. 'tis good in a *Quare ejecit infra terminum*, because therein a Chattel is only to be recovered; 'tis good in a *Writ brought against Lessee for Years*, and in *Detinue* of Charters, tho' they concern the Freehold; so in *Detinue* of any personal Goods, and in *Debt upon a Lease for Years*, tho' a Sum certain is demanded; and in *Covenant for not repairing*, because 'tis mixed with a Wrong, in which Damages are to be recovered. 6 *Rep.* 43. *Blake*'s Case. *Dyer* 75. 'tis good in Ejectment, because 'tis not an Action only in the Realty, but Damages are to be recovered. 1 *Brow.* 133. *Pats* versus *Chittie*.

2. In an Action on the Case the Plaintiff declared, that in Consideration of Money paid to the Defendant, he promised to deliver 400 *lb.* of Wax, *&c.* and that at the Day he delivered only 200 *lb.* of bad Wax; the Defendant pleaded an Accord between them for the said 200 *lb.* of Wax, which Agreement he had performed, and this was held a good Bar. *Dyer* 75. *Andrews*'s Case.

3. *Covenant* for not repairing an House, the Defendant pleaded *in Bar* an Accord, and Execution of it in Satisfaction of the Repairs, this was held a good Plea, for tho' a *certain Duty*, which accrues *by a Deed*, must be avoided by Matter of as high a Nature, and in such Case Accord *without Writing* is no Satisfaction; yet where the Duty accruing by a *Deed is not certain*, but a Wrong is done subsequent to the Deed, for which Damages only are recoverable, as in this Case, for not repairing, there Accord with Satisfaction, is a good Plea. 6 *Rep.* 43. *Blake*'s Case. 2 *Cro.* 99. *S. C. Eden* versus *Blake*.

4. In Trespass an Accord *Executory* is no good Plea, because the Wrong is confessed, and no Recompence in Fact made for the same. * *Ibidem*.

5. The best Way of pleading an *Accord* is to plead it by Way of *Satisfaction*; as in Ejectment against three, they pleaded, that after the supposed Trespass and Ejectment, there was an Agreement between the Plaintiff and Defendants, that one of them should pay unto the Plaintiff 10 *l.* in Satisfaction thereof, which he had performed, and this was held a good Plea. 9 *Rep.* 77. *Petoe*'s *Case*; and in that Case it was held, that where the Condition is *by Deed to pay Money*, there by Accord between the Parties, any other Thing may be given in Satisfaction of the Money; but if the Condition be to *deliver fifty Quarters of Wheat*, there an Accord to pay Money in Satisfaction thereof, is not good; 'tis otherwise where the Contract is *without Deed*. *Goldsf.* 80. See there, that Accord without Satisfaction is no good Plea. *Sanderson*'s *Case*.

2 Cro. 578. Palm. 110. 2 Roll. Rep. 187.

6. *B.* owed 100 *l.* to *A.* which he covenanted to repay within three Years; the said *B.* covenanted likewise, that *A. should enjoy a Lease of certain Lands*, &c. *peaceably during all that Time*, but notwithstanding this Covenant, *B. entered several Times* before the three Years were expired, for which the Action was now brought, and the Breach assigned accordingly; the Defendant *B.* pleaded, that after the first, and *before* the other Entries there was an Accord and Satisfaction between him and the Plaintiff of all the said Entries, and this was held a good Plea, because *Damages* for the Entries were the Ground of this Action, which may be discharged *without Deed*. 2 *Roll. Rep.* 187. *Roberts* versus *Stoker*.

7. *Case*, *&c.* for Slanderous Words; the Defendant pleaded an Agreement between the Plaintiff and him, that he should confess that he had done the Plaintiff Wrong, and should ask Forgiveness on his Knees, and that after such Submission the Plaintiff should release the Defendant of all Actions for the said Words, and that accordingly he (the Defendant) did make the Submission, and the Plaintiff forthwith discharged him; and upon a Demurrer to this Plea it was objected, that it was ill, because there was no Consideration in Law pleaded to this Action, for Asking Forgiveness is no Consideration, the Plaintiff had Judgment. 2 *Roll. Rep.* 96. *Covill* versus *Jefferey*.

8. *Case for Words*, *&c.* The Defendant pleaded an Accord between him and the Plaintiff, that whereas the Plaintiff had done a Trespass to him, this Trespass of the Defendant should be set against the other; and upon a Demurrer to this Plea, it was adjudged no good Plea. *Style* 245. *Dove* versus *Oakham*.

9. *Debt upon Bond* against the *Executor* of the Obligor, the Defendant pleaded an Accord 28 *April*, by which it was agreed, that he should give the Plaintiff a new Security for this Debt,

and for another alſo which was due to him on Bond, who accordingly gave a new Security purſuant to the Accord by a Bill *ſealed by himſelf*, and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe *one Bond* given in Satisfaction of another, is no Diſcharge, for it doth not amend the Matter, tho' in this Caſe the new Bond binds the Obligor *in Bonis propriis*, whereas by the old Bond he was bound only *in Bonis Teſtatoris*. 3 *Lev.* 55. *Lobly* verſus *Gildart*. Adminiſtration. (S) 5. *S. C.* *Antea* Acceptance. (F) 14. *S. P.*

10. *In Covenant*, the Plaintiff declared, that the Defendant by Indenture covenanted to permit the Plaintiff to receive 100 *l. per Annum Rent*, Part of which was to go in Satisfaction of a Debt, and the Reſidue to be paid to the Defendant, and aſſigned a Breach in diſturbing him (the Plaintiff) in receiving the Rent: The Defendant pleaded an Accord between them, that each ſhould deliver his Part of the Indenture to *T. S.* to be cancelled, and that each ſhould be diſcharged of all Actions upon the ſaid Indenture, and averred, that he did deliver his Part, *&c.* and upon Demurrer this was adjudged ill, becauſe Accord is no Plea, unleſs executed *on both Sides*. 3 *Lev.* 189. *Ruſſell* verſus *Ruſſell*.

11. *Covenant*, *&c.* In Conſideration the Plaintiff would permit *S. P.* to enjoy a Farm in *Clipſham* for one Year, paying 72 *l.* Rent, that then the Defendant would pay to the Plaintiff 200 *l.* which was then in arrear for Rent, and alſo the ſaid 72 *l.* and the Breach aſſigned, was Non payment of the 72 *l.* The Defendant pleaded in Bar, that *before any Cauſe of Action did ariſe for Breach of Covenants*, *&c.* it was agreed between him and the Plaintiff, that he, (the Defendant) ſhould pay to the Plaintiff 30 *l.* in Diſcharge of all Covenants, which Sum the Plaintiff *received and accepted* in full Satisfaction thereof; and upon Demurrer the Plaintiff had Judgment, becauſe upon the Defendant's own Shewing, there was no Covenant broken at the Time of this Agreement made, and Accord and Satisfaction is no good Plea, but only in Diſcharge of Damages for a Covenant actually broken, or for Damages actually ſuſtained. 1 *Lutw.* 358. *Snow* verſus *Franklin*.

12. In Treſpaſs, *&c.* The Defendant pleaded an Accord between him and the Plaintiff, (*viz.*) That he (the Defendant) ſhould pay the Plaintiff 3 *l. and ſhould undertake to pay the Attorney's Bill*, and averred, that he had paid the 3 *l.* and was always ready to pay the Attorney's Bill, but never produced it; and upon Demurrer to this Plea it was adjudged ill, becauſe here is an Accord pleaded, but not *executed* tho' it was inſiſted, that the Agreement was executed, and that this did not differ from *Peytoe's Caſe*, for there was an Obligation given to pay the Money, and here is a Promiſe to pay the Attorney's Bill, which is of the ſame Nature, but the Plaintiff had Judgment. *Raym.* 203. *Cock* verſus *Honychurch*. See *Plow. Com.* 11.

13. *Indebitatus Aſſumpſit*; the Defendant pleaded an Accord between the Plaintiff and him to do ſeveral Things, and averred the Performance of *Part, and that he tendered to do the reſt*; and upon Demurrer this Plea was adjudged ill, becauſe an Accord was pleaded, but not executed. *T. Jones* 6. *Sheppard* verſus *Lewis*.

14. *Aſſumpſit* for Wares ſold, *&c.* the Defendant pleaded an Accord or Agreement to pay to the Plaintiff 9 *l.* and ſuch Coſts as the Maſter ſhould tax in Satisfaction of all Matters between them, and *then lays mutual Promiſes* for the Performance, ſets forth, that the Maſter did tax the Coſts, and that the Plaintiff had Notice of it, and that he (the Defendant) tendered the 9 *l.* and the Coſts to the Plaintiff, which he was ready to pay, and yet is; and upon a Demurrer it was held, that tho' formerly and Accord without a full and compleat Execution, was not good, according to *Peytoe's* Caſe, yet the Law is now taken to be, that *Mutual Actions* will lie upon ſuch Agreements, and therefore ſuch a Plea will now be allowed; but then the Promiſes muſt be mutual at the Time of the Agreement, otherwiſe 'tis no Bar to the Plaintiff's Action. *T. Jones* 158, 168. *Wickham* v. *Tailour*. See *Caſe* verſus *Barber*. Raym. 450. S. C.

15. *In Covenant*; the Breach aſſigned was, that the Houſes were out of Repair, *&c.* The Defendant pleads an Agreement between the Plaintiff and him, that he (the Defendant) ſhould employ a Workman three or four Days about the repairing the Houſes, which ſhould be a *ſufficient Satisfaction*; upon this they were at Iſſue, and the Verdict was againſt the Plaintiff; it was moved in Arreſt of Judgment, that the Plea was ill, for where an Accord and Satisfaction is pleaded it muſt be *Real*, which this is not, becauſe the Defendant hath done no more than he was obliged to do by his Covenant; beſides, the Satisfaction is incertain, it being to employ a Man to work three or four Days. *Per Curiam*, where the Damages are incertain, as they are in this Action, a leſſer Thing may be done in Satisfaction; and in ſuch Caſe an Accord and Satisfaction is a good Plea, but in an Action of Debt on a Bond, where the Sum is certain, there a Leſſer Sum cannot be paid in Satisfaction of a Greater. 4 *Mod.* 88. *Adams* verſus *Tapling*.

16. *Quantum meruit* for Work and Service, and an *Inſimul computaſſet* for 5 *l.* The Defendant pleaded an Agreement between him and the Plaintiff, that the Defendant ſhould give, and the Plaintiff ſhould receive and accept a *Bill under the Defendant's Hand* for 5 *l.* in Satisfaction of what was due to the Plaintiff, and that the Defendant did give, and the Plaintiff did accept, ſuch a Bill according to the ſaid Agreement; the Plaintiff replied *proteſtando*, that he made no ſuch Agreement; *Proteſtando* likewiſe, that he did not accept the ſaid Bill in Satisfaction, *&c.* *Pro placito*, he ſaid, that it was not given *under Hand and Seal*, and upon a Demurrer to this Replication, it was held good. 5 *Mod.* 136. *Talor* verſus *Baker*. See *Young* verſus *Rudd*.

Act.

(A)

Who is to do the firſt Act, and of Diſability by his own Act.

1. *DEBT on a Bond* conditioned to give ſuch a Releaſe in *Michaelmas-Term*, as the Judge of the *Prerogative Court* ſhould think proper; the Defendant pleaded, that in that *Term B. B.* was Judge of that Court, and that he did not appoint any *Releaſe*; and upon Demurrer it was held an ill Plea, becauſe the Defendant did not alledge, that he had prepared a *Releaſe*, and tendered it to the Judge to be allowed, for 'tis on his Part to draw the *Releaſe*. *Cro. Eliz.* 716. *Lamb* verſus *Brownwell.*

2. *Debt upon Bond*, conditioned, That if the Plaintiff did bring ſuch a Ship to a Port in *Greece*, there to remain for *forty Days*, or ſo long of the *forty Days* as the Defendant pleaſed, ſo as he might freight the ſaid Ship, that then the Defendant would freight it within *forty Days*, and bring it to ſuch a Port in *England*; there was a friyolous Plea, to which the Plaintiff demurred, and it was inſiſted for the Defendant, that the firſt Act was to be done by the Plaintiff, (*viz.*) To bring the Ship to ſuch a Port, there to remain by the Space of *forty Days*, and he had not averred, that the Ship was at that Port by the Space of *forty Days*, and for that Reaſon the Court inclined that the Condition was not broken. *Godbolt* 74. *Tayler* verſus *Ribera.*

1 And. 18. Moor. 452. 3. *Leaſe for Years*, in which the Leſſor covenanted with the Leſſee, that *upon Surrender* of his ſaid Leaſe at any Time within the Term, he would grant a new Leaſe, afterwards the Leſſor levied a *Fine ſur Cognizance de droit* of the Lands, and granted and rendered the ſame to the Cogniſee for 80 Years; adjudged, that by this Means the Cogniſor had *diſabled* himſelf either to take the Surrender or to make a new Leaſe, and altho' the Leſſee was to do the firſt Act, (*viz.*) *To make the Surrender*, yet, when the Leſſor had *diſabled* himſelf to take it, the Law will not compel him to do that which will be in vain; eſpecially in this Caſe, for if he ſhould make a *Surrender*, then he would looſe his old Term without any Poſſibility of having a new Leaſe. 5 *Rep.* 20. *Sir Anth. Mayne's* Caſe. Poſtea *Breach of Covenant.* (B) 8. *S. C.*

Hob. 48. 1 And. 300 by the Name of Foſter v. Frank. 4. The Condition of a Bond was, that the Obligor and his Wife ſhould before *Eaſter-Term*, *&c.* levy a *Fine* of ſuch Lands to the Plaintiff; the Defendant pleaded, that before that Term the Plaintiff did not ſue forth a *Writ of Covenant* to make himſelf capable of the *Fine*, and *Hobart*, Ch. Juſt. was of Opinion it was a good Plea. *Hutt.* 48. *Weſton* v. *Hill. Hetley* 105. *Newton* v. *Sutton. S. P. Hob.* 48. *S. C. Waldron* verſus *Hill. Covenant* (I) 7. contra.

5. *Debt upon Bond*, for Performance of Covenants, *&c.* the *Covenant* was, that the Obligor before ſuch a Day, ſhould make a *further Aſſurance* of Lands to the Obligee, but at the *Coſts and Charges of the Obligee*; the Queſtion was, whether the Obligee was firſt to offer *the Coſts*, or whether the Obligor was firſt to declare *what Manner of Aſſurance* he would make? and adjudged, that it being purely in the Choice of the Obligor, what Manner of *Aſſurance* he would make, he ought to do the firſt Act, (*viz.*) to give Notice to the Obligee what Aſſurance he intended to make, and then the Obligee is to ſupply the Coſts. *Moor* 454. *Hollins* verſus *Connard.* 457. *S. C.*

6. The Husband ſettled an Eſtate to the Uſe of himſelf for Life, and afterwards, to the Uſe of *Dorothy* his Wife for Life, *ſo long as ſhe ſhould be effectually ready to demiſe it to his Heir at Law at* 50*l. yearly Rent, when ſhe ſhould not dwell in it her ſelf*; the Husband died, his Widow married again, and lived with her Husband in another Place, and having made no Leaſe to the Heir, he entered; adjudged, that ſhe ought to make none unleſs it had been *demanded*, and that the Heir ought to *tender a Leaſe* to her to Sign, with a Reſervation of 50*l.* Rent. *Moor* 626. *Sir Cha. Rawleigh's* Caſe.

7. *Debt* by the *Mayor*, *&c. of London*, for Rent of a Mill, which went by the Labour of Priſoners in *Bridwell*; the Defendant pleaded a Proviſo in the Leaſe, that if the Leſſors did not find eight Men to work in the Mill every Day, that the Leſſee might retain 8 *d.* of the Rent for every Man wanting in that Day, and ſo *toties quoties*; and that there had been ſo many Men wanting for ſo many Days, and that the Money retained for that Defect amounted to more than the Rent; the Plaintiffs replied, that the Defendant had ſo altered the Mill that he made it go with *one Horſe* inſtead of *eight Men*, for which Reaſon they did not provide the Men; and upon Demurrer the Plaintiffs had Judgment, becauſe the Alteration was made in the Mill by the Defendant's own Act. *Moor* 877.

8. The *Condition* of a Bond was to deliver 200 *Weight of Hops*, *&c.* and the Obligee was to chooſe them out of *twenty-four Bags* of the Obligor's own growing; in an Action of Debt brought on this Bond for not delivering the *Hops*, the Defendant pleaded, that he was ready to deliver them, but the Plaintiff had not choſe them; adjudged, that the Plaintiff ought to do the firſt Act, (*viz.*) to require the Defendant to ſhew the twenty-four Bags that he might make his Choice. *March* 24. *Brook* verſus *Brook.*

9. *Debt upon Bond*, conditioned, that whereas there was a Suit in Chancery depending between the now Plaintiff and ſeveral *Infants*, by their *Guardian*, and that it was decreed, that the Plaintiff ſhould pay the ſaid *Guardian* to the Uſe of the *Infants* 840 *l.* in full Satisfaction of their Right and Title to a *Leaſe of the Manor of Martley-Hall*, and other Lands in *Suffolk*, if therefore the ſaid *Guardian* ſhall procure the ſaid Infants, when they come of Age, to releaſe all their Right, Title, and Intereſt in and to the ſaid Leaſe then to be void; the Defendant pleaded in *Bar*, that the ſaid *Infants* never had or pretended to have any Right, Title, or Intereſt to the Leaſe of the ſaid *Manor*, which they might releaſe; and upon Demurrer to this Plea the Plaintiff had Judgment, for whether the Infants had a Title or not, the Defendant had obliged himſelf to procure a Releaſe from them *de facto*, and 'tis not material whether it was *de jure* or not, and the rather, becauſe by their Bill in Equity they pretended to have a Title. 1 *Saund.* 215. *Doughty* verſus *Neale*.

10. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that the Defendant (as he affirmed) was poſſeſſed of a ſixth Part of a Ship, which he offered to ſell, whereupon it was agreed between the Plaintiff and him, that the Defendant ſhould ſell all his Intereſt to the Plaintiff, and that the *Sale ſhould be in Writing*, and that the Plaintiff ſhould pay the Defendant 600 *l. &c.* (*viz.*) 20 *l.* in Hand, and the reſt upon *executing the Writing*, and in Conſideration, that the Plaintiff had paid the ſaid 20 *l.* and had promiſed to perform the Agreement on his Part, the Defendant promiſed to perform it on his Part, but that the Defendant had *not performed the Agreement on his Part*: After a Verdict for the Plaintiff it was objected, that the *Breach* was not well aſſigned, it being too general to ſay, that he *had not performed the Agreement on his Part*, for he ought to ſhew ſome particular in which he had not performed it; as, that he tendered the Defendant a *Writing*, which he refuſed to execute, or that he had not delivered to the Plaintiff the ſixth Part of a Ship, *&c.* But adjudged, that 'tis not the Plaintiff, but the Defendant, who is to do the firſt Act, 'tis he, who is to tender the Writing, becauſe, *he had undertaken to ſell his Part by a Writing*; as where a *Covenant* is to enter into a Bond, the Covenanter is to prepare it and tender it: Judgment for the Plaintiff in *C. B.* and affirmed in Error in *B. R.* 3 *Lev.* 319. *Keech* verſus *Knight*. See *Dyer* 297. *Hob.* 67, 88, 106. *Cro. Eliz.* 292, 543. 2 *Cro.* 503. 2 *Saund.* 351, *Sid.* 178. 4 Mod. 188.

11. *Covenant* to Seal and Deliver a *Leaſe for Years* to commence from *Michaelmas next*, and a Bond for Performance of Covenants, and on an Action of Debt brought on that Bond, the *Breach* aſſigned was, that the Obligor had not made one Part of ſuch Leaſe, whereupon the Obligee put one Part in Writing and tendered it to the Obligor to Seal, which he refuſed. *Et per Curiam*, where a Man covenants to *Seal and Deliver* a Deed, he is bound to put it in *Writing*; but if he refuſe, the Covenantee may do it, and 'tis warranted by Law. 2 *Roll. Rep.* 177. *Steele* verſus *Spight*.

12. *Debt upon Bond*, conditioned to perform an *Award*: Upon the Pleadings in this Caſe the Queſtion did ariſe upon one Part of the Award, which was, that the Defendant ſhould *ſeal and execute* within ſeven Days ſuch a *Releaſe* to the Plaintiff, as ſhould be to the Satisfaction *of his* (the Plaintiff's) *Counſel*, and the Queſtion was, which of the Parties was to *tender* it? for the *Defendant was to execute it*, but it was to be to the Satisfaction of the *Plaintiff's Counſel*, and adjudged, that the Defendant was to *tender* it; for 'tis not like the Caſe where a Deed is to be *made* by *T. P. as the Counſel of* R. W. *ſhall adviſe*, for there the Deed muſt be tendered as the *Counſel doth adviſe*, and *R. W.* to whom 'tis to be made muſt do the firſt Act, (*i. e.*) he muſt tender the Deed to *T. P.* by Advice of his Counſel. 1 *Vent.* 255. *Baker* verſus *Bulſtrode*. See *Lamb's* Caſe 5 *Rep.* 13, 23. *C.* 1 *Brownl.* 21. *S. C.* *See* Breach of Covenant. (B) 5. *S. C.* 2 Lev. 25. Raym. 282. 1 Mod. 104.

13. *Debt* upon Articles of Agreement, wherein the Plaintiff covenanted to *execute a good Conveyance* of certain Lands to the *Uſe* of the Defendant, *at or before the 17th of* November, and the Defendant, *in Conſideration thereof*, agreed to pay the Plaintiff 503 *l. &c.* at ſuch a Place, *tempore executionis* of ſuch Conveyance, *&c.* for which the Action was now brought; and upon a Demurrer to this Declaration, it was objected, that the Plaintiff ought to execute the Conveyance before the Defendant was obliged to pay the Money, becauſe *where no certain Day is appointed for the Payment*, it muſt be reduced to a Certainty by the Act of the Plaintiff, which in this Caſe was by executing the Conveyance; but the Law had been the ſame, if a *certain Day* had been appointed for the Payment of the Money, becauſe the Payment muſt neceſſarily relate to the *Execution of the Deed*, and not to the very Day in which it was appointed to be executed, and ſo it was adjudged. 1 *Lutw.* 565. *Chaloner* verſus *Davis*.

Act of God.

(A)

No Man shall be prejudiced by it. See *Abatement.* (D) 19. *Action of the Case.* (H) 14.

1. *ff.* IF any of the Circumſtances, which are required by Law to perfect an Eſtate, become impoſſible to be performed by the *Act of God*, no Perſon ſhall be prejudiced thereby; as where Leſſee for another Man's Life is diſſeiſed, the Means which the Law requires to recover the Profits is, that the Leſſee re-enter and bring an Action of Treſpaſs; but if the *Ceſtui que vie die* before Re-entry, in ſuch Caſe the Leſſee ſhall have an Action of Treſpaſs, without Re-entry. 1 *Rep.* 97. *Shelley*'s Caſe.

2. *ff. Edw. Shelly* made a Leaſe for Years, and there covenanted to ſuffer a *Recovery* to the Uſe of himſelf for Life, and afterwards to the Uſe of *R. B.* for 24 Years, then to the Heirs Males of his and to the Heirs Males of their Bodies, *&c. Edw. Shelley died the firſt Day of Michaelmas Term*, and on the ſame Day the Recovery paſſed, and an *Habere facias ſeiſinam* was awarded, but the Recovery was not executed until ten Days following, and about two Months afterwards the Widow of his eldeſt Son, was delivered of a Son; adjudged, that here being no Neglect in the Recoverers, for they ſued forth Execution immediately by *Habere facias ſeiſinam*, and it being impoſſible they ſhould do it in the Life-time of *Edw. Shelley*, who died early in the Morning of the ſame Day, therefore the Son, who was after-born, ſhould not be prejudiced. 1 *Rep.* 98. *Shelley*'s Caſe.

3. *ff. Tenant in Capite* died, leaving his Heir at full Age, who tendered his Livery and was admitted to it, and within the Time limited for the Proſecution of it; he ſold the Land and died; adjudged, that by tendring the *Livery* he did as much as he could, and ſince it became impoſſible for him, by the Act of God, to ſue it out, the King's Intereſt ſhall be determined by his Death, and the Vendee ſhall have the Land without any *Monſtrans de droit*, or *Amoveas manum*, 8 *Rep.* 172. *Hale*'s Caſe.

4. Leaſe for twenty-one Years, if the Leſſee lived ſo long, *and continued in the Service of the Leſſor*, who died within that Time; adjudged, that the Leaſe was not determined, for there was no Default in the Leſſee, that he did ſerve, but 'tis the Act of God, that he could not ſerve longer. *M.* 40 *Eliz. Cro. Eliz.* 643. *Wrenford* verſus *Giles.*

W. Jones 179. 5. *Aſſumpſit* againſt *Huſband and Wife*, in which the Plaintiff declared, that the Wife, *dum ſola*, in Conſideration, that the Plaintiff would lend her his Horſe (to her Uſe *dum ſola*) to ride about her Buſineſs as long as her Husband ſhould pleaſe, ſhe promiſed to redeliver *eundem ſpadonem*, when ſhe ſhould be thereunto *required*; then he ſets forth, that the Wife *dum ſola*, not the Husband and Wife after Marriage, had not redelivered the Horſe, nor any wiſe contented the Plaintiff, nor either of them had contented him, altho' at ſuch Day, Year and Place they were required: The Defendant, by Proteſtation ſaid, that the Wife *dum ſola*, was not required to redeliver the Horſe; and for Plea ſaid, that before the Requeſt as alledged by the Plaintiff, (*viz.*) on ſuch a Day, and at ſuch a Place, the Horſe *per diverſos morbos in corpore ſuo moritur*, ſo that he could not redeliver it; and upon Demurrer to this Plea it was inſiſted for the Plaintiff, that he ought to recover, becauſe the Defendant, tho' not bound in Law, yet is bound by expreſs Agreement to redeliver *eundem ſpadonem*; but adjudged, that where an Agreement is poſſible to be performed at the Time when it was made, and afterwards becomes impoſſible by the Act of *God*, and without any Default in the Party, he is for ever diſcharged. *Palm.* 548. *Williams* verſus *Hide & Ux'.*

Acts of Parliament.

A Miſrecital ſhall not prejudice the Party, and where it ſhall. (A)
What is eſſential to make an Act of Parliament, and of Adjournments and Prorogations. (B)
What ſhall make a Seſſion. (C)
Of what Statutes the Court muſt take Notice *ex officio*. (D)
Privilege of Parliament, and Writs of Error. (E)
Of chooſing Members. (F) (G)

(A)

A Miſrecital ſhall not prejudice the Party, and where it ſhall. See *Statutes.*

1. IN *Debt* upon the Statute *of Uſury*, the *Writ* was *contra formam Statuti in Parliamento Domini Regis, &c. Anno Regni ſui ſexto*, and declared, that the Parliament was held 23 *January*, *Anno quinto*, and continued *uſque* 15 *Aprilis*, *Anno ſexto*, ſo that the Act was miſrecited in the *Writ*, for it hath Relation to the firſt Day of the Seſſion, and that was on the 23*d of January*, *Anno quinto*, and not *Anno ſexto*, as in the *Writ*, yet this Objection was not allowed upon a Motion in Arreſt of Judgment. *Dyer* 95. *Whitton* verſus *Morrice*.

2. *In Aſſault, &c.* and falſe Impriſonment, the Defendant juſtified under a *Warrant* from a Juſtice of Peace againſt the Plaintiff for Keeping an *Alehouſe* contrary to the Statute made 12 *February*, 5 *Eliz.* where it was made 12 *Feb.* 5 *Ed.* 6. but adjudged, that this *Miſrecital* was not material, becauſe 'tis a *general Act*, of which the Court ought to take Notice. *Godbolt* 178. *Jolly Woolly*'s Caſe.

3. In an Action of falſe Impriſonment againſt the Defendant and two other *Juſtices of Peace*, they juſtified under the Statute 1 *Mar.* by which 'tis enacted, that it ſhould not be lawful for any Perſon *malitiouſly and contumelioufly* to moleſt or diſturb any Perſon or Perſons which are *Preachers, &c.* and upon a Demurrer to this Plea, the Plaintiff objected, that the Statute was miſrecited, for the Words in the Statute are in the Disjunctive *malitiouſly and contumelioufly*, but adjudged, that where the Words precedent and ſubſequent in the Disjunctive are of the ſame Senſe and Signification, as they are in this Caſe, there the Disjunctive *or* is all one with the copulative *And*, but where they are of a different Senſe, 'tis otherwiſe, as if a Man is prohibited to do ſuch a Thing by *Word or Deed:* Then it was objected, that the Words in the Statute are *By the greater Part of the Juſtices*, and as they are recited in the Plea, 'tis *By the better Part of the Juſtices*; but notwithſtanding theſe Exceptions, the Defendants had Judgment. *Mich.* 11 *Jac. Croſſe* verſus *Stanhope.* 1 *Bulſt.*

4. Indictment upon the Statute 8 *H.* 6. *of forcible Entry*, Exception was taken to it, becauſe the Statute was miſrecited in the Indictment, ſetting forth, that the Fine was given *dicto Domino Regi*, whereas the Words in the Statute are *Domino Regi*, without *dicto*, adjudged a good Exception, and the Party was diſcharged, and a Writ of Reſtitution awarded. *Trin.* 10 *Jac.* 1 *Bulſt.* 218. *The King* verſus *Coles.*

5. *The Biſhop of Norwich* pleaded a private Act of Parliament, and was miſtaken in the *Day of the Commencement of the Parliament*, and upon a general Demurrer to the Plea there was a Judgment againſt the *Biſhop*, for tho' the Court is not bound to take Notice of a private Act of Parliament *ex officio*, yet they are bound to take Notice of the Day when the Parliament begins, for that is Publick. *Moor* 551.

6. Information upon the Statute 14 *Car.* 2. *cap.* 5. againſt a Worſted-weaver in *Norfolk*, for taking above two Apprentices *contra formam Statuti prædict.* upon Not guilty pleaded there was a Verdict for the Informer; and it was moved in Arreſt of Judgment, that this Statute was miſrecited, becauſe 'tis ſaid at a Seſſions of Parliament holden at *Weſtminſter* by Prorogation 18 *Feb.* which is according to the printed Statute-Book, but the Parliament-*Roll* is at a Parliament begun at *Weſtminſter*, 8 *May*, 13 *Car.* 2. and there continued till 19 *May*, 14 *Car.* 2. and thence prorogued to the 18*th of Feb.* next following, ſo that there being no ſuch Seſſions as mentioned in this Information, 'tis ill, and ſo is *Partridge*'s Caſe; one of the Judges thus diſtinguiſhed, (*viz.*) where an Action, *&c.* is grounded on an Act of Parliament it ſelf, and the Concluſion is *contra formam Statuti præd.* there, if the Statute is miſrecited, the Action or Information is not good; but if the Concluſion is *contra formam Statuti in hujuſmodi caſu edit'*, this is not tied up to a particular Statute, ſo that tho' one may be miſrecited, the Court may take Notice of any other to puniſh the Offence, the Judgment was ſtayed. *Raym.* 191. *The King* verſus *Wild.* See *Hetley* 119. 1 Lev. 296.

7. Debt upon the Statute 29 *Eliz. cap.* 4. brought by the Sheriff for his *Fees* in ſerving an Execution; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that the Statute was miſrecited in the Time of holding that Parliament, for by the Copies out of the *Rolls* it appears

pears to be held and to begin the 19*th of October*, whereas the Plaintiff had declared, that it be-
*4 Inſt. 7. gan on the * 15*th Day of February*, whereas in Truth it was *adjourned* to that Day from the 19*th of October: Sed per Curiam*, this Miſrecital is cured by a *Verdict*, he ſhould have pleaded *Nul tiel Record*; but having admitted it in Pleading, they cannot judicially take any Notice to the contrary. 2 *Mod.* 240. *Spring* verſus *Eve.*

8. Action upon the Statute of *R.* 2. *de ſcandalis Magnatum*, after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Statute was miſrecited, for the Declaration is, *ſi aliquis tam auſus fuit ad contrafaciend*, when the Statute is *to deviſe*, now *contrafacio* can never ſignify *to deviſe*; for to counterfeit a Thing, imports that the Thing counterfeited muſt exiſt and have a Being, and can never be applied to Words: *Sed per Curiam*, the Word *contrafacere* is ſignificant in the Law, as upon the Statute 25 *Ed.* 3. 'tis uſed in *Raſt. Entr.* 593. but in the princi-
*Hutt. 56. pal Caſe ſo much of the Statute which concerns the Plaintiff's Caſe is well recited; ſo is * *Parker*'s Caſe, which was an Action upon the Statute of *Winton*, in which the Plaintiff declared of *burning Houſes*, when the Statute mentions *burning generally*; but the Action being brought for a Robbery, ſuch Miſrecital will not hurt. *T. Jones* 49. *Lord Shaftsbury* verſus *Digby.*

9. *Debt upon the Statute of Ed.* 6. for not ſetting out his Tithes, in which the Plaintiff declared, *quod cum* 4 *die Novemb. Anno ſecundo Ed.* 6. it was enacted, *&c.* and ſo recites the Statute; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Statute was miſrecited, becauſe the Parliament began *Anno* 1 *Ed.* 6. and was continued by Prorogation to the 4*th Day of Novemb. (viz.) Ad Seſſionem, &c. tent. per prorogationem*, but this was diſallowed, for when a Statute is pleaded, 'tis generally alledged to be made *in Parliamento tent.* 19 *die, &c. Yelv.* 127. 2 *Lutw.* 1402. *Cade* verſus *Hillary. S. P.*

5 Mod. 307. 10. *Treſpaſs* for *entring his Cloſe and treading down his Graſs and Corn, and Hunting* there, he being an *inferior Tradeſman, (viz.)* a *Clothier*, againſt the Peace of the King, *& contra formam Statuti inde proviſ.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that *contra formam Statuti* goes to the whole Declaration, whereas the Entring the Cloſe and Treading down the Graſs is not contrary to any Statute, but only the *Hunting*, and in ſuch Caſe where 'tis done by an inferior Tradeſman the Statute 4 *&* 5 *Will.* 3. *cap.* 33. encreaſes the Forfeiture to 5 *s.* or to any other Sum not exceeding 20 *s.* and full Coſts; adjudged, that where a Statute encreaſes a Penalty, or deprives a Man of that Liberty which he had at Common Law, if the Plaintiff will declare upon ſuch a Statute, he muſt bring his Caſe within it, and then conclude *contra formam Statuti*, otherwiſe his Declaration will be ill, and this was *Penhallo*'s Caſe, 3 *Cro.* 231. but if there is no Statute in the Caſe, and the Plaintiff concludes *contra formam Statuti, &c.* 'tis only *Surpluſage*, and that was *Wara*'s Caſe, 1 *Vent.* 103. 'tis true, in the principal Caſe, *Hunting* is only within the Statute, and tho' in a grammatical Conſtruction *contra formam Statuti* will go to the reſt of the Treſpaſſes, yet in Law it ſhall be applied to the *Hunting*, which was really againſt the Statute, and as to the reſt it ſhall be rejected as Surpluſage. 1 *Salk.* 212. *Bennet* verſus *Talbott.* See *Allen* 43. *Harwood*'s Caſe.

11. Indictment, for that twenty Perſons being aſſembled, the Defendant not being licenſed preached to them, but did not conclude *contra formam Statuti*, and for that Reaſon it was quaſhed, for this being no Offence at Common Law but by the Statute, it muſt appear to be againſt the Statute, which this doth not, becauſe thoſe twenty Perſons may be of his *own Family*, and the Statute doth not extend to that. 1 *Salk.* 370. *The King* verſus *Franklyn.*

1 Eliz. cap. 2. 13 & 14 Car. 2. cap. 4. 12. By the Statute 1 *Eliz.* 'tis enacted, that every Miniſter ſhall uſe the Service in ſuch Form as mentioned in the Book of *Common-Prayer*, and if convicted in uſing another Form, *ſhall forfeit one Year's Profit of his Spiritual Promotions, and ſuffer ſix Months Impriſonment, &c.* The Defendant was indicted at the *Quarter-Seſſions* for uſing *alias preces* in the Church, and *alio modo* than mentioned in the Common-Prayer Book, (it ſhould have been other Forms and Prayers than thoſe enjoined, which he had neglected). He was convicted and *fined* 100 *Marks*; and upon a Writ of Error brought, this Judgment was reverſed, becauſe the *Juſtices in their Seſſions have no Power to aſſeſs* a Fine, for the Puniſhment is directed by the Statute, (*viz.*) A Forfeiture of his Spiritual Promotions for a Year. 3 *Mod.* 78. *The King* verſus *Sparks.*

13. The Defendants were committed to *Newgate* by a Warrant ſigned by *Robert Harley*, Speaker of the Houſe of Commons, for proſecuting Actions at Law againſt the *Conſtables of Ailesbury*, for refuſing to take their Votes at the Election of Members of Parliament, *&c.* in Contempt of the Juriſdiction and Privileges of the Houſe; and this Matter being returned by *Habeas Corpus* ſeverally, and the Defendants being brought into Court, their Counſel moved, that they might be diſcharged, for that the Proſecution of a Suit at Law could be no unlawful Act, nor a Breach
* *See* Poſtea. (F) 5. of the Privileges of the Houſe; * three Judges againſt the *Chief Juſtice*, that the Houſe were the proper Judges of their own Privileges: But *Holt* Ch. Juſt. held, that the Authority of the Commons was circumſcribed by Law; and if they ſhould exceed that Authority, then to ſay that they are Judges of their own Privileges, is to make their Privileges to be what they would have them to be, and that if they ſhould wrongfully impriſon, there could be no Redreſs, the Conſequence of which is, that the Courts at *Weſtminſter* cannot execute the Laws upon which the Liberties of the People ſubſiſt. 2 *Salk.* 503. *Paty*'s Caſe.

Mod. Caſes 62. 14. *Treſpaſs* for taking ſeveral *Skins, &c.* the Defendant juſtified on the Statute 1 *Jac.* 1. *cap.* 22. concerning *Tanning*, and ſet forth the *Title* of the Act, but it varied from the *true Title* by the Miſtake of one Word; and upon Demurrer to this Plea it was inſiſted, that there was no ſuch Act as the Defendant had ſet forth; adjudged, that the *Title* is not a material Part, and that 'tis

not neceſſary to ſet it forth, but if the Party will ſet it forth, he muſt deſcribe it by the Title which the Makers gave it; and the Court denied the Opinion of my Lord *Hale*, in *Hardres* 324. 2 *Salk.* 609. *Mills* verſus *Wilkins*. See *Hutt.* 56. *Hob.* 310. 11 *Rep.* 33. *Cro. Car.* 232.

15. *In Treſpaſs*, a Special Verdict was found, that a Gentleman had a Coach and Harneſs of his own, and agreed with an Innkeeper for 100 *l. per Annum*, to find a Pair of Horſes and a Coachman to drive them; and the Queſtion was upon the Statute 5 *& 6 Will.* 3. *cap.* 22. whether this could be done without a *Licence* to *keep a Hackney-Coach* within the Meaning of that Statute; adjudged, that tho' in the licenſing Clauſe, *Sect.* 3. and the prohibiting Clauſe, *Sect.* 5. *of that Statute*, *Hackney-Coaches or Horſes* are mentioned in the *Disjunctive*, yet that muſt be underſtood of *Coach Horſes* to be uſed with an *Hackney-Coach*, becauſe all other Things in the Act, as the Number, Figure, Rent, and the whole Revenue reſerved is confined to *Hackney-Coaches*. 2 *Salk.* 612. *Billings* verſus *Eads*.

16. A Warrant of Attorney to confeſs Judgment was written on a Sheet of Paper, which likewiſe contained a *Bond* and had but one *Stamp*, the Judgment was entered upon this Warrant, and a Motion was made to ſet aſide the Judgment and Execution, becauſe the Statute requires there ſhould be two Stamps, but it was denied; for tho' this may be a Reaſon to refuſe ſuch a Warrant of Attorney in Evidence, yet 'tis no Reaſon to make it void, and no ſuch Thing is imported in the Statute. 2 *Salk.* 612.

17. Debt upon the Statute 10 *Will.* 3. *cap.* 2. for twelve Dozen of Buttons made *de ligno tantum*, the Jury found the Buttons were all made of Wood, except the *Shanks*, and thoſe were Braſs, and that they were made in Imitation, *&c.* and that there were Buttons made *de ligno tantum*; it was objected, that ſince the Jury had found, that *there were Buttons made de ligno tantum*, the Statute was applicable to ſuch Buttons, but not to thoſe found by the Jury, for they were *de ligno*, except the *Shanks*, and that this being a penal Law ſhould be conſtrued in the ſtricteſt Senſe, but adjudged that the *Shank* is no Part of the Button, but added, to faſten it to the Coat. 2 *Salk.* 612. *Dunn qui tam* verſus *Hinchdy*.

18. Debt upon the Statute 1 *Jac.* 1. *cap.* 22. *Sect.* 44. brought by the Company of *Sadlers* againſt the Defendant, for making 500 Saddles inſufficiently, *&c.* and ſo he became indebted to them for the Forfeiture; the Caſe was, the Defendant was employed by the *King of Portugal's Envoy*, to make 500 Saddles of War, according to a Pattern of a Saddle brought from *Portugal*, the Seat whereof was covered with *Goat-skin* and ſtuffed with Straw; the Defendant made ſeveral in Imitation of the Pattern, but covered them with *White Allom Sheep-skins*, and ſtuffed them with Hay; the Envoy being informed of it, ordered him to proceed, which he did, and made all the Saddles, which were ſent into *Portugal*; and this Action being brought for the Penalty, and three of the Company being disfranchiſed to make them proper Evidence, the Queſtion was, whether *allomed Sheep-skins* were Leather within that Act, and adjudged, that if they were not, yet ſince the Buyer knew it and was ſatisfied, it would be no Crime, for it was not the Deſign of the Statute to deprive Men of the Liberty of buying and making Contracts for what they would, but to prevent their being cheated by having bad Goods put on them. *Mod. Caſes* 165. *Sadlers Company* verſus *Jones*.

(B)

What is eſſential to make an Act of Parliament, and of Adjournments and Prorogations.

1. ſſ. THere muſt be the Aſſent of the *King*, *Lords*, and *Commons*, and without theſe three Aſſenting there can be no good Act of Parliament, but there are many Acts in Force tho' theſe three Aſſents are not mentioned therein, as *Dominus Rex Statuit in Parliamento*, and *Dominus Rex in Parliamento ſuo ſtatuta edidit*, and *de communi concilio ſtatuit*, and ſometimes 'tis only *Domus Rex ſtatuit*. *Plowd.* 79. *Partridge* verſus *Croker*. *Allen* verſus *Tooley*. 2 *Bulſt.* 186.

2. The Houſe of Lords made an *Order to apprehend one* Pritchard *for a Contempt*, but before he could be taken the Parliament was *prorogued*, and about five Days after the Prorogation the Serjeant at Arms took him, but he brought a *Habeas Corpus* and was diſcharged, becauſe by the Prorogation every Thing before them was diſcharged, except *Writs of Error* and *Scire facias* thereon. *Raym.* 120. *Pritchard's* Caſe. 1 Lev. 165. Poſtea (E) 11. Sid. 245.

(C)

What ſhall make a Seſſion.

1. IT was the Opinion of all the Judges, that if a Parliament is aſſembled, and Orders made by them, and Bills agreed to, but none paſſed and ſigned, this is but an Inception of a Parliament, and no *Seſſion*, ſo that there muſt be the Royal Aſſent to a Bill to make a Seſſion. 2 *Bulſt.* 237. *Heydon* verſus *Godſalve*. See *Hutt.* 61. 1 Roll. Rep. 14. 2 Cro. 342.

2. An Act was made to continue *for three Years, and to the End of the next Seſſions of Parliament*; after the three Years the Parliament met, but was *prorogued* and nothing done; adjudged, that Raym. 187. Lev. 288.

that the Act was ſtill in Force, becauſe this was no *Seſſions*. *Sid.* 457. *Horſley* verſus *Potts*. 1 *Lev.* 265. *Man* verſus *Cooper*. *S. P.*

Poſtea (E) 15. S.C.

3. In the *Earl of Shaftsbury*'s Caſe it was objected, that the Order of the Houſe of Lords, by which he was committed, was diſcharged, becauſe the *Seſſions was determined by the King's Signing ſeveral Bills*, and this was inferred from the Act 1 *Car.* 1. *cap.* 7. by which it was enacted, that the giving the Royal Aſſent to ſeveral Bills ſhall not determine the Seſſions; and by a *Proviſo* in the Statute 16 *Car.* 1. *cap.* 1. to the ſame Purpoſe; but that Statute was made to a particular Purpoſe, and a *Proviſo* is not a Determination what the Law was before, but only added *in majorem cautelam*, to ſatisfy thoſe who are ignorant of the Law; and my *Lord Coke* is expreſs in *Heydon*'s Caſe, that the *Seſſion* continues, tho' the *Royal Aſſent* hath been given to ſeveral Bills. 1 *Mod.* 155. in the *Earl of Shaftsbury*'s Caſe.

(D)

Of what Acts the Court is to take Notice ex officio. See (A) 2.

1. 'TIS a Rule in Law, that the Court ought to take Notice of a general Statute *ex officio*, without pleading it, as for Inſtance, the Statute 21 *H.* 8. *cap.* 13. which makes the Acceptance of a ſecond Living, *&c.* an Avoidance of the firſt, is a general Law which concerns all ſpiritual Perſons, and therefore the Court is to take Notice of it without Pleading it; but the Statute 1 *Eliz.* giving Biſhops Power to make Leaſes, *&c.* concerns Biſhops only, and therefore 'tis a ſpecial or private Act, and muſt be pleaded. 5 *Rep. Elms* verſus *Gale*, and 4 *Rep.* 75. *Holland*'s Caſe.

2. *ſſ.* The Statute 23 *H.* 8. *cap.* 10. concerning *Sheriffs*, *&c.* is a *private Act* relating to *Sheriffs* only, and muſt be pleaded. *Dyer* 119.

3. *ſſ.* All Acts concerning *Myſteries and Trades* in general are *publick Acts*, but an Act which concerns one particular Trade is a private Act. *Dyer* 27.

4. *ſſ.* Every Statute which concerns the King is a *publick Act*, and the Court, *ex Officio*, are to take Notice of it. *Plowd.* 38. *Lord Berkly*'s Caſe, and *Wimbiſh* verſus *Tailbois*.

5. It was enacted by a *private Act of Parliament*, 5 *Ed.* 6. that the *Quarter-Seſſions* for the County of *Angleſea* ſhould be holden at *Beaumorris*, this Act was exemplified and ſhewed to the Juſtices under the Great Seal, at their *Seſſions*, but yet they proceeded and took ſeveral Indictments at *B.* another Place within that County; adjudged, that the ſaid Indictments were void, *& coram non judice*, and the Juſtices were fined for their Contempt. *Mich.* 4 *Mariæ*, *Dyer* 135.

6. The Defendants were indicted for diſobeying an Order of Seſſions to pay Money towards the Charge of Building a *New Work-houſe* in *Middleſex*, to be erected by Vertue of the Statute 15 *Car.* 2. for that Purpoſe, it was objected upon a Demurrer to this Indictment, that it would not lie, becauſe it was founded on a *private Act of Parliament*; for tho' the Title concerned the *Poor in general*, yet it was a private Clauſe upon which this Indictment was brought; but adjudged, that this was a *publick Act*, for the Words are, (*viz.*) *And for the further Redreſs of the Miſchiefs afore ſaid*; *be it enacted, that a Work-houſe ſhall be erected in* Middleſex, ſo that here is a general Remedy provided for the Poor, tho' by different Methods; and as to Indictments upon *private Acts of Parliament*, this Diſtinction was made, (*viz.*) where a *private Act* provides for a Thing, the not Doing whereof may be prejudicial to ſeveral Perſons, there an Indictment will lie for not doing it; as if it be enacted, that *the Vill of* H. *ſhould repair their Street*, there the not Doing it might be prejudicial to all who paſs that Way: But where the not Doing a Thing tends only to the particular Injury of one or two, there an Indictment will not lie for not doing it; as where an Act is made that *W. R.* ſhall repair ſuch a Bank, and the not Repairing it is the Cauſe by which another Man's Ground lies under Water, there he ſhall have an Action on the Caſe and not an *Indictment*. *Sid.* 208. *The King* verſus *Parelyn & al'*.

(E)

Privilege of Parliament, and of Writs of Error. See *Error* (N) per totum.

1. T *Rewynyard*, a Burgeſs of Parliament, was taken in Execution and diſcharged by a Writ of Privilege; adjudged, that after the Parliament is ended he may be taken in Execution again, becauſe the Plaintiff ſhall have no Prejudice by an Act of Law, by which he was diſcharged out of Cuſtody. *Paſch.* 28 *H.* 8. *Dyer* 60.

2. A Member of Parliament ſhall have Privilege for himſelf and his Servants and Goods, that they ſhall not be diſtrainable, and ſuch Privilege holds in all Caſes, except for Treaſon, Felony, and Breach of the Peace. 4 *Inſt.* Tit. *Parliament* 24.

3. Debt upon Bond, conditioned that *B. B.* ſhould render himſelf at ſuch a Day and Place to an Arreſt; the Defendant pleaded, that by Privilege of Parliament, the Members, *&c.* and their Servants, ought not to be arreſted by the Space of forty Days before the Sitting of the Parliament, nor during the Seſſion, nor forty Days afterwards, and that *B. B.* was at that Time Servant to *S. T.* a Member of Parliament, ſo as he could not render himſelf to be arreſted; and upon De-

murrer to this Plea it was adjudged ill, becauſe he might have rendered himſelf at the Time and Place, and then it would be at their Peril, if he was arreſted. 1 *Brownl.* 81. *Jackſon* verſus *Kirton.*

4. The Defendant being a Member of Parliament, brought a Letter from the Speaker to the Court of King's Bench to ſtay Proceedings, at which the Court was diſpleaſed, and would not allow it, but told him, he might bring his *Writ of Privilege. Latch* 150. *Moor* verſus *Hodges.* Cro. Car. 64.

5. Judgment in Ejectment was affirmed on a Writ of Error in the King's Bench, and afterwards the Defendant brought a Writ of Error in Parliament, and the Record was brought thither by the * Chief Juſtice, and not long after the Parliament was diſſolved, by the Death of the King, whereupon the Plaintiff prayed, that he might have Execution, and the Defendant inſiſted to have it ſtaid till the next Parliament; but becauſe upon the Diſſolution of the Parliament there was no *Writ of Error depending*, and for that the Court could not tell whether the Defendant would bring a new Writ of Error or not, they made a Rule *quod fiat Executio*, and told the Counſel, that the Defendant might bring a new Writ of Error at the next Parliament, if he thought fit. *Latch* 57. *Crouch* verſus *Haines.* W. Jones 68. * And a Tranſcript left, but the Record was carried back.

6. Judgment againſt the Defendant, who was afterwards choſen a Member of Parliament, and after his Election was taken in Execution, yet he had his Privilege; but the Book tells us *minus juſte. Moor.* 57. *Ferrars's* Caſe.

7. Judgment againſt the Defendant, who was taken in Execution in the Morning, and about three Hours afterwards, was choſen a Member of Parliament; the Houſe agreed, that being arreſted before he was choſen, *&c.* he ſhall not have his Privilege. *Moor* 340. *Fitzherbert's* Caſe.

8. *Information* by the *Attorney General*, againſt *Sir John Elliot*, *Denzell Hollis*, and *Mr. Valentine*, for, that they in the Parliament Houſe ſpoke theſe Words, (*viz.*) *The King's Privy Council, his Judges, and his Counſel learned in the Law, have conſpired to trample under their Feet the Liberties of the Subject, and of this Houſe*; and farther, that the King having ſignified his Pleaſure to the Houſe of Commons, for the *Adjournment of the Parliament*, and the *Speaker* endeavouring to get out of the Chair, in Obedience to the King's Command, they, the ſaid Defendants, *violenter, manu forti & illicite, detained him in the Chair*, whereupon there was a great Tumult and Commotion in the Houſe to the Terror of the Commons there aſſembled, and againſt their Allegiance, in Contempt of the King, his Crown and Dignity. The Defendants pleaded to the Juriſdiction of the Court, this being an Offence done in Parliament, and there to be examined and puniſhed, and not otherwiſe; and upon Demurrer to this Plea, adjudged, that they ought to anſwer, for the Charge is for a *Conſpiracy*, and for ſeditious Acts to prevent the *Adjournment of the Parliament*, which may be examined out of it; but they refuſing to anſwer, Judgment was given againſt them, that *Sir John Elliot* ſhould be commited to the Tower and fined 2000 *l.* and the other two were fined and impriſoned. *Cro. Car.* 130. *Sir John Elliot* and *Hollis, &c.*

9. *Debt for Rent*; the Defendant pleaded, that he is Tenant and Servant to the *Lord Mohun*, a Lord of Parliament, and prayed his Privilege; the Plaintiff demurred; the Queſtion was, whether the Privilege extends to protect his Lands and Eſtate, the Court was of Opinion, that it did. *M.* 4 *Car. Style* 139. *Smith* verſus *Hack.*

10. There being a Day appointed for a Trial at Bar, the Defendant moved to put it off, for that he was choſen a Member of Parliament, which was to meet within eight Days, but the Court would not put it off, upon an *Affidavit* that he was choſen, and the Clerk of the Parliament would not certify it before they were aſſembled; he ought upon the Return of his Election to ſue a Writ of Privilege out of *Chancery. Sid.* 42. *Sir Richard Temple's* Caſe.

11. The Houſe of Peers, before a Prorogation, had made an Order to their Serjeant at Arms, to arreſt a Man for a Breach of Privilege, who accordingly did arreſt him *ſix Days after the Prorogation*, and turned him over to the *Fleet* for his Fees, who brought an *Habeas Corpus*, and the Return being filed, he was diſcharged, becauſe by a Prorogation every Thing is determined but a *Scire facias*, or *Writ of Error*, which may be returnable *ad proximum Parliamentum*; and if he had been taken before the Prorogation he might have been bailed now, becauſe *non conſtat* whether the Parliament may meet again. *Sid.* 246. *Serjeant at Arms* verſus *Pritchard.* Antea (B) 2. Raym. 120. 1 Lev. 165.

12. Error to reverſe a Judgment in *Dower*, and the Judgment being affirmed, a Writ of Error was brought in Parliament, which being abated by a Prorogation, a new Writ of Error was brought *Teſte* 1 *Martii*, which was the Day on which the Seſſions was prorogued, and *returnable* 19 *October* next, that being the Day to which they were prorogued, and this was held to be no *Superſedeas*, becauſe there was no Parliament ſitting; if the Writ had been made as uſual, returnable *ad proximam Seſſionem, &c.* 'tis no *Superſedeas*, but if it had been returnable *ad proximum Parliamentum*, 'tis certainly none, tho' it was ſaid, that a Writ of Error returnable *ad proximam Seſſionem* is as certain as the Nature of the Thing will bear, for 'tis as to this Purpoſe *præſens Parliamentum. Sid.* 413. *Wortley* verſus *Holt.* Error. (N) 5. *S. C.* 1 Vent. 31.

13. Error of a Judgment in *B. R.* returnable *ad proximam Seſſionem Parliamenti*; this was held no *Superſedeas* in Reſpect of the Incertainty, thereupon the Plaintiff got the Curſitor to mend it, who made it returnable *in preſenti Parliamento*, for which he was committed, and they would not quaſh the firſt Writ, and if they did, they were of Opinion, that the ſecond Writ, thus amended, being without any certain Day, would not be a *Superſedeas. Sid.* 454. *Roderigo* verſus *Waldoe.* See 2 *Bulſt.* 162.

14. There being a Decree in *Chancery* againſt the *Earl of Derby*, and a Queſtion ariſing concerning the Privilege of Peers in Parliament; the *Lord Chancellor*, before he would grant a Sequeſtration, ſent to the *Lord Hollis* and other Peers, to be informed of their Privileges, who ſent him two Orders of the Houſe, by which it appeared, that their *Privilege* commenced from the *Teſte of the Writ of Summons*, and that upon every *Seſſion and Prorogation* they have twenty Days before and after, which is Time enough to go and return to and from any Part of the Kingdom; but the Commons never aſſented to this, but claim forty Days before and after each Seſſions. 2 *Lev.* 72. *The Earl of Atholl* verſus *Earl of Derby.*

15. Upon the Return of an *Habeas Corpus* it appeared, that the *Earl of Saftsbury* was committed to the Tower by the Houſe of Peers, *during the King's Pleaſure, and the Pleaſure of that Houſe, for a Contempt committed againſt the Houſe*; it was objected againſt this Return, that it was Incertain and Illegal, for it doth not appear what the *Contempt* was, nor when done, nor whether upon an Accuſation or Conviction, *&c.* But adjudged, that tho' this Return had been ill if the Commitment had been by an Inferior Court; yet it being by the Houſe of Peers, the Court of *B. R.* cannot determine a *Contempt* committed in Parliament during the ſame Seſſions, for the Lords themſelves are the proper Judges of their own Privileges, if the Parliament had been prorogued, then it might be proper to apply to *B. R.* 1 *Mod.* 144. *The Earl of Shaftſbury's* Caſe.

16. Adjudged, That if a Writ of Error in Parliament is abated, and another Writ of Error is brought in the ſame Court, 'tis no *Superſedeas*; but if a Writ of Error is brought in the Exchequer-Chamber, and another in Parliament, this laſt is a *Superſedeas* againſt my Lord *Coke's* Opinion. 1 *Mod.* 185. *Sir John Duncomb's* Caſe.

(F)

Of electing Members, and of Members elected.

1. SEveral Perſons *outlawed*, as well before as after Judgment, were choſen Members of Parliament held *Anno* 35 *Eliz.* and the Queſtion being, whether they ought to be Members, all the Judges held, that they could not, and that they might be taken upon the *Capias Utlagatum*, notwithſtanding the Privilege of Parliament, and thereupon the Queen commanded, that no ſuch Perſon ſhould be ſuffered in the Houſe of Parliament. 1 *And.* 293.

2. The King by Letters Patents granted, that the Town of *Dunganon in Ireland* ſhould be a Body corporate, conſiſting of *one Provoſt, twelve Free Burgeſſes, and Commonalty*, and that the ſaid *Provoſt and Burgeſſes*, and their Succeſſors, ſhould for ever have Power to choſe Burgeſſes for the Parliament of *Ireland*; adjudged, that this Grant was void, to enable them to chooſe Members of Parliament, becauſe they being incorporated by the Name of *Provoſt, Burgeſſes and Commonalty, &c.* the Power cou'd not be granted to the *Provoſt and Burgeſſes alone*, without the *Commonalty*, for the Law veſts this Privilege in the whole Corporation in Point of Intereſt, it being an Inheritance in them. *Hob.* 14. *Caſe of Burgeſſes to Parliament.* 12 *Rep.* 120. *S. C.*

3. The *Sollicitor General Egerton* was commanded by the *Queen's Writ* to attend the Houſe of Peers in the Parliament, *Anno* 28 *Eliz.* and after he had attended there three Days, he was choſen a Burgeſs for *Reading in Berks*, and thereupon the Commons demanded him, and that he might be diſmiſſed from his Attendance on the Houſe of Lords; but he expreſly refuſing to be a Repreſentative for the ſaid Borough, as not being an Inhabitant there, or Free threof, and being Attendant on the Houſe of Lords before he was choſen for the ſaid Borough, therefore they ſtill retained him; 'tis true, this differs from *Onſlow's* Caſe, who was Solicitor General *Anno* 5 *Eliz.* for he was choſen a Member of the Houſe of Commons before he was commanded by Writ to attend the Houſe of Lords, and afterwards choſen *Speaker*, and the Houſe of Commons demanding their Member, it was granted, becauſe he was choſen Member before he had a Writ to attend the Houſe of Lords; but *Egerton* was choſen after. *Moor* 551. *Egerton's* Caſe.

4. This Caſe, by the Order of the long Parliament, was adjourned into *Exchequer Chamber*, and it was ſhortly thus: *ff.* The Plaintiff brought an Action on the Caſe againſt *Stroud*, the Sheriff of *Berks*, ſetting forth, that a Writ iſſued to him to cauſe *five Knights* to be elected for that County to ſerve in the next Parliament, and that the Plaintiff was elected for one, but that the Sheriff had returned five others, to his Damage 2000 *l.* there was a Verdict for the Plaintiff for this *Falſe Return*, and 1500 *l.* Damages; and it was objected, that this Action of the Caſe did not lie for a * *Falſe Return*, becauſe an Action of Debt of 100 *l.* was given by the *Statute* 23 *H.* 6. *cap.* 10. as a new and ſufficient Remedy, and therefore the Plaintiff ought not to have any other; beſides, this could not be a new Caſe, for *Falſe Returns* had been as antient as Parliaments, and if ſuch an Action would lie, it would have been brought before, which, according to *Littleton's Text*, is an Argument that it ought not to be brought now: To which it was anſwered, that the *Statute* 23 *H.* 6. which gave the Action of Debt of 100 *l.* is not in the Negative, and therefore it doth not exclude the Remedy by Action on the Caſe, tho' it giveth a new Action; 'tis true, the Statute mentions, that there was not any Remedy before, but that muſt be intended any Remedy by Statute Law, neither can 100 *l.* mentioned in that Statute be an adequate Remedy at this Time, becauſe it was more in Value than 500 *l.* now: As to the Argument from *Littleton's Text* 108. that if an Action on the Caſe would have laid

* See Poſtea, (G) 9.

for a *False Return*, it would have been brought before this Time, *Mr. Noy*, 9 *Car. in Fletcher's Case*, tells us that was not the *Text of Littleton*, but an Interpolation by ſome other Perſon, tho' my *Lord Coke* in his Comment takes no Notice of it; ſo that upon the whole Matter the Action will lie; for 'tis a Loſs of Credit and Honour to be excluded this great Court, 'tis Loſs of the Wages which would be due for ſitting there, and 'tis contrary to the Statute 7 *H.* 4. *Adjournatur.* 2 *Sid.* 168. *Nevill* verſus *Stroud.*

5. Caſe, *&c.* by a Burgeſs of the *Borough of Ailesbury* againſt the Conſtables of the ſaid Borough, for refuſing to receive the Plaintiff's Vote in the Election for a Member of Parliament: Upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted by the Opinion of three Judges, *(viz.)* That the Action is not maintainable, becauſe the Conſtables acted as Judges, becauſe the not Receiving the Plaintiff's Vote is *damnum ſine injura*, for when the Matter comes before the Houſe, his Vote will be received; that *de minimis non curat lex*, ſo that if this is an Injury, it falls within that Rule; that the Right of electing Members to ſerve in Parliament is to be decided in Parliament, and the Plaintiff may *Petition* the Houſe for that Purpoſe, and after 'tis determined there, he may then bring his Action, and not before. But *Holt* Ch. Juſt. was of a contrary Opinion, that this Action would lie, and according to his Opinion the Judgment of the other three Judges was reverſed upon a Writ of Error in Parliament; he held, that the Right of electing Members is either Real, and that is *ratione liberi tenementi* in Counties, or *ratione Burgagii* in antient *Boroughs*; or 'tis Perſonal, and that is *ratione Franchefiæ* in Cities and Corporations; that this is not *minimum in lege*, for 'tis a Noble Privilege, which entitles the Subject to a Share in the Legiſlature; that if the Plaintiff has a Right, he muſt have a Remedy to aſſert that Right; that refuſing to take the Plaintiff's Vote is an Injury, and every Injury imports a Damage; that where a Parliamentary Matter comes in as incident to an Action in the King's Court, it muſt be determined there, and not in Parliament, becauſe that Court cannot judge of the Injury, nor give Damages to the Plaintiff, therefore he hath no Remedy by way of *Petition.* 1 *Salk.* 19. *Aſhby* verſus *White.* See *Sir Sam. Sterling's* Caſe. See 2 *Cro.* 368. Mod. Caſes 45.

(G)

On the Statute 23 H. 6. cap. 15. for electing Knights of the Shires to ſerve in Parliament, and of Actions in Falſe and Double Returns of Members.

1. *ſſ.* DEBT on the Statute for 100 *l.* ſetting forth, that a Writ was directed to the Sheriff of *B.* to make Election of two Knights, *&c. & licet*, the Plaintiff was *electus & nominatus* Knight for the ſaid County of *B. &c. per majorem numerum gentium* within that County, he *in facto* ſaid, that the Defendant did not return him to be Knight, *&c.* but returned the ſaid Writ, and that one *R. B.* was elected *Knight*, *&c.* it was objected, that *licet electus per majorem numerum gentium* was uncertain, but adjudged certain enough, without expreſſing the Number of Freeholders. *Plowd.* 118. *Sir Rich. Buckley's* Caſe.

2. *ſſ.* Debt againſt a *Bailiff* upon this Statute which requires the Sheriff to ſend his Precept to the Mayor, *and if there is no Mayor*, then to the *Bailiff*, *&c.* and the Plaintiff declared, that the Sheriff had made his Precept to the *Bailiff*, without averring there was no Mayor; but adjudged, that the Court will not intend there was a *Mayor*; if there was, it ought to be ſhewed on the other Side. *Hob.* 78. *St. John* verſus *St. John.*

3. Treſpaſs, *&c. pedibus ambulando & cum ſpadonibus conculcando*, *&c.* The Defendant juſtified, ſetting forth, that a Writ iſſued to the Sheriff of *Worceſter*, to chooſe *Knights of that Shire*, *&c.* and that the next County-Court held for the ſaid County, after the Receipt of the ſaid Writ, was held at the Caſtle of *Worceſter*, and from thence it was *debito modo* adjourned to the Place where the Treſpaſs was ſuppoſed to be done; that the Defendant at the Time of the ſaid Court holden and adjourned, was and is an Inhabitant of the ſaid County of *Worceſter*, and ſeiſed of Freehold Lands, to the Value, *&c.* and that his Place of Habitation was diſtant ſix Miles from the *Place where*, *&c.* that in Obedience to the ſaid Writ and Adjournment, he *tempore quo*, *&c.* came from his Dwelling-houſe, to the *Place where*, *&c.* riding on his Gelding, with one Servant attending him, riding on another Gelding, that he might give his Vote for electing *two Knights*, according to the Command of the ſaid Writ *que eſt eadem tranſgreſſio*, *&c.* Upon a Demurrer to this Plea, it was adjudged, that the County-Court, as to the Election of Knights for Shires, is the Sheriff's Court, and he is Judge thereof, and the Adjournment is his Act; the Writ directed to him for this Purpoſe, being in Nature of a Special Commiſſion, *quod eligi faciat*, *&c.* tho' in all other Caſes the Suiters are Judges; that the Freeholders, coming to the Place where the Court is adjourned, are not Treſpaſſers, becauſe of the Neceſſity to make an Election; but if the Sheriff malitiouſly adjourn the Court to an improper Place, as to a Field ſowed with Corn, an Action lies againſt him, and not againſt the Freeholders; that the Defendant living ſuch a Diſtance from the Place to which the Court was adjourned, might come on Horſe-back, and with a Servant to attend him, being an *Eſquire.* *H.* 13 *&* 14 *Car.* 2. *C. B. Rot.* 1884. *Lechmere's* Caſe.

4. A *Double Return* is of the ſame Nature with a *Falſe Return*, as to this Action, for in both Caſes 'tis grounded upon the *Falſity*; but there is another Reaſon why an Action on the Caſe will not lie for a *Double Return*, (*viz.*) becauſe the Law doth not take any Notice of ſuch a a Return, 'tis only allowed by the Uſage of Parliament, and in Caſes wherein the proper Officer cannot determine who is choſen, therefore when he doubts he makes a *Double Return*, and ſubmits the Choice to the Determination of the Houſe of Commons; therefore, if that Houſe doth admit ſuch Returns, and make Determinations on them, it may ſeem hard, that the Law ſhould ſubject a Man to an Action only for ſubmiting a Fact to be determined by a Court, which hath a proper Juriſdiction to determine it; 'tis, in the Caſe of *Bernardiſton and Somes*, it was held, that the Action would lie, but that Judgment was reverſed in the *Exchequer-Chamber*, tho' the Jury found, that the Defendant made the Double Return *falſo & malitioſe*; but in the Caſe of * *Onſlow and Rapley*, which was likewiſe for a *Double Return*, it was adjudged, that the † Action would not lie; and becauſe of the Variety of Opinions it hath ſince been enacted, *That the laſt Determination of the Houſe of Commons concerning the Right of Election, is to be purſued.* 7 & 8 *Will.* 3. *cap.* 7. 2 *Lev.* 114. *Bernardiſton* verſus *Soams.* 3 *Lev.* 30.

* Poſtea 10.

† *See* placito, 8.

5. *Caſe* againſt the Defendants, who were *Bailiffs of the Borough of Tamworth*, for a *Falſe Return* of Members to Parliament, ſetting forth, that by the Statute 7 & 8 *Will.* 3. *cap.* 7. all *Falſe Returns* are prohibited, and Power is given to the Party grieved to ſue the Officers, or Perſons making or procuring a *Falſe Return*, and that he ſhall recover Damages and Coſts; that a Writ iſſued, &c. to elect, &c. and that it was delivered to the Sheriff, who made his Precept to the Defendants, which was delivered to them; that they went to an Election, and that the Plaintiff was duly choſen, but that the Defendants refuſed to certify it to the Sheriff, and returned two other Perſons as choſen; now the Plaintiff having purpoſely omitted that Clauſe in this Statute, *That if any Perſon ſhall return a Member to ſerve in Parliament contrary to the laſt Determination of the Houſe of Commons, of the Right Election for ſuch Place, the Return ſhall be void*: The Defendants plead in Bar, ſetting forth this Clauſe, and that the laſt Determination of the Houſe of Commons, of the Right Election for *Tamworth*, was, that it ſhould be *in the Bailiffs and twenty-four Capital Burgeſſes, and not in the Populace*, and that thoſe who voted for the Plaintiff were not *Burgeſſes*, and ſo averred, that the Perſons returned were duly elected; there was no farther Proceedings. 1 *Lutw.* 60. *Sir H. Gough* verſus *Bateman & al'.*

6. By the Statute 23 *H.* 6. 'tis enacted, That if any *Mayor* ſhall return, other then the Perſon choſen by the Burgeſſes, &c. he ſhall forfeit 40 *l. to the King*, and the Perſon choſen, and not returned, ſhall have an *Action of Debt of* 40 *l.* againſt the Mayor, his Executors or Adminiſtrators, or any other Perſon, who in Default of ſuch Burgeſs will ſue for the ſame: The Plaintiff brought an Action of Debt on this Statute, *Ad reſpondend' tam pro Domino Rege quam pro ſeipſo qui ſequitur*, &c. and had Judgment in *C. B.* by Default, and upon a Writ of Error in *B. R.* it was objected, that this Statute directs in what Manner the Sheriff ſhall make his Precept, (*viz.*) To the Mayor, &c. (reciting the Writ) and commanding him to proceed to the Choice of a Burgeſs *per Burgenſes*; but by the Precept ſet forth in the Declaration, 'tis to chooſe a Burgeſs of the diſcreet Men of the Borough, and doth not ſay *per Burgenſes*; ſo that having brought an Action of Debt on this Statute for a Sum certain, and having not purſued the Directions of the Statute, he cannot have the Penalty; 'tis true, this might have been an Objection, if the Precept had been void in itſelf, but 'tis no Objection as this Caſe is, becauſe the Mayor is bound to obey: Then it was objected, that the King ought not to be a Party in this Action; 'tis true, where a Statute creates an Offence, and adds no Penalty, there the Action brought againſt the Offender muſt be *tam pro Domino Rege quam pro ſeipſo*, but where a Penalty is given to the Party grieved, there the King is not to be joined; therefore in Debt upon the Statute of *Ed.* 6. *for not ſetting out Tythes*, the King muſt not be joined, becauſe treble Damages are given to the Party grieved. But adjudged, that in the principal Caſe the King may be well joined, becauſe the Defendant is guilty of a Contempt to his Law, which is puniſhable by a *Fine*; 'tis always ſo upon the Statute of *Hue and Cry*, and for the ſame Reaſon, 'tis ſo in all Prohibitions; 'tis likewiſe ſo upon the Statute *R.* 2. *De ſcandalis magnatum*, but the Reaſon may be, becauſe Damages are given by that Statute which are incertain till recovered, but where the Sum is certain he need not be joined; however, 'tis only Matter of Form and Surpluſage. 5 *Mod.* 311. *Norris* verſus *Mawdit.*

2 Lev. 104. 3 Lev. 29. * This is remedied by the Statute 7 & 8 *Wil. cap.* 7.

7. *Caſe*, &c. againſt the returning Officer of a Corporation, for making a *Double Return* of Members to Parliament: Upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was ſet aſide, for *per Curiam*, the Action * will not lie, for that the ſubject Matter was not within the Juriſdiction of *B. R.* and that even for a *Falſe Return* no Action would lie before the Statute *H.* 6. 2 *Vent.* 37. *Onſlow* verſus *Rapley.*

Farr. 13. 2 Salk. 502. * *See* placito 5.

8. *Caſe againſt the Sheriff for a Falſe Return*, in which the Plaintiff declared, that he was duly elected, &c. and that *T. P.* the Sheriff, &c. returned *W. R.* duly elected, who in Fact was not, &c. it was objected, that the Right of Election was only determinable in the Houſe of Commons, and ought not to be tried in an Action; it was anſwered, that *B. R.* may determine *what is an Act of Parliament.* 8 *Rep.* 1. and *what are their Privileges. Moor* 76. and the *Right of Peerage. Dyer* 275. Adjudged, that the Uſe of this Suit is for a Wrong done out of Parliament, and that even in Parliamentary Matters, the King's Courts may determine in ſuch Things which are incident to theſe Matters; 'tis true, for a * *Double Return* no Action lay

before the Statute 7 & 8 *Will.* 3. *cap.* 7. becauſe 'tis the only Method that the Sheriff had to ſecure himſelf, and when the Right was determined in the Parliament, then one Indenture is taken off the File, ſo that 'tis not then a *double Return*, neither can the Party have an Action for a *falſe Return*, becauſe the Matter may be determined in the Houſe, whether true or falſe; and if ſo, there may happen to be an Inconvenience in contrary Reſolutions, if they ſhould determine it one Way and *B. R.* another Way; but after a Diſſolution the Action may lie for a falſe Return, becauſe then the Right cannot be determined in Parliament. 2 *Salk.* 502. *Prideaux* verſus *Morris.*

9. *Caſe, &c.* wherein the Plaintiff declared, that he was duly elected a Member of Parliament for ſuch a Borough, and that the Defendant returned two other Perſons to be elected, and that he petitioned the Houſe, and was adjudged to be duly elected, and his Name ordered to be inſerted in the *Roll*, and the Name of the other to be raſed out: Upon Not guilty pleaded, the Plaintiff had a Verdict, but it was adjudged in Arreſt of Judgment, that this Declaration was not founded on the Act 7 & 8 *Will.* 3. becauſe that Statute gave an Action where there was none before, and therefore the Fact muſt be laid agreeable to it; and becauſe that was not done, the Defendant had Judgment. 2 *Salk.* 504. *Condell* verſus *John.*

Act original of the Party.

(A)

Where ſuch Act is regarded by Law.

1. WHere ſeveral Accidents are requiſite to the Conſummation of a Thing, the Law hath more reſpect to the *original Cauſe* than any Thing elſe; as where one Man preſents to another Man's Church *in Time of War*, tho' his Preſentee be inſtituted and inducted *in Time of Peace*, yet the Law gives ſuch Regard to the *original Act, (viz.)* to the *Preſentation*, that all which follows thereon is void. 2 *Rep.* 93. in *Bingham*'s Caſe.

2. The Son purchaſed Lands, and made a Leaſe thereof to his Father, who made a Feoffment in Fee of the ſame Lands, and bound himſelf and *his Heirs* to Warranty, the Father died, and the Warranty deſcended on his Son, but it could not bar him from Entry, or from recovering the Land in an *Aſſiſe*, becauſe the Warranty began by Diſſeiſin, and the Law regards the firſt and original Act. 4 *Rep.* 37. in *Terringham*'s Caſe.

3. Where a Clerk is preſented to a Biſhop to be admitted, and he refuſeth, upon Pretence that he is inſufficient, or for ſome other Defect; in a *Quare Impedit* brought, he ought to alledge ſome particular Fact, and not alledge generally, that he is not *idoneus*, or that he is *Schiſmaticus inveteratus*, for tho' the Courts at *Weſtminſter* cannot determine what is *Schiſm* or *Hereſy*, yet the original Cauſe of the Suit being Matter whereof the King's Court hath Cognizance, the Schiſm or Hereſy ought to be alledged in certain, that the Judges may conſult with Divines, to know whether 'tis ſo or no. 5 *Rep.* 58, *Specot*'s Caſe.

Action popular.

(A)

1. DEBT *qui tam, &c.* for 220*l.* for that the Defendant, 20 *October*, 31 *Car.* 2. being above the Age of ſixteen Years, and inhabiting in *Halſtead*, did not come to Church for the Space of eleven Months, *contra formam Statuti*; the Defendant demurred to the Declaration, and the ſole Queſtion was, whether this Suit can be commenced in *C. B.* and that depends on the Statute 21 *Jac. cap.* 4. By which 'tis enacted, That *all Offences againſt Penal Laws, for which any common Informer may Ground any Popular Action by Bill, Plaint, or Suit*, &c. *ſhall be commenced and ſued, tried, and determined by Way of Action, Plaint, Bill, Information or Indictment, before the Juſtices of Aſſiſe*, Niſi prius, *Gaol-Delivery*, Oyer *and* Terminer, *or Juſtices of Peace, having Power to enquire of, hear and determine the ſame, and not elſewhere*; now the Statute 23 *Eliz. cap.* 1. gives Remedy by *Action of Debt, Bill, &c.* and an *Action of Debt* cannot be commenced before Juſtices of *Aſſiſe*, either by Writ or Bill, and conſequently ſuch Action cannot be within the Statute 21 *Jac.* and ſo it hath been often adjudged. *Raym.* 394. *Pheſant* verſus *Finch.*

2. *January*

2. *January* 25. 1682. The Judges made this Rule, *That all Clerks of Aſſiſe and Aſſociates do return the* Poſteas *in all Popular Actions and Informations* qui tam, &c. *into the reſpective Offices whence they iſſue, and to receive their Fees for the Returning thereof at the Trial, from the Party for whom the Verdict ſhall be given, and the Maſter of the reſpective Offices, to whom the ſaid* Poſteas *ſhall be returned by the Clerks of Aſſiſe, ſhall ſend a Note into the Exchequer to the Clerk of Eſtreats, to the Intent the Sheriffs may be charged therewith.* Raym. 479.

3. Information in *B. R.* on the Statute 5 & 6 *Ed.* 6. *cap.* 14. *for buying and ſelling live Cattle,* not having kept them the Time required by that Statute, and the Buying and Selling was alledged to be in *Norfolk*, and thereupon it was inſiſted, that this Information ought to have been brought in *Norfolk* and not in *Middleſex*; on the other Side it was ſaid, that notwithſtanding the Statute 21 *Jac.* 1. the Attorney-General may exhibit *Informations* for the King in *B. R.* Adjudged, that the Statute 21 *Jac.* 1. *cap.* 4. doth not extend to any Offence created ſince that Time, ſo that Proſecutions on Penal Statutes *ſubſequent*, are not reſtrained by that Act, but as to them 'tis repealed *pro tanto*, that all Informations and Popular Actions on Penal Statutes made before that Act, muſt, by Vertue thereof, *be laid, brought, and proſecuted in the proper County where the Fact was done.* 1 *Salk.* 372. *The King* verſus *Gaul.*

Latch. 192. 2 Cro. 178. 1 Cro. 112. 1 Vent. 8. Jones 193. Sid. 360.

4. An *Action of Debt* was brought in *B. R.* by a *Common Informer* on the Statute 5 *Eliz. cap.* 4. for exerciſing a Trade, not being Apprentice to it; adjudged, that by the Statute 21 *Jac.* 1. *cap.* 4. *Debt* cannot be brought by a *Common Informer* in *B. R.* unleſs the Cauſe of Action did ariſe in the County where the King's Bench ſits, but muſt be by *Information* in the proper County, unleſs where an *Action of Debt* is given in any Court of Record upon any Penal Statute made *ſince the Statute* 21 *Jac.* but Debt will not lie on a Penal Statute made *before that Time.* 1 *Salk.* 373. *Hicks*'s Caſe. See *Barnes* verſus *Hughes.* *Hale* was againſt that Caſe.

Acquittance for Rent. See *Avowry.* (B) 8.

Action on the Caſe.

Carriers, and upon Cuſtoms. (A)
Commons and Commoners. (B)
Conſpiracy. (C)
Deceits, Frauds, and Warranties. (D)
Eſcapes and Reſcous. (E)
Inn-keepers and Hoſts. (F)
Malitious Proſecutions. (G)
Misfeaſance, Nonfeaſance, Negligence. (H)
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Aſſumpſit.

Where the Conſideration is good, where not. (K)
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Concerning Marriage. (Q)
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For other Wrongs. (T)
In Special Caſes, and againſt Judges and Officers. (V)
By Attornies and others, for Fees. (U)

Slander.

For charging the Plaintiff with Capital Offences. (W)
Where it doth not lie for charging him with capital Offences. (X)
It lies for charging him with other Crimes. (Y)
It doth not lie for charging him with other Crimes. (Z)
For Words ſpoken of Magiſtrates and Officers. (a)
It doth not lie for Words ſpoken of Magiſtrates and Officers. (b)
For Words ſpoken of Men of Profeſſions. (c)
It doth not lie for Words ſpoken of Men of Profeſſions. (d)
For Words ſpoken of Tradeſmen. (e)
It doth not lie for Words ſpoken of Tradeſmen. (f)
For charging the Plaintiff with Perjury. (g)
It doth not lie for charging him with Perjury. (h)
It lies for charging him with Witchcraft. (i)
It doth not lie for charging him with Witchcraft. (k)
For ſlandring Women. (l)
It doth not lie for Words ſpoken of Women. (m)
Of adjective and negative Words, and by Way of Interrogation. (n)
For ſlandring a Title and calling the Plaintiff Baſtard. (o)
Slander by negative Words. (p)
In what County Actions on the Caſe and other Actions muſt be brought. (q)
Of Declarations and Pleas in Actions on the Caſe. (r)

(A)

For and againſt Common Carriers, and upon Cuſtoms of England.

See *Poſtea.* (D) 18.

1. CASE againſt an *Inn-keeper in Reading*, upon the Cuſtom of *England*, for keeping the Goods of his *Gueſts* ſafe; the Action was laid in *Middleſex*, which was wrong, for it ought to be laid in the County of *Berks* where the *Inn* is. 29 *Eliz. Godbolt.*

2. *Caſe*, on the Delivery of a *Portmanteau* to a *Common Hoyman*, with 50 *l.* in it, to carry from *London* to *M.* for which he gave him 2 *d.* and that the Defendant ſuffered it to be loſt; he pleaded, that the Day after, *&c.* the Plaintiff diſcharged him of and from Keeping the Goods; the Plaintiff denied it, and the Defendant demurred upon the Replication, and it was adjudged for the Plaintiff, becauſe by the Demurrer the Defendant had confeſſed he was not diſcharged, and if ſo, then at Common Law the Action lieth. *Hob.* 17. *Rich* verſus *Kneeland.* 2 *Cro.* 330. *S.C.* See *Poſtea, Placito* 9. *S. P.*

3. *In Accompt* for Wares delivered *ad merchandizandum*; the Defendant pleaded, that he was *robbed* of thoſe Goods, and of many more of his own Goods; it was held, that this might be a good Plea for a Factor or for a Servant, but not for a *Common Carrier*, becauſe he receives a *Premium* for the Carriage. *Moor* 462. *Woodliffe's* Caſe.

4. A *Carrier* agreed to carry Goods of the Plaintiff from *H.* to *London*, paying him for the Carriage, and in an Action on the Caſe brought againſt the *Carrier*, the Plaintiff declared againſt him for not carrying his Goods, and that *paratus fuit ſolvere*; it was objected, that the Declaration was ill, for he ſhould have ſet forth, that he had paid for the Carriage, or had tendered the the Money, but the Plaintiff had Judgment. 2 *Roll. Rep.* 466. *Seabright* verſus *Beale.*

5. *Caſe, &c.* by the Plaintiff, who was a *Merchant*, ſetting forth, that by the Common Law every *Lighterman* ought to govern his *Lighter*, that the Merchant's Goods come to no Damage, that the Plaintiff was a *Merchant* and the Defendant a *Lighterman*, and that he had carried the Plaintiff's Goods from ſuch a Place to ſuch a Place for Hire, (*viz.*) for ſo much Money, and that he had ſo negligently governed his *Lighter* that the Goods were damnified; after a Verdict for the Plaintiff, it was objected, that the Action would not lie, becauſe the Plaintiff had not averred, that the Defendant was a *Common Lighterman*, beſides, he did not ſet forth how his Goods were ſpoiled, but both theſe Exceptions were over-ruled; and tho' there was no Promiſe, yet ſince this Action ariſes *ex malefacto*, there is no Occaſion to alledge a Promiſe, for the Delivery of the Goods to a Common Carrier implies a Contract. *Palm.* 523. *Simonds* verſus *Darknell.*

6. Caſe, *&c.* againſt a *Common Carrier*, for ſo negligently carrying the Plaintiff's Goods that they were loſt, and he declared likewiſe *in Trover*; adjudged, that the Declaration was good, becauſe the Plea of Not guilty goes to both, but this was after a *Verdict*. *Sid.* 244.

7. Caſe, *&c.* in which the Plaintiff declared, that he delivered to the Defendant (being a Water Carrier) Goods in *York* to carry them from *Hull* to *London*, and that the Goods were loſt; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that there was no *poſitive Agreement ſet forth between the Plaintiff and Defendant, for any certain Sum for the Carriage*; beſides, the Agreement was to carry the Goods from *Hull* to *London*, ſo that the Defendant did not undertake to carry them from *York* to *London*, but adjudged, that he ſhall be charged upon the *general Receipt at York*, and that 'tis not requiſite to ſet forth any Agreement of the *Premium*. *Sid.* 36. *Nicholls* verſus *Moor.* See 4 *Rep. Southcott's* Caſe.

8. *Aſſumpſit by a Carrier*, upon a Promiſe to pay ſo much for carrying Goods from *York* to *London*; if the Plaintiff in his Declaration doth aver Performance, and doth not ſhew in *what Pariſh and Ward* he brought the Goods, 'tis ill upon a Demurrer. *Sid.* 178.

1 Mod. 82. 2 Lev. 69. Raym. 220.

9. *Caſe, &c.* upon the Cuſtom of *England* againſt a *Maſter of a Ship*, for negligently Keeping the Plaintiff's Goods, in which a Special Verdict found, that the Ship lay in the River *Thames*, and that the Goods were delivered on board, *&c.* that in the Night-time ſeveral Perſons pretending to preſs Seamen by Force, ſeiſed thoſe Men which were in the Ship, and the Goods were loſt, that the *Maſter* was to have Wages of the Owners of the Ship, and the Mariners Wages of the Maſter; the Queſtion was, whether the *Maſter* was chargeable for the Loſs of theſe Goods; it was argued that he was not, becauſe the *Maſter* is but a *Servant* to the *Owners*, and he receives his Wages from them, but adjudged he is rather an *Officer* than a *Servant*, for he may pawn the Ship if he ſee Occaſion, he may ſell *Bona peritura, &c.* and tho' he receives his Wages from the *Owners*, yet in effect he is paid by the Merchant, for 'tis he who pays the Owners, and there is no Difference between this Caſe and that of a Hoyman or Common Carrier. 1 *Vent.* 190, 238. *Morſe* verſus *Slue.* See *Antea, Placito* 2. *S. P.*

10. *Aſſumpſit* for Money due *by Cuſtom* for *Scavage*, upon *Non Aſſumpſit* the Jury found the Duty to be due, but no Promiſe expreſly made to pay it; adjudged, that an *Aſſumpſit* will lie for this Money due by *Cuſtom*, without an expreſs Promiſe. 2 *Lev.* 174. *Mayor of London* verſus *Gorry.* See *By-Law.* (A) 8. *S. P.*

11. Caſe againſt the Defendant for *negligently Keeping his Fire*, ſetting forth, that by the Cuſtom of *England* every Houſe-keeper is bound to keep his Fire ſafe at all Times, leſt by the Neglect thereof, and of his Servants and *Lodgers*, any Damage ſhould happen; that the Defendant being a Houſe-keeper in *Chancery-Lane*, took a *Lodger*, who kept his Fire ſo negligently that *the Goods* of the Plaintiff were burnt, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe this Cuſtom was never extended to Servants or *Lodgers*; beſides, he ſets forth, that *his Goods* were burnt and ſpoiled, but did not ſay *what Goods*. *Allen* verſus *Stephenſon.* 1 *Lutw.* 33.

12. Adjudged, that a *Common Carrier* is liable in reſpect of the *Reward* he takes, and not becauſe the *Hundred* is anſwerable over to him, for he was chargeable at Common Law before the Statute of *Winton*, which makes the *Hundred* liable; and the Reaſon why he is chargeable is, becauſe he might be robbed by Conſent and Combination, of which it might be difficult to make any Proof. 1 *Salk.* 143. *Lane* verſus *Cotton. Poſtea* (H) *Placito* 53. *S. C.*

13. In an *Action on the Caſe* upon the Cuſtom of the Realm againſt the Defendant, who was Maſter of a *Stage-Coach*, the Plaintiff ſets forth, that he took a Place in the Coach for ſuch a Town, and that in the Journey, the Defendant, by Negligence, loſt the Plaintiff's Trunk; upon Not guilty pleaded, the Evidence was, that the Plaintiff gave the Trunk to the Man who drove the Coach, who promiſed to take care of it, but loſt it; and the Queſtion was, whether the *Maſter* was chargeable, and adjudged that he was not, unleſs the *Maſter* takes a Price for the *Carriage of the Goods* as well as for the *Carriage of the Perſon*, and then he is within the Cuſtom as a Carrier is. That a *Maſter* is not chargeable for the Acts of his *Servant*, but when they are done in Execution of the Authority given by the Maſter; and then the Act of the *Servant* is the Act of the *Maſter.* 1 *Salk.* 282. *Middleton* verſus *Fowler.*

14. But now by the Statute 6 *Annæ*, 'tis enacted, *That if any Servant, thro' Negligence, ſhall cauſe an Houſe or Outhouſe to be fired, ſuch Servant being thereof convicted upon Oath before two*

Juſtices, ſhall forfeit 100 l. *unto the Church-wardens of the Pariſh of*, &c. *to be diſtributed amongſt the Sufferers, as to the Church-wardens ſhall ſeem juſt, and upon Non-payment, ſhall be committed to ſome Work-houſe by a Warrant of one Juſtice, there to be kept eighteen Months at hard Labour: And by the ſame Act 'tis enacted, that an Action ſhall not lie againſt any, in whoſe Houſe or Chamber any Fire ſhall accidentally happen; and if it be brought, then the Defendant may plead the General Iſſue, and give the Act in Evidence, and if the Defendant recover, he ſhall have treble Coſts.* 6 Annæ cap. 31.

(B)

Concerning Common and Commoners.

A *Copyholder* in Fee preſcribed to have Common in *B.* and alledged, that the Defendant put his Cattle into the Common, which deſtroyed the ſame, ſo that *communiam habere non potuit ſed totum proficuum ſuum amiſit*; and adjudged, that the Action did lie. *9 Rep.* 111. *Mary's* Caſe. *Poſtea* Verdict, (D) 16.

2. *Caſe, &c.* for that he was ſeiſed of ſixteen Acres of Land in *Corſham*, by Reaſon whereof he had Common in twenty Acres adjoining every Year after Harveſt, and that the Defendant had ploughed the ſaid twenty Acres, by Reaſon whereof the Plaintiff had loſt his Common; it was objected, that *Caſe* did not lie, but an Aſſiſe; but adjudged, that the Plaintiff might have either Action. *Cro. Eliz.* 199. *Leverett* verſus *Townſend.* 2 *Leon.* 184. *S. C.*

3. *Caſe*, for that the Defendant having a Wood adjoining to a Common, where the Plaintiff and other Copyholders, had Common, the Plaintiff kept *Conies* in the Wood, which ran out into the Common, and eat up the Graſs, *&c.* adjudged, that the Action did not lie, becauſe when the *Conies* were out of the Wood, the Defendant had no Property in them, and the Commoner is at no Miſchief, for he may then kill them. *Cro. Car.* 281. *Hiuſly* verſus *Wilkinſon.* Warren. (A) 4. *S. C.*

4. *Ff. Caſe* againſt *R. B.* for *ſurcharging the Common*, it was objected in Arreſt of Judgment, that *Caſe* would not lie, but an *Aſſiſe*; adjudged, that the Plaintiff might have either Action. *Style* 164. *Ayre* verſus *Pincomb.*

5. *Caſe*, &c. *by a Commoner for digging Pits* and ſpreading the Gravel, *&c.* by which he loſt his Common; the Defendant pleaded, that he is Lord of the Soil, and that he did dig for Coals, doing as little Damage to the Paſture as he could, and averred, that he had left Common ſufficient; and upon a Demurrer to this Plea, it was adjudged, that it amounted to no more *than the General Iſſue*, and that the Lord could not dig Pits in the Common, for the Statute 43 *Eliz. cap.* 11. intends only an Improvement by encloſing. *Sid.* 106. *Goe* verſus *Cother.* 2 *Cro.* 165.

6. *Caſe*, &c. *for diſturbing him in a Common*, in which the Plaintiff declared, that he was poſſeſſed of a Meſſuage, and ſo many Acres of Land, *&c.* for a Term of Years not yet expired, and that for all that Time, *habuiſſet & gaudere debuiſſet communiam paſturæ pro omnibus averiis levan' & cuban', &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict; it was objected againſt the Declaration, that the Plaintiff had not ſhewed any *Title either by Grant or Preſcription. Per Curiam*, this might be a good Exception upon a *Demurrer*, but 'tis cured by a *Verdict.* 4 *Mod.* 175. *Hill* verſus *Gollop.*

(C)

For Conſpiracy.

1. WHere an Action in Nature of a *Conſpiracy* lieth, the Plaintiff muſt be *lawfully acquitted*; and therefore where there was a General *Pardon by Parliament*, and Plaintiff did not plead it, but was tried and acquitted, he ſhall not have this Action againſt thoſe who cauſed him to be indicted, becauſe he was not lawfully acquitted, *(viz.)* by the Act of Grace, which the Court ought to have allowed without pleading it. *Dyer* 28, 85.

2. If a Man is acquitted upon an *Inſufficient Indictment*, he cannot have this Action againſt the *Indictors*, becauſe he may again be indicted, and *Auterfoits acquit* is no good Plea, unleſs where the Acquittal is lawful. *Vaux's* Caſe. 4 *Rep.* 41.

3. Three conſpired to charge *R. B.* with a Robbery, and preferred an Indictment againſt him, which was returned *Ignoramus*, the Action lieth. *9 Rep. Poulterer's* Caſe.

4. It will not lie before a Man is *acquitted* of the Indictment, or it be traverſed or reverſed by Error, for if it ſhould, it might prevent the Trial at Law. *Goldſ.* 51 *Hurlſtone* verſus *Glaſeor.*

5. *Caſe*, in Nature of a Conſpiracy, againſt the *Mayor*, *Town-Clerk* and *Gaoler of B.* for that the Plaintiff had affirmed a *Plaint* of Debt in the Town-Court before the *Mayor*, *&c.* againſt *R. B.* and cauſed him to be arreſted, and that the Defendants did conſpire to delay him in his Suit, and had let *R. B.* go at Large, without Bail; adjudged that the Action lay. 1 *Leon* 189. *Cockſhall* verſus *Mayor of Borealſton.*

6. This Action ought not only to be *Falſe, but Malitious*, and the *Malice* ought to be proved; therefore where a Robbery is commited, and the Perſon robbed accuſes another by Miſtake, as

being like the Offender, the Action will not lie. *Godb.* 206. *Reynalds* verſus *Baſſet.* *Hutt.* 73. *Mankleton* verſus *Allen. S. P.*

7. It doth not lie againſt the *Jury*, becauſe they are returned by the Sheriff to make their Inquiry for the King, and being on Oath, are ſuppoſed to be indifferent; neither will it lie againſt a Judge for what he does in Court as Judge. 12 *Rep.* 23. *Evans and Barker's* Caſe.

8. If a Man will encourage another, who is robbed, to cauſe the Felon to be indicted, and accompanies him to the Aſſizes in order to the Proſecution, and the Party is acquitted, no Action on the Caſe upon a Conſpiracy will lie againſt him, unleſs he knew that the Perſon was not robbed. 1 *Brownl.* 9. *Stone* verſus *Bates.*

2 Bulk. 270. 1 Roll. Rep. 209. 1 Vent. 12, 18. Raym. 176.

9. No *Conſpiracy*, or Action in Nature of Conſpiracy, lieth, for procuring one to be indicted for *Treaſon*; otherwiſe, for procuring one to be indicted for *Felony.* 2 *Cro.* 357. *Lovet* verſus *Fawkner.* But ſince adjudged *contra.* See *poſtea* Action on the Caſe. (G) 14.

10. *Action on the Caſe*, wherein the Plaintiff declared againſt three Defendants, for that on ſuch a Day and Place *per conſpirationem prius ibidem inter eos adinde habitam*, and to oppreſs the Plaintiff, and to cauſe him to be arreſted at the Suit of *William Gunton* (one of the now Defendants,) and that he might be detained in Priſon for Want of Bail, they levied a Plaint againſt him in the Sheriff's Court, in a Plea of Treſpaſs, which was laid to the Damage of the ſaid *William Gunton*, in 300 *l.* by Vertue whereof they cauſed him to be arreſted, and impriſoned for the Space of twenty Days, when in Truth the ſaid Defendant *Gunton* had no Cauſe of Action againſt him: Upon Not guilty pleaded, the Jury found *Gunton* guilty, but acquitted the other two; and upon a Motion in Arreſt of Judgment, it was objected, that this Verdict had falſified the Declaration, for that was in an Action of *Conſpiracy between three*, and two of them being acquitted, 'tis impoſſible for *one to conſpire* with himſelf; beſides, the Plaintiff did not alledge in his Declaration, that the Plaint levied in the Compter was determined either by a Nonſuit, Diſcontinuance, or a Verdict againſt the Plaintiff, and if ſo, then the Plaintiff had commenced this Action too ſoon, which is very true, and this might have been a good Exception, if the Defendants had *demurred* to the Declaration; but 'tis not ſo after a *Verdict*, which had found the Defendant guilty of levying a Plaint, without any Cauſe of Action; and therefore in ſuch Caſes it ſhall be intended, that the Plaint was determined in the Inferior Court, and againſt the Defendant, by which it appeared, that he had no Cauſe of Action; and as to the Objection, that this was an Action of Conſpiracy, it was adjudged, that this was an Action on the Caſe for an Injury done to the Plaintiff, for it was the Arreſting him, without a Cauſe, which was the Subſtance of the Action, and not the *Conſpiracy*; *Moreton Juſtice*, of a contrary Opinion, and ſo was *Saunders*, who reports the Caſe, that this was a plain Action of Conſpiracy by the Words *per conſpirationem inde verſus eos habitam.* 1 *Saund.* 228. *Skinner* verſus *Gunton & al'.* *Cro. Eliz.* 701. *Marſh* verſus *Vaughan. S. P.*

11. *Caſe, &c.* in the Nature of a *Conſpiracy*, for *indicting* the Plaintiff for *Barretry*, one of the Defendants was found guilty, and the reſt were acquitted, and it was moved in Arreſt of Judgment, that one cannot conſpire by himſelf; but adjudged, that this being in an Action on the Caſe, 'tis well enough. *Raym.* 180. *Price* verſus *Crofts* and others.

(D)

For Deceits, Frauds and on Warranties.

1. *Fogoſſa* a Merchant Stranger, ſhipped 4500 Kintalls of Wood to be brought to *England*, and a great Tempeſt ariſing, the Maſter caſt Part of it into the Sea, and afterwards coming into Port *told* the Cuſtom-Officer, that he believed 2000 Kintals remained, when upon further Examination there were above 1000 more, and an Information being exhibited for the Forfeiture of thoſe 1000 Kintalls, for which no Cuſtom was paid, it was adjudged, that the incertain Accompt made with the Officer for 2000 Kintalls only before the Landing, was good, becauſe it appeared there was no Manner of *Deceit.* *Plowd.* 1. *Reneger* verſus *Fogoſſa.*

2. The Defendant ſold Sheep, and *warranted that they were ſound*, and ſhould be ſound for a Year next enſuing; adjudged, that the Warranty is not impoſſible to be performed, no more than to warrant, that ſuch a Ship ſhall return ſafe to *London*, ſo the Action will lie. *Owen* 60. *King* verſus *Braines.*

3. *Caſe, &c.* in which the Plaintiff declared, that in Conſideration of 20 *l.* paid by him to the Defendant, he promiſed to deliver to him 400 Pounds of Wax on ſuch a Day, and that at the Day he did deliver 373 *Pounds* of bad Wax, which *he warranted to be good* and merchantable, by which he was damnified, *&c.* The Defendant pleaded *an Agreement* between them, as well for the *twenty-ſeven Pounds* not delivered, as for the Badneſs of that which was delivered; upon which Plea the Plaintiff demurred, becauſe the Defendant had not anſwered the *Deceit*; adjudged, that it was not material to anſwer it, becauſe the *Warranty*, that the Wax was good, was after the Contract made. *Trin. 6 Ed. 6. Dyer* 75. *Andrews's* Caſe.

4. *Aſſumpſit, &c.* for that there being a Diſcourſe between the Plaintiff and *B. G.* about certain *Hogs* of the Plaintiff's to be put to *Maſt*; the Defendant promiſed in Conſideration the Plaintiff would give *B. G.* 3 *s.* for every Hog put to Maſt, that they ſhould be well fatted and *re-delivered* to the Plaintiff, and the Action was brought for *fifty Hogs not re-delivered*; adjudged,

that the Action lay, tho' the Defendant had no Manner of *Benefit by the Promiſe*, becauſe it was grounded upon a *Deceit*. *Cro. Eliz.* 200. *Smith* verſus *Hitchcock*, and 131, 137. *Kirby* verſus *Cole. S. P.*

5. *A Goldſmith* had a Stone, which he affirmed to be a *Bezoar-Stone*, and ſold it to the Plaintiff for 100 *l.* whereas it was not a *Bezoar-Stone*; adjudged, that the bare * *Affirmation*, without warranting it to be ſo, would not maintain an Action, againſt the Opinion of *Anderſon*. 2 *Cro.* 4. *Chandler* verſus *Lopez*, and 196. † *Roſewell* verſus *Vaughan*. See *placito* 22. *poſtea* contra. * Placito 7. contra pl. 36. † Poſt. 11.

6. The Plaintiff being a *Merchant in London* went beyond Sea to Trade, and appointed the Defendant to receive all Goods conſigned to him in his Abſence, and to pay the Cuſtoms, and to diſpoſe them to the Plaintiff's Uſe; afterwards twenty Pieces of *Velvet* were conſigned to the Plaintiff, and imported in *London*, of which the Defendant having Notice, cauſed the Goods to be Landed without paying the Cuſtoms, or agreeing with the Officer, by Reaſon whereof they were forfeited and ſeiſed; adjudged, that for this Matter a Special Action on the Caſe did lie. 2 *Cro.* 265. *Lewſon* verſus *Ward*.

7. If a Man ſell Goods to another falſly and deceitfully, * *affirming* them to be his Goods, when in Truth they are not, the very Sale is an Offence, for which the Vendee may have a preſent Action. 2 *Cro.* 474. *Furnice* verſus *Leiceſter*. * Placito 5. contra pl. 35.

8. The *Maſter* declared, that *B. G.* was his *Servant*, and had 65 *l.* of his (the Maſter's) Money in his Poſſeſſion, and that the Defendant, to deceive him, procured a Letter to be written and directed to the *Servant*, and to be delivered to him, which he *affirmed* was written by the *Maſter*, and that he, the Defendant, was ſent with it by the Maſter to the Servant, who cauſing it to be read, and underſtanding, that his Maſter had therein appointed him to pay the Money to the Defendant, he paid it accordingly, *ubi revera*, the Letter was counterfeited, and he never ſent the Defendant for the Money; it was objected after a Verdict for the *Maſter*, that he ought not to bring the Action, but the *Servant*; but adjudged the Action was well brought by the *Maſter*, for he had the Loſs. 2 *Cro.* 223. *Tracy* verſus *Veal*.

9. The Defendant was arreſted in *London*, and gave Bail to the Action, and afterwards upon an *Habeas Corpus cum cauſa*, the Cauſe was removed into the *Exchequer* upon Pretence of a *Quo minus*, by Reaſon whereof the Bail in *London* were diſcharged, thereupon the Plaintiff brought an Action on the Caſe for this *Fraud*, and adjudged, that the Action did lie; this was vouched by *Juſtice Dodderidge* to be the Caſe between *Saddlehorn and Harriſon*,

10. *In Aſſumpſit*, the Plaintiff declared, that he had bought a Parcel of *Gum* of the Defendant containing 28 Hundred Weight, at 3 *l.* 8 *s. per* 8 *Hundred* good and merchantable, and had paid for it in *Linen* called *Holland*, *at* 16 *d. per Ell*; and that there being a Diſcourſe between them of another Parcel of *Gum*, which the Defendant *affirmed to be on the Sea, and would be in London in May following*, and which he *affirmed* to be as good as the other, the Plaintiff promiſed, that if the ſaid Parcel did not *exceed* 2000 Weight, he would within four Months after the Delivery thereof to his Brother, deliver likewiſe to the Defendant ſo much *Holland*, at the Rate of 16 *d. per Ell*, as the ſaid *Gum*, after the Rate of 3 *l.* 10 *s. per Hundred*, ſhould amount unto, and the Defendant, in Conſideration thereof, promiſed to deliver to the Plaintiff's Broker the *ſaid Parcel of Gum, when it ſhould come to the Port of London*, and that it ſhould be as good as the firſt was; and then he ſets forth, that the Defendant delivered to the Plaintiff's Broker eight Bags, containing 1800 *Weight of ill* and not merchantable *Gum*, and not ſo good as the former, *&c.* Upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff, and upon a Writ of Error brought in the *Exchequer-Chamber* the Judgment was reverſed, becauſe the Plaintiff had *not averred, that the Gum* which the Defendant delivered to his Broker, was the *Gum* which was *upon the Sea*, nor, that it came to the *Port of London*, nor, that it did *not exceed* 2000 *Weight*; for if it was another Parcel of *Gum*, then it was not within the Promiſe; and tho' it was not ſo good as the firſt, and not merchantable, that is not material, it not being within the Promiſe, and 'tis his Folly to accept it. 2 *Cro. Weſton* verſus *Dykes*.

11. In an Action in Nature of *Deceit*, the Caſe was, (*viz.*) *Queen Elizabeth* was ſeiſed in Fee of the Advowſon of the Vicarage of *S.* to which the Tithes of *S.* did appertain, and the Defendant *affirmed*, that after the Death of the preſent Incumbent, that he ſhould be lawful Incumbent, and have Right to the Tithes; whereupon the Plaintiff, on the ſame Day, *&c.* having ſome Diſcourſe with the Defendant of buying the Tithes after the Death of the Incumbent, (who died in the next Year) and that the Defendant *adtunc ſciens*, that he had not any Right or Intereſt to the ſaid Tithes, *falſo & deceptive* ſold them to the Plaintiff for 30 *l.* and alledged *in facto*, that after the Death of the laſt Incumbent, one *W. R.* was admitted and inducted to the ſaid Vicarage on the laſt Day of *Auguſt*, *&c.* and took the Tithes, and ſo the Plaintiff loſt them. Upon Not guilty pleaded, the Plaintiff had a Verdict; but adjudged in Arreſt of Judgment, that this Action did not lie; for where a Man ſells a Thing, in which he hath no Property, tho' he *affirms*, that he is the Owner, and hath Right to ſell, yet, if he doth not * *Warrant* that the Vendee ſhall *enjoy it*, the Action will not lie, and ſuch *Warranty* muſt be made at the Time of the Sale; and eſpecially in this Caſe, becauſe the Vendor was not in Poſſeſſion of Tithes, and therefore 'tis at the Peril of the Vendee, that he took no more Care. *Hill.* 4 *Jac.* 2 *Cro.* 196. *Roſwell* verſus *Vaughan*. *Antea 5.

12. *W. R. ſold to T. S.* all the Butter *which he ſhould make* of his Cows in one Year; afterwards, when the Butter was made, *W. R.* ſold it to *J. H.* who paid for it, and put it up in Barrels, which he marked, and left them in the Poſſeſſion of *W. R.* who delivered then to *T. S.* the

the firſt Vendee, againſt whom *J. H.* brought the Action, and the Queſtion was, who had a Property in this Butter? the better Opinion was, that the Plaintiff, who was the laſt Vendee, had the Property, becauſe the firſt Agreement between *W. R.* and *T. S.* was only for the Butter *when it ſhould be made*; now there could be no Property in it before it was made, ſo by that Agreement there could be no Property altered, and if ſo, then by the ſecond Sale to *J. H.* the Property was altered, for then the Butter was made, and the firſt Vendee might have an Action on the Caſe againſt the Vendor, for ſelling it to another; and this is not like that Caſe, where a Man ſold the Wool upon the Back of his Sheep, or all the Corn ſowed on his Land, becauſe there was ſomething then in Being for which a Contract might be made. *Moor* 174. *Hob.* 132. *S. P.*

13. *Caſe, &c.* for that the Defendant ſold certain Tithes to the Plaintiff for ſo much Money, *ſciens* that he, (the Defendant) had no Right to them, *&c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had not poſitively alledged, that the Defendant had not any Right, but only that the Defendant *ſciens* he had none; but the Plaintiff had his Judgment. *Moor* 467.

14. *Caſe*, in which the Plaintiff declared, that he had 100 *l.* delivered to him to pay to *W. R.* and that the Defendant affirmed to him, that he was *W. R.* and thereupon the Plaintiff delivered the 100 *l.* to him, when in Truth he was not the ſaid *W. R.* It was objected, that the Action did not lie, but adjudged, that the Plaintiff having alledged in his Declaration, that the Defendant * *falſo & fraudulenter* had affirmed himſelf to be *W. R.* the Action would lie upon this Deceit. *Moor* 538. *Thompſon* verſus *Gardner.*

* Antea 22.

15. *Caſe, &c.* for a Deceit at a Game on the Cards, by which the Defendant *colore ludendi* cheated the Plaintiff of 16 *l.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this Action would not lie, no more than for cheating with Falſe Dice, but the Plaintiff had his Judgment. *Moor* 776. *Baxter* verſus *Woodyard.* See *Statutes*, (D) 23.

2 Roll. Rep. 5, 26. S. C. 2 Cro. 468. S. C.

16. The Defendant having counterfeit Jewels, and *knowing* them to be ſuch, ſent his *Servant* with them to the Plaintiff, being a Merchant in *Barbary*, to ſell them there; and the Plaintiff ſold them to the King of *Morocco for* 800 *l.* and the *Servant* received the Money, and returned home to *London*; afterwards the Cheat being diſcovered, the Plaintiff was impriſoned in *Barbary*, and compelled to make Reſtitution to the King; adjudged, that the Action did lie againſt the *Maſter*. *Poph.* 143. *Southern* verſus *Howes.*

17. A *Clothier* made good Cloth, to which he ſet his Mark and got a great Trade; another Clothier ſet the ſame Mark upon bad Cloth, for which the Action was brought, and adjudged that it did lie. *Poph.* 143. 2 *Cro.* 468.

2 Cro. 386. *That the Action did not lie.* 3 Bulſt. 96. S. C.

18. *Caſe, &c.* in which the Plaintiff declared, that the Defendant brought a *Bale of Wood* to him (the Plaintiff) and *affirmed* it to weigh 800 Pounds Weight, to carry to ſuch a Place, and it was agreed between them, that the Plaintiff ſhould have 2 *s. per* Hundred for the Carriage, when in Truth it weighed 2000 Pounds Weight; and the Plaintiff *fidem adhibens* to the Promiſe of the Defendant, did carry it to the Place appointed, by which Deceit, *&c.* his Cart was overloaded, and he loſt three Horſes by drawing it with exceſſive Labour: The Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this Action would not lie, becauſe it was the Folly of the Carrier, that he did not weigh the Goods; beſides, here was only an *Affirmation*, but no expreſs Promiſe that the Goods weighed ſo much, which is not a ſufficient *Warranty*; and of this Opinion were two Judges: But the other two held, that the Action would lie, becauſe the *Carrier* was deceived by the *Affirmation* of the Defendant, and took the Goods upon his Promiſe, that they were of no greater Weight than 800 Pounds; 'tis true, where the Defendant endeavours to deceive in a Thing which is plain to be * ſeen by the Plaintiff, in ſuch Caſe an Action will not lie; but in this Caſe the Weight of the Goods could not be ſeen, and the Plaintiff being deceived and damnified by ſuch Deceit, the Action will lie for the Damages: The Court was divided. 1 *Roll. Rep.* 275. *Bailie* verſus *Merrill.*

* *See* placito 19, 34.

19. *Caſe, &c.* in which the Plaintiff declared, that the Defendant ſold to him a *Horſe*, and *warranted* the Horſe to be ſound, and the Plaintiff averred, that he was Shoulder-Slipt; the Plaintiff had a Verdict; but it was objected in Arreſt of Judgment, that the Action would not lie, becauſe the Defect was viſible, and in ſuch Caſe a *Warranty* is inſignificant. *Sed per Curiam*, had it not been for this Warranty the Plaintiff might have rid the Horſe, and then he would have found the Fault. 2 *Roll. Rep.* 188. *Dorrington* verſus *Edwards.*

20. The Plaintiff knowing that his Goods would be taken in Execution, procured *T. S.* by Fraud to ſet his Waggon in his (the Plaintiff's) Yard, which he did, and the Bailiffs took it in Execution, whereupon he brought an Action of Treſpaſs; but the Bailiffs perceiving the Miſtake ſent the Waggon back to the Plaintiff, and the Plaintiff ſtill proceeded in his Action. *Sed per Curiam*, the Defendant may plead the Fraud in Excuſe. 2 *Roll. Rep.* 393. *Groom* verſus *Groom.*

21. One, who was not a known Officer, but only *pro hac vice*, diſtrained the Cattle of *B. G.* having an Authority ſo to do, and he not having ſufficient Sureties for his Appearance at the next Court, delivered the Cattle back again to the Owner, who did not appear, *&c.* for this an Action on the Caſe was brought in an *Inferior Court*, and Judgment for the Plaintiff; and on a Writ of Error brought, adjudged, that this was ſuch a *Deceit*, for which the Action did lie. *Latch* 159. *Wild* verſus *Dowſe.*

22. A Lady's Steward bought Cattle of the Defendant for 80 *l.* and paid 20 *l.* down, and the other 60 *l.* at the End of one Month; the Steward died, and the Defendant demanded the 60 *l.* of the Lady, affirming it was not paid, and she believing him, paid it again; adjudged, that the Action lay. *Cro. Car.* 100, 141. *Cavendish* versus *Middleton.* W. Jones 196. S. C.

23. *Case* for selling the Plaintiff false *Bills of publick Faith*, knowing them to be false, with an Intent to deceive, the Action will lie. *Style* 348. *Fowke* versus *Boyle.*

24. Case, *&c.* wherein the Plaintiff declared, that the Defendant did sell a Gelding to him, and upon the Sale thereof did *falso & fraudulenter* affirm, that the Gelding was his own, and that he bred it from a Colt, whereas in Truth it was another Man's Gelding, and that he did not breed him of a Colt; the Defendant pleaded, that he made no *Warranty*, and therefore the Action did not lie, but adjudged, that the Words * *falso & fraudulenter* were sufficient to imply a *Deceit*, and for that Reason the Action would lie. *Style* 310. *Harding* versus *Freeman.* * Antea 14.

25. *Case*, *&c.* in which the Plaintiff declared, that the Defendant was his *Shepherd*, and that two of his Sheep did *stray*, and that one being found again, the Defendant affirmed it was the Plaintiff's Sheep, who thereupon marked it and sheered it for his Own, but the Defendant afterwards malitiously contriving to disgrace the Plaintiff, and knowing that the Sheep was the Plaintiff's, did *falso & fraudulenter affirm* to the Bailiff of the Manor, *&c.* that it was an *Estray*, who thereupon seised it, *&c. ad damnum*, *&c.* after a Verdict for the Plaintiff it was objected, that this was not a Breach of Trust in the Shepherd, and that the Plaintiff might have his Remedy against the Bailiff for wrongfully seising it; but adjudged, that by this Falsity the Plaintiff did suffer Damage and Disgrace, and tho' he might have an Action against the Bailiff, he might likewise bring it against the Defendant in respect of the Trouble and Charge which he might sustain in suing the Bailiff. *Allen* 3. *Newman* versus *Zachary.*

26. *Information* against the Defendant, for that he *fraudulenter & deceptive* procured one *Ann Wigmore* to give a Warrant of Attorney to confess a Judgment; upon Not guilty pleaded, the Woman her self was admitted as Evidence (tho' the Judgment would be set aside if the Defendant had been convicted) because this was at the Suit of the King. 1 *Vent.* 49. *Parrie's* Case. *Hardres* 331. *S. P. Moor* 468. *S. P.* Sid. 431.

27. *Case*, *&c.* in Nature of a *Deceit* for taking *false* and *insufficient Bail*, with an Intention to defraud the Plaintiff of his just Debt; the Defendant pleaded, that he had taken sufficient Sureties within his Bailiwick; and upon a Demurrer to this Plea it was objected that it was ill, because the Defendant did not set forth the *Place* where he took the Bail, and for that he did not make any Answer to the Deceit alledged in the Declaration; but adjudged, that the *Place* where he took Bail is not issuable, and the *Intention to deceive* the Plaintiff is not traversable. *Sid.* 96. *Bentley* versus *Hoar.* 1 Lev. 86.

28. Case in Nature of a Deceit, wherein the Plaintiff declared, that he, discoursing with the Defendant about the Purchase of certain Houses, the Defendant *affirmed* the *yearly Rent* to be so much, which the Plaintiff believing, he bought the Houses, when in Truth the yearly Rent was not so much; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that this Action would not lie, because there was only a *Discourse about the Houses and no Warranty* that they were of that yearly Value; 'tis true, if a Man sells Goods and * *affirms* them to be his Own, when they are not, an Action will lie, because the Buyer cannot tell who hath any Property in them, and so it will in the principal Case, because the *Rent* is a certain Thing, and the same to every Body; but to *affirm* a Jewel or Land is worth so much, when 'tis not, an Action will not lie, because that may be of greater Value to one than to another. *Sid.* 146. *Leakins* versus *Chissel.* See *Yel.* 20. *Harvey* versus *Young. S. P.* 1 Lev. 102. S. C. Postea 35. S. P.

29. *Assumpsit*, *&c.* to pay for a Horse a *Barley-Corn a Nail*, * doubling it on every Nail; and the Plaintiff averred, that there were thirty-two Nails in the four Shoes of his Horse, and that the Barley-Corn being doubled in every Nail, it came to 500 *Quarters of Barley*; on *Non Assumpsit* pleaded, the *Chief Justice*, at the Trial, directed the Jury to give the Value of the Horse, which was 8 *l.* in Damages, and so they did. 1 *Lev.* 111. *James* versus *Morgan.* * Postea (M) 152. S. P.

30. *Indictment*, setting forth, that *W. R* having seventeen Yards of Silk, the Defendant *deceptive* told him, that *A. B.* had Occasion for it to make her Wedding-gown, whereupon he sold it to her under that false Pretence; adjudged, that this Indictment would not lie, because there was no Trust; and if there was any, then an Action on the Case would lie for the Fraud. 5 *Mod.* 18. *The King* versus *Wood.*

31. *Case*, *&c.* in which the Plaintiff declared, that the Defendant having caused him to be arrested in *Middlesex*, and intending to keep him in Gaol, *false & malitiose*, told the Sheriff, that he (the Plaintiff) owed the Defendant 5000 *l.* and that he should take Bail accordingly, whereupon the Plaintiff was kept in Prison several Days; the Defendant pleaded, that he told the Sheriff, that the Plaintiff owed him 40 *l.* and traversed the Residue; upon which they were at Issue, and the Plaintiff had a Verdict; and it was insisted in Arrest of Judgment, that if the Plaintiff was detained for 5000 *l.* he was under an illegal Arrest, and that the Sheriff ought to discharge him, or keep him at his Peril, but the Plaintiff had Judgment because he was damnified by such a false Affirmation. *Sid.* 424. *Dow* versus *Swaine.* 1 Mod. 4. 1 Lev. 275. Raym. 176. Postea (G) 40. S. C.

32. Case, *&c.* for that the Defendant, *&c.* on such a Day and Place, sold to him (the Plaintiff) *an Horse*, and then and there *warranted* the said Horse to be sound Wind and Limb, whereupon he paid so much Money, and averred the Horse had but *one Eye*; upon *Non warrantizavit* pleaded, the Plaintiff had a Verdict, and it was objected in Arrest of Judgment, that a *Warranty* extends

* Antea 18, 19. extends only to ſecret Infirmities, but the Want of an * Eye was apparent; that this Warranty might be after the Sale, when it ought to be Part of the Contract, and therefore it ſhould be *Warrantizando vendidit*, but adjudged, that the Want of an Eye ſhall be intended to be a ſecret Infirmity, ſince the Jury have found that the Defendant *Warrantizavit*, and that the Plaintiff need not declare, that *Warrantizando vendidit*, becauſe the Bargain was not compleat till the Money was paid. 1 *Salk.* 211. *Butterfeild* verſus *Burroughs*.

33. *Caſe*, for that the Defendant *being poſſeſſed* of a Lottery-Ticket, ſold it to the Plaintiff *affirming* it to be his Own, when in Truth it was not; the Defendant pleaded, that he bought it *bona fide*, and ſo ſold it, *& petit judicium de narratione*; and upon Demurrer it was adjudged, that where a Man hath the *Poſſeſſion of a perſonal Thing, the Affirming it to be his Own* amounts to a * Warranty; but 'tis otherwiſe in Caſe of *Lands*, for there, whether the Seller is in Poſſeſſion, or not, the Buyer is at his Peril to ſee that he hath a Title. 1 *Salk.* 210. *Medina* verſus *Stoughton*. See 3 *Mod.* 261. See *Cro. Car.* 296. *Roſwell* verſus *Vaughan*. *Antea* 11.

* *Per* Holt *Ch. Juſt.* *'tis a collateral Title, and perhaps no other can be made beſides the* Poſſeſſion; *but where the Seller hath not* the Poſſeſſion, *there is Room to doubt.*

Antea 28. 34. *Caſe, &c.* for that the Plaintiff being in Treaty with the Defendant about the Purchaſe of ſuch an Houſe, *&c.* he did *fraudulently affirm* the Rent to be 30 *l. per Annum*, when in Truth it was but 20 *l. per Annum*, by Reaſon whereof the Plaintiff was induced to give ſo much more than the Houſe was worth; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that this was an improper Action, and that the Plaintiff was too credulous; but adjudged, that the Action lies, becauſe the Value of the Rent lies in the private Knowledge of the Landlord and Tenant; and if either of them *affirm* it to be more than 'tis, the Purchaſer is cheated. 1 *Salk.* 211. *Riſney* verſus *Selby*.

35. *Caſe, &c. for a Deceit*, in which the Plaintiff declared, that he bought Silk of the Defendant for ſuch Silk, *&c.* whereas it was of another Kind, and that the Defendant knowing the Deceit, ſold it to him; upon Not guilty pleaded, it appeared that there was no actual Deceit in the Defendant, who was the Merchant, but that it was in his Factor beyond Sea, but adjudged that his Deceit ſhall charge the Merchant, becauſe 'tis more reaſonable, that he who puts a Truſt in a Deceiver ſhould loſe than a Stranger. 1 *Salk.* 289. *Herne* verſus *Nicholls*.

36. *Caſe, &c.* in which the Plaintiff declared, that on ſuch a Day and Year there was a Diſcourſe between him and the Defendant concerning the Sale of *two Oxen*, then in the Poſſeſſion of the Defendant, and that they agreed for the ſame, and that the Defendant did then ſell the Oxen to the Plaintiff, and did falſly affirm them *to be his Own*, when in Truth they were the Oxen of *another Man*; after a Verdict for the Plaintiff it was objected, that the Declaration was ill, becauſe 'tis not alledged that he *affirmed* them to be his own, *Sciens* they were the Oxen of another, or that there was any *Warranty: Sed per Curiam*, it had been ill upon a Demurrer, but not after a Verdict. 3 *Mod.* 261. *Croſſe* verſus *Garnett*.

(E)

On Eſcapes and Reſcous.

Godb. 125. 1. ON a *Ca. ſa.* directed to the Plaintiffs, who were *Sheriffs of Norwich*, they made a Warrant to three Serjeants to arreſt *B. G.* which they did, and let him eſcape, for which an Action on the Caſe was brought by them againſt the *Serjeants*, yet it was objected that the Action did not lie, becauſe the *Sheriffs were not damnified*, there being no Suit againſt them for the Eſcape, and they might die before there was any; but adjudged that the Action did lie before any Suit againſt the Sheriffs, for the Perſon arreſted did a Wrong to them by the Eſcape, and if they ſhould ſtay till they were ſued, he might die in the mean Time. *Cro. Eliz.* 53. *Sheriffs of Norwich* verſus *Bradſhaw*.

2 Bulſt. 236. 2. *Caſe, &c.* againſt the *Sheriffs of Briſtol*, for ſuffering a Man to eſcape who was committed by the *Commiſſioners of Bankrupts*; adjudged, that the Action would lie. *Moor* 834.

3. *Error* of a Judgment in an Action on the Caſe for a *Reſcous*, where the Arreſt was made by a *Bailiff of a Liberty* and reſcued from his *Deputy*, when it ſhould have been from the *Bailiff himſelf*, but the Plaintiff had his Judgment. *Burgh* verſus *Appleton*, and *Kent* verſus *Elwis*. 2 *Cro.* 241.

Yelv. 57. 4. A Man was arreſted by the *old Sheriff*, who returned *Languidus*, and afterwards *in exitu ab officio*, he delivered the Priſoner to the *new Sheriff*, who ſuffered him to eſcape, the Action lies againſt him. *King* verſus *Andrews*. 2 *Cro.* 380.

Poſtea *Eſcape.* (A) 11. 5. The *old Sheriff took a Man in Execution*, and *in exitu ab officio*, delivered him over to the *new Sheriff*, and upon an *Habeas Corpus* he was delivered to the *Marſhal in Execution*, who ſuffered him to eſcape, for which an Action was brought againſt him; but upon a Demurrer to the Declaration it was held, that the Action did not lie, becauſe the Plaintiff did not ſhew that the *old Sheriff* delivered the Priſoner *in Execution to the new Sheriff*, with the Cauſe of his Impriſonment. *Dowdſwell* verſus *Sir Geo. Reynolds*. 2 *Cro.* 587.

6. Judgment for the Plaintiff in an Action for a *Reſcous*, and it was moved, that the Party did not ſhew that the Perſon was in the Cuſtody of the Serjeant from whom he was reſcued, but the Plaintiff had his Judgment. *Gough* verſus *Can. Style* 342.

7. *ſſ.* The Plaintiff brought *Treſpaſs Vi & Armis* againſt the Defendant for *Reſcuing* the Priſoner; it was objected in Arreſt of Judgment, that he ought to have brought *Treſpaſs on the Caſe*, but adjudged he might have either the one or the other Action. *Style* 99, and *Gough* verſus *Can. Style* 341, 342.

8. *Caſe* againſt the Sheriff by the *Executor* for an *Eſcape* in the Time of the *Teſtator*, this being a perſonal Wrong, it was doubted and not reſolved, whether the Executor could have this Action. *Latch.* 167. *Maſon* verſus *Dixon.* Eſcape (H) 3. Adminiſtration. (F) 15.

9. *Caſe* againſt the Sheriff for ſuffering a Perſon to eſcape, who was taken upon a *Capias Excommunicatum*; upon Not guilty pleaded, the Plaintiff had a Verdict, but it was moved in Arreſt of Judgment, that this Action would not lie, becauſe the original Matter was Spiritual, (*viz.*) an *Excommunication* for not *paying Tithes*, and therefore the Plaintiff ought to have his Remedy in the Spiritual Court; 'tis true, the original Matter is ſpiritual, and after the * *Excommunication* the Proceſs iſſues out of the Spiritual Court, but 'tis directed to a temporal Officer, and executed by him, and he ſuffering the Perſon to eſcape, this is a perſonal Injury, and the conſequential Damages are temporal; but the Court relied upon the Caſe of the Sheriffs of *Briſtol*, ſo the Plaintiff had his Judgment. 1 *Lutw.* 122. *Slipper* verſus *Maſon.* *See* Prohibition. (E) 14. *S. P.* * Poſtea (G) placito 39.

10. *Caſe, &c.* againſt the *Sheriffs of London*, for ſuffering a Priſoner to eſcape who was taken upon *meſne Proceſs*; the Defendants pleaded a *Reſcous* in Bar to this Action, the Plaintiff replied, that the Perſon who eſcaped was arreſted in the Pariſh of St. *Andrew Holborn* in the County of *Middleſex*, in which County there is a Priſon called *Newgate*, to keep Priſoners arreſted for Debt, whither they ought to be carried in ſome convenient Time after the Arreſt, and that the Defendants might have carried this Perſon thither within half an Hour, but did not within two Days after he was arreſted, but kept him in an Alehouſe, which was not a Place of ſafe Cuſtody; and that the *Reſcous*, if any, was made in the ſaid Houſe; and upon Demurrer to this Replication it was held all Matter which might be given in Evidence, and upon which no Iſſue could be taken. 1 *Lutw.* 128. *Whitrow* verſus *Edwyn & al'.*

(F)

For and againſt Inn-keepers and Hoſts. See *Indictment.* (W) 5.

1. IN an Action againſt an Inn-keeper, the Iſſue was, whether the Goods were ſtolen thro' his Default; the Evidence was, that the *Inn* was full of Gueſts, and the Inn-keeper refuſed to entertain the Plaintiff, who thereupon ſaid he would make a Shift; adjudged, that if the *Inn* was not full, an * Action lay againſt the Inn-keeper for his Refuſal. *Dyer* 158, 266. 8 *Rep. Caley's* Caſe. 1 And. 29. * Poſtea 6, 13.

2. The Plaintiff declared, that it was the *Cuſtom for common Inns* to keep the Goods of their Gueſts ſafe, that he was *Hoſpitatus in hoſpitio*, but did not ſay *Communi*, and that his Goods were imbezilled; and this being objected in Arreſt of Judgment, it was diſallowed, becauſe the Cuſtom was laid for *Common Inns*, &c. *Hob.* 245. *Maſon* verſus *Graſſon.* 4 *Rep.* 8. *Southcote's* Caſe. 8 *Rep. Caley's* Caſe.

3. *An Inn-keeper* deſired his *Gueſt* to put his Goods in ſuch a Place under Lock, otherwiſe he would not Warrant the Safe-keeping; the Gueſt was negligent and left the Goods in an outward Room, but not locked, and they were taken away, he ſhall not be charged in an Action. *Mich.* 10 *Eliz.* *Dyer* 266. Moor 78.

4. If a *Gueſt* leave Goods with an *Inn-keeper* (who hath no Profit in Keeping them) telling him he will return in two or three Days, and in that Time the Goods are ſtolen, the Inn-keeper is not liable, without a ſpecial Promiſe for the Safe-keeping; becauſe, when the Plaintiff departed for ſo long a Time, he is not a *Gueſt*, but if he go out in the Morning and return at Night, he is a *Gueſt.* 2 *Cro.* 188. *Gelley* verſus *Clarke*, See Sir *Edwin Sand's* Caſe. *Moor* 876. *S. P.*

5. *A Servant* lodged in a *Common Inn* with the Goods of his *Maſter*, which were there loſt, the *Maſter* may have an Action againſt the *Inn-keeper*; affirmed on Error in the *Exchequer-Chamber.* 2 *Cro.* 224. *Beedle* verſus *Morris.* *Co. Entr.* 347. *S. C.* *Latch* 126. * *Drope* verſus *Thaire.* *S. P.* *Poph.* 178. *S. C.* Yel. 162. * *And ſo may the Servant,* per *two Judges.*

6. ſſ. *Caſe againſt an Inn-keeper*, upon the Cuſtom of *England*, for the Safe-keeping the Goods of his Gueſts, muſt be brought in the County where the Inn is. *Godbolt* 29 *Eliz.*

7. *Caſe, &c.* lieth againſt an *Inn-keeper* for denying Lodging to a Traveller, if he have any to ſpare, for his Money; and in ſuch Action the Plaintiff need not ſhew that the Defendant hath Licence to keep an Inn, and this Action will lie, tho' he take down his Sign, if he ſtill keep the Inn; it was likewiſe held, that 'tis lawful for any Man to build an *Inn*, if 'tis not *ad nocumentum, &c.* and that if the Defendant is indicted for Building it, theſe Words muſt be in the Indictment, otherwiſe 'tis ill. *Trin.* 22 *Jac.* *Godbolt* 345.

8. In *Caley's* Caſe before-mentioned, theſe Points were reſolved, That if the Gueſt gives his Horſe to the Hoſtler, and requires him to put the Horſe to *Graſs*, and he doth ſo, and afterwards the Horſe is ſtolen, he ſhall not be charged, becauſe 'tis not *infra hoſpitium*; but if the *Inn-keeper* put the Horſe to Paſture, without Requeſt, then 'tis otherwiſe; that if a Writ be brought againſt an Inn-keeper, it need not mention that he keeps a common Inn. 8 *Rep. Caley's* Caſe.

1 Roll. Rep. 449.

9. A Stranger came to an *Inn* with an Horſe without the Knowledge of the Owner, and there left him at Hay; the Horſe remained there till he eat out more than he was worth; the Owner hearing where he was, demanded him of the Inn-keeper, who refuſed to deliver him without paying for what he had eaten; the Court was divided, whether the Inn-keeper might keep the Horſe; but this Doubt was reſolved in a Caſe about five Years afterwards, (*viz.*) that he might * keep the Horſe till he was ſatisfied for his Keeping, and ſhould not be put to his Action againſt the Perſon who left him at the Inn. 1 *Bulſt.* 170. *Skipwith's* Caſe. *Mich.* 14 *Jac. Robinſon* verſus *Walter.* 3 *Bulſt.* 269. 3 *Bulſt.* 289. † *Stirt* verſus *Drungold. S. P. Poph.* 127. *S. P. Moor* 876. *S. P.*

* Poſtea, placito 12,14,15.

† Trover. (C) 5.

10. If an Inn-keeper uſe the Trade of an Alehouſe, 'tis within the Statute of Alehouſes. *Paſch.* 9 *Jac.* 1 *Bulſt.* 109.

11. It was the Opinion of Juſtice *Doderidge*, that if a Traveller lodgeth three Days together in a common Inn, that in ſuch Caſe the Inn-keeper is not anſwerable if his Goods are ſtolen out of his Chamber; but the Court was of another Opinion in * *Drope's* Caſe, for Clothiers and others coming to *London* to ſell Cloths and Cattle, ſtay commonly a Week, and if they are robbed in the Inn, the Inn-keeper ſhall be charged in an Action. *Latch* 88. *Guillim's* Caſe, and 126. *Drope* verſus *Thaire.*

* Latch 126. Poph. 178.

Antea 5.

12. In an Action on the *Caſe* brought againſt an *Inn-keeper* for Goods ſtolen out of the Inn, the Defendant pleaded in Bar an Agreement made between him and the Plaintiff, that he the (Defendant) would not be chargeable for any Goods brought thither by his Gueſt, but for ſuch as were delivered either to himſelf or to his Wife, and this was adjudged a good Plea. *Moor* 158. *Brand* verſus *Glaſſe.*

13. *Caſe, &c.* againſt an *Inn-keeper* for an Horſe, *&c.* the Defendant pleaded the general Cuſtom of the Realm, that where an Horſe is put to an Inn-keeper to keep, and continues ſo long in the Inn that his Meat amounts to more than the Value of the Horſe, then the Inn-keeper may call four Neighbours to appraiſe the Horſe, and ſet a Value upon his Meat; and if it appear to them that it comes to more than the Value of the Horſe, then the Inn-keeper may detain him as his Own; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe there is no ſuch *general Cuſtom of the Realm*, 'tis only ſo in *London* and *Exceſter*, but it was reſolved that an Inn-keeper might detain an Horſe for his Meat, or might have an Action on the Caſe for it. *Moor* 876. *Walbrook* verſus *Griffith.*

Antea 8.

14. Adjudged, that an Inn-keeper ſetting up a Sign and entertaining Gueſts, charges himſelf to the Publick, and therefore if he refuſe to let a Traveller lodge in his Houſe, * an Action on the Caſe will lie againſt him. 2 *Roll. Rep.* 345.

* Antea 1. 6.

15. *Treſpaſs* for Aſſault, Battery, and Taking his Horſe in *Cheapſide*; the Defendant, as to the Aſſault and Battery, pleads Not guilty, and as to the reſt he ſet forth, that he was an *Inn-keeper in St.* Martin's *Pariſh*, and that the Plaintiff came to his Houſe and agreed to give 2 *s. per* Week for his Lodging, and 6 *d.* for his Horſe for a Day and Night; and if he did not pay the ſame, and 10 *s.* more, which he owed the Defendant, then he ſhould detain the Horſe till he was paid, and ſhews how long he lodged there, and how many Days, *&c.* his Horſe was there, and how much was due, and becauſe it was not paid, he detained the Horſe till the Plaintiff took him out of his (the Defendant's) Stable, and rode him to *Cheapſide*, where the Defendant retook him, as he might lawfully; and upon a Demurrer to this Plea it was inſiſted for the Plaintiff, that the Defendant might detain the Horſe for his Hay and Oats, whilſt he was *in his Poſſeſſion*, becauſe it was in Nature of a Diſtreſs, but he could not retake him when once out of his Poſſeſſion: *Sed per Curiam*, if he hath the Horſe by *Diſtreſs*, then the Taking him out of his Poſſeſſion is a Reſcous, and in ſuch Caſe he may retake him, but here he had a Property as well as a Poſſeſſion by the Agreement of the Plaintiff, (*viz.*) to detain the Horſe, if he (the Plaintiff) did not pay for his Lodging, Horſe-meat, and a Debt of 10 *s.* and having a Property as well as the Poſſeſſion, he might retake him, 2 *Roll. Rep.* 438. *Roſſe* verſus *Bramſteed.*

16. The Plaintiff declared, that he was an *Hoſtler*, and that the Defendant brought an Horſe to him, and agreed to give 6 *d.* Livery for a Day and Night, and becauſe the Horſe had been there ſo many Days and Nights as amounted to 20 *l.* he brought the Action, and declared *licet ſæpius requiſit'*, the Defendant had not paid the Money; it was inſiſted for the Defendant, that there ought to have been a *Special Requeſt*; but adjudged, that where the Ground of the Action is a *Debt*, there the Law induceth a Promiſe, and in ſuch Caſe the *Requeſt* is not iſſuable, nor any Part of the Conſideration; and in this Caſe the Promiſe is entire, and the Plaintiff may demand for ſo many Days and Nights together, without bringing an Action for every 6 *d.* and that if a Man brings an Horſe to an Inn and leaves him in the Stable, without any ſpecial Agreement to pay, *&c.* the Inn-keeper may * detain him till he is ſatisfied for the Keeping; and if he eat more than he is worth, he may get him appraiſed and juſtify the Sale. *Yelv.* 66. *The Caſe of the Hoſtler.*

* Antea, placito 8, 12.

(G)

For malitious Proſecutions. See *Statutes.* (D) 22.

1. CASE, againſt the now Defendant, who formerly, as Plaintiff, had recovered in Debt, and thereupon the now Plaintiff brought a Writ of Error, and the now Defendant knowing thereof, and *malitiouſly intending to charge* the now Plaintiff, had taken out a *Ca. ſa.* againſt him,

by Reaſon whereof, at *Reading* in the County of *Berks*, he was taken in Execution; the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Action was brought in *Middleſex*, when it ought to be brought in *Berks*, where the Wrong was done, by taking the Plaintiff in Execution, beſides, 'tis not alledged, that the *Ca. ſa.* was procured by Fraud, or without Leave of the Court; but adjudged, that it was well brought in *Middleſex*, and that the Allegation, that he *malitiouſly* intended to Charge the Plaintiff, *&c.* was a ſufficient Ground for the Action. *Cro. Eliz.* 574. *Willis* verſus *Stroud.*

2. *Caſe, &c.* for that the Plaintiff was *Bail* for *B. G.* at the Suit of *R. L.* and whereas the ſaid *B. G.* owed *O. B.* 200 *l.* for which an Action was brought, but the Plaintiff was not Bail therein, yet the Defendant by Fraud and Covin to Charge the Plaintiff with that 200 *l.* informed the Court, that he was *Bail*; whereupon after a *Sci. fa.* and *Nihil* returned, the Defendant knowing the Premiſſes, procured a *Ca. ſa.* againſt the Plaintiff, and he was taken in Execution for the ſaid 200 *l.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this was a *judicial Proceſs*, and the Miſawarding it was the Default of the Court, and not of the Party, altho' it was upon his Information, and therefore the Action did not lie againſt him; but adjudged, that it did, becauſe it was a *Fraud and Covin* in him to deceive the Plaintiff; and 'tis like the Caſe, where one procures a falſe Suit to be brought in another Man's Name. *Cro. Eliz.* 628. *Baron* verſus *Sleigh.*

3. Tithes were paid to the Vicar in the Preſence of *two Witneſſes*, afterwards, (one of the Witneſſes being dead) the *Vicar* ſued the Pariſhioner in the Spiritual Court for the ſame Tithes, in which Court *one Witneſs* is not allowed to prove the Payment; and this being an Expence, and a wrongful Proſecution, the Pariſhioner brought an Action on the Caſe againſt the *Vicar*, in which Action the ſurviving Witneſs would be good Evidence; but adjudged it would not lie, becauſe the Suit for the Tithes was in the * *Spiritual Court*, which hath a proper Juriſdiction, tho' the Suit was without Cauſe; but if the Libel had been *for a Temporal Matter*, the Action would lie for ſuch malitious Proſecution. *Cro. Eliz.* 836. *Bray* verſus *Parry.* * Poſtea 29, 39.

4. *Caſe* for conſpiring to indict the Plaintiff for the ſuppoſed *Counterfeiting a Letter*, and *malitiouſly* proſecuting him for it at the *Aſſizes*, where he was *acquitted*; the Defendant made a Special Juſtification, that a Stranger brought the Letter to him, with which he cheated him of 30 *l.* that the Plaintiff was very like him, and that the Defendant believing him to be the Perſon, and *other Perſons agreeing he was*, he complained to a *Juſtice*, who upon Examination found Cauſe of Suſpicion, and bound him over to the Aſſizes, and there he was acquitted; adjudged, that this Juſtification is not good, for the Proſecution was upon the Suſpicion of other Perſons, when it ought to be upon his own Suſpicion and *probable Cauſe.* 1 *Bulſt.* 149. *Wale* verſus *Hill.*

5. The Sheriff returned a *Fi. fa.* that he had levied the Debts and Damages, but that the Goods remained in his Hands for want of Buyers; the Defendant knowing this, ſued out another *Fi. fa.* and thereupon the Sheriff levied the Debt and Damages, and paid the Money to the Defendant, for which the now Plaintiff brought an Action, and adjudged, that it did lie, altho' the *Fi. fa.* was an Act in Law. *Brownl.* 12. *Warter* verſus *Freeman.* See *placito* 39. *S. P.* Hob. 205.

6. *Caſe* for falſly procuring the Plaintiff to be *indicted for a Felony, & in priſona detineri*, until before the Juſtices *legitimo modo fuit acquietatus*, and doth not ſay *inde acquietatus*; but the Declaration was held good, for it cannot be intended he was acquitted of any other Matter but of that for which he was indicted. 2 *Cro.* 230. *Fox*'s Caſe. *Bill* verſus *Fox. Ibid.*

7. *Caſe* lies for procuring the Plaintiff to be indicted as a *Common Barretor*, before *A. B.* Juſtices, *&c.* and that he was *acquitted.* 2 *Cro.* 32. *Barnes* verſus *Conſtantine.* Tho' the Indictment was erronious, or if *Ignoramus* had been found. See *Sir Andrew Henley* verſus *Burſtall*, Caſe. Yel. 46. poſt. 21.

8. *Caſe, &c.* the Daughter told the Father ſhe was raviſhed by the Plaintiff, the Father cauſed him to come before a *Juſtice*, who bound him over to the Aſſizes, and the Defendant likewiſe to prefer a Bill of Indictment, where the Plaintiff was *acquitted*; but becauſe the Father preferred the Indictment upon the Complaint of his Daughter, for a Cauſe, which tho' it had not been ſufficient, yet 'tis a good Cauſe to excuſe him from a malitious Proſecution, therefore the Action would not lie. 2 *Cro.* 193. *Cox* verſus *Wirrall.*

9. Caſe, *&c.* for that the Defendant, (formerly as Plaintiff) brought againſt him at the Suit of *B. G. without his Knowledge*, and thereupon did arreſt and impriſon the now Plaintiff, by Reaſon whereof all his Creditors come upon him, ſo that he loſt his Credit; the Plaintiff had a Verdict, and upon *Error* brought, it was inſiſted, that the Action did not lie, becauſe in Truth the Plaintiff did owe Money to *B. G.* and ſo the Action was brought for a juſt Debt; but adjudged, that if *B. G.* himſelf had commenced the Action, in ſuch Caſe, tho' it had brought all the Creditors upon him, he could have no Remedy, becauſe it is a lawful Action for a Man to ſue for a juſt Debt; but where a Suit is brought in the * Name of another without his Knowledge, that is a wrongful Act and Maintenance, and therefore the Action will lie. *March* 47. *Thurſton* verſus *Juman.* * Poſtea pl. 28.

10. There was a *Non pros'* againſt a Plaintiff, and his Attorney knowing it, cauſed Judgment to be entred againſt the Perſon who had the *Non pros'*, by Reaſon whereof he was impriſoned, for which he brought an Action againſt the Attorney, and adjudged well brought. *Hutt.* 125. *Knight* verſus *Copping.*

Moor 835. S. P.

11. *A.* recovered againſt *B.* and died, *C. a Stranger, outlawed B* on that Judgment, and had him taken and committed upon the *Capias Utlagatum*, for which he brought the Action againſt *C.* and adjudged good. 7 *Rep.* 4. *Bulwer's* Caſe.

12. Caſe, *&c.* in which the Plaintiff declared, that the Defendant cauſed him (the Plaintiff) to be *indicted* at, *&c.* for *Perjury*, upon the Statute 5 *Eliz. cap.* 17. and that he was arraigned for the ſame at, *&c.* on the 18*th Septemb.* in the Year, *&c.* and that he was *debito modo acquietatus* on the ſaid Indictment remaining in the Court, *&c.* And it was objected againſt this Declaration, that the Plaintiff ought to have alledged, that he was *legitimo modo acquietatus*; which is very true, if the Indictment had been for a * *Conſpiracy*, for that is *ſtricti juris*, and in ſuch Caſe it muſt appear, that the Perſon was *lawfully acquitted*, which is an Acquittal by *Verdict*; but where a Man is indicted for *Perjury*, 'tis not the *Acquital* which gives him a Right of Action, but the *ſcandalous* and *malitious Accuſation* of ſo heinous a Crime, and the Injury which the Plaintiff receives by it. *Palm.* 44. *Talor's* Caſe.

* Palm. 315.

W. Jones 93. 2 Roll Rep. 258. Cro. Car. 15. Latch 79. 2 Bulſt. 271, 173. Mills *v.* Mills.

13. *Caſe, &c.* againſt *three Defendants*, for malitiouſly conſpiring to indite him for *High Treaſon*, for which the Plaintiff declared, that they brought him before a Juſtice of Peace, who committed him, and that afterwards at the *Aſſiſes* in *N.* they preferred a Bill of *Indictment* of High Treaſon againſt him, and gave Evidence to the Grand Jury at *N. &c.* who at *N.* aforeſaid found *Ignoramus* on the ſaid Bill, *ad damnum, &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Action would not lie; 'tis true, it will lie for a malitious Proſecution where the Jury find *Ignoramus*, but not for *High Treaſon*, becauſe that may endanger the State, and be a Means to conceal Treaſon for fear of being puniſhed by an Action; beſides, the Plaintiff is not acquitted of the Treaſon by finding *Ignoramus*, for he is liable ſtill to be proſecuted for it, tho' the Action might lie, if he had been *legitimo modo acquietatus*; therefore, ſince he is not *acquitted, &c.* the Action will not lie; and for this Reaſon the Judgment was arreſted. *Palm.* 315. *Smith* verſus *Crawſhaw & al'*, † *Cro Car.* 15. *S. C.* contra, and (C) placito 9. contra. See *Lovet* verſus *Fawkener. Ibid.*

W. Jones 93. *that the Action lies.*

14. *Caſe, &c.* for that the Defendant *falſo & malitioſe* cauſed the Plaintiff to be bound over to the Seſſions, and for indicting him for ſtealing ſix Oxen, for which *Ignoramus* was found by the Jury, *&c.* The Defendant pleaded, that ſix Oxen were ſtolen from him in the County of *Hartford*, and that afterwards he coming to *London*, and hearing that the Plaintiff had them in his Poſſeſſion, he (the Defendant) demanded of the Plaintiff to ſee them, which he refuſed, and therefore, and becauſe he gave very doubtful Anſwers, the Defendant ſuſpected that he (the Plaintiff) had ſtolen them, and for that Reaſon, he (the Defendant) by Vertue of a Warrant, *&c.* brought him before Sir *S. S.* a Juſtice of Peace, who bound him over to appear at the next Seſſions, *&c.* and bound the Defendant to proſecute him, which he did accordingly, *&c.* The Plaintiff replied, that he bought the ſix Oxen in ſuch a Market-Overt, he being a Butcher, which the Defendant did know very well, and yet he proſecuted the Matter *ex malitia* againſt him; and traverſed, that he refuſed to ſhew the Oxen; and upon a Demurrer to this Replication it was objected, that the Plaintiff had not anſwered that Part of the Plea, of Binding the Defendant over to proſecute: *Sed per Curiam*, 'tis not requiſite, becauſe by the Demurrer 'tis confeſſed, that the Defendant did know that the Oxen were not ſtolen, but that the Plaintiff bought them in a *Market*, and yet *ex malitia crimen feloniæ ei impoſuit*; and if ſo, then the Binding over by a Juſtice of Peace will not purge this Wrong, and by Conſequence the Binding over is not material; the Plaintiff had Judgment. 1 *Roll. Rep.* 438. *Webb* verſus *Wells.*

W. Jones 312.

15. Action againſt an *Apparator*, for Citing him into the Eccleſiaſtical Court for *Incontinency*, where he ſtood charged till cleared by *Sentence*, it was objected, that the Action did not lie, becauſe the Defendant did nothing but *ex officio*; but the Plaintiff having declared that he did it *falſly and malitiouſly*, and without Cauſe or Colour of Suſpicion, and it being ſo found, the Action was well brought. *Cro. Car.* 291. *Carlion* verſus *Hill.* 2 *Cro.* 351. See *Kirchevall* verſus *Smith. Poſtea* Churchwardens. (A) 3. * *Powell* verſus *Godfrey*, and 355. *Weald* verſus *Peaſe* 601. *Eyres* verſus *Sedgwick*, for a falſe Oath. *Sid.* 50. *Broad* verſus *Hancock. S. P.*

* Moor 835. 2 Bulſt. 265.

16. *Caſe*, for that the Defendant *ex malitia*, (but did not ſay *falſo*) impoſed Felony on the the Plaintiff's Wife, and before a Juſtice *falſo & malitioſe* charged her with Felony; adjudged, that the Declaration was good, for having ſaid, that the Defendant *ex malitia* impoſed on her the Crime of Felony, that implies he did it *falſo*. *Cro. Car.* 197. *Manning* verſus *Fitzherbert*; ſo Caſe lies for *falſo & malitioſe* cauſing the Plaintiff to be *indicted*. 2 *Cro.* 193. *Cox* verſus *Wirrall.* See *placito* 16. *S. C.*

17. *Caſe*, for malitiouſly *preferring an Indictment* at the Seſſions againſt the now Plaintiff *for Felony*, and enticing *R. B.* to give Evidence that it was true, by which the Plaintiff was bound to anſwer it at the next *Aſſizes*, and there he was * *acquitted*; now, tho' it was not ſhewed in the Declaration, that the *Bill was found*, yet it was a great Scandal to give this Matter in Evidence to a Jury, for which the Action lay. *Winch.* 28. *Wright* verſus *Back.*

* Poſtea 27, 47.

18. *Caſe*, for cauſing the Plaintiff to be indicted for a Robbery, and doth not ſhew, that he was *legitimo modo acquietatus*, for this Reaſon the Declaration was held ill. *Godb.* 79 *Shotbold's* Caſe.

Hutt. 49.

19. *Caſe*, for that the Defendants intending to take away the Plaintiff's good Name, preferred an *Indictment* againſt him *for a Rape*, and gave Evidence to the Jury of the ſame, and they found *Ignoramus*; adjudged the Action well brought. *Winch* 54. *Whorewood* verſus *Corderoy. Style* 10. *Dogat* verſus *Lawry. Cro. Car.* 199. *S. P.*

20. *Caſe*

20. *Caſe* againſt two Defendents, for *procuring* the Plaintiff to be indicted of Common Barretry; it was objected upon a Writ of Errror, that the Plaintiff ought not to have *joined them* in the Action, but that was held well enough; then it was objected, that there was no Place laid where the * *Procurement* was made, and for that Reaſon the Judgment was reverſed, tho' it was inſiſted, that no Procurement could be till the Party was indicted. *Latch* 162. *Pencavin* verſus *Trapping*. * Antea 8. * 1 Roll. Rep. 109.

21. *Caſe*, for cauſing a *Falſe Preſentment* to be made againſt the Plaintiff before the *Conſervators of the River Thames*; after a Verdict for the Plaintiff, it was moved, that the *Conſervators*, *&c.* had no Authority to take ſuch Preſentment, yet adjudged, that the Action lay for the malitious Proſecution, and the unjuſt Vexation. *Style* 378. *Atwood* verſus *Monger*.

22. *Caſe* will lie againſt one, who brings *Vexatious Actions* againſt another, or for entring Actions of great Value, when the Cauſe is but * ſmall, on purpoſe to force the Party to put in great Bail; or for cauſing one to be indicted for a Thing, which, if true, deſerves corporal Puniſhment, or which is a Scandal to the Party indicted; but not for cauſing one to be indicted for a Treſpaſs, *per Rolls*. *Style* 424, 451. *Stevens* verſus *Aſh*. * 1 Saund. 228. 2 Lutw. 1571.

23. *Caſe*, for cauſing him to be *indicted of Felony*, as *Acceſſary*, in ſuffering a Priſoner convicted to eſcape, after a Verdict for the Plaintiff, and a Writ of Error brought, and the Error aſſigned, that the *Indictment* was only for a Matter of *Treſpaſs*; adjudged, that tho' the Matter with which the Defendant is charged is not Felony, yet there is a Charge of Felony in the Indictment, and the Plaintiff was ſcandalized by it. *Gardiner* verſus *Jolley*. *Style* 157.

24. *Caſe*, *&c.* for cauſing him to be indicted for Stealing a Mare; the Plaintiff had a Verdict, it was moved in Arreſt of Judgment, that the Declaration was repugnant, for upon exhibiting the Indictment to the Grand Jury, they found *Ignoramus*; and if ſo, then the Plaintiff was not indicted; adjudged, the Words ſhall be taken according to Common Intendment, *(viz.)* that the Plaintiff *was indicted*, and the *Trouble* which he was put unto by Reaſon of the Judgment, is the Foundation of this Action. *Style* 372. *Trin.* 1653.

25. An Information was proſecuted in the Exchequer, upon a Seiſure of Goods imported without paying Cuſtom; and after Proclamation made, the Goods were condemned according to the Courſe of the Court by Reaſon whereof they were forfeited; and afterwards the Owner brought an Action on the Caſe againſt the Informer, for *falſly and malitiouſly* ſeiſing and exhibiting this Information, *&c.* Upon Not guilty pleaded, all this Matter was found Specially, and the Queſtion was, whether this Action would lie? and adjudged, that it would not; 'tis true, an Action lies for a *falſe and malitious* Proſecution, where the Plaintiff is *acquitted*, or where *Ignoramus* is found, becauſe by ſuch Acquittal, *&c.* it appears there was no Cauſe for ſuch Proſecution, and therefore the Law allows him a Recompence for ſuch a falſe and unjuſt Vexation: But the exhibiting this Information cannot be ſaid to be done *falſly and malitiouſly*, becauſe by a due Courſe of Proceeding *Judgment* hath been given, that the Goods were forfeited, and the Judgments of Courts are always preſumed to be juſt, and given upon true and good Grounds, therefore Falſhood and Injuſtice cannot be objected after ſuch Judgments. *Hardr.* 194. *Vanderbergh* verſus *Blake*.

26. *Caſe*, *&c.* for that the Defendant *falſe and malitioſe* indicted the Plaintiff before *A. B. C.* and *other Perſons*, Juſtices of *Oyer* and *Terminer*, *&c.* for ſtealing Sheep: upon Not guilty pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſet forth, that *he was acquitted, or Ignoramus found*; beſides, it did not appear that the Plaintiff was indicted before one of the Judges, as 'tis expreſly required by the Statute 2 *Ed.* 3. *cap.* 2. but only before ſuch Men, and *other Perſons*, Juſtices of *Oyer and Terminer*; but adjudged, that thoſe *other Perſons* ſhall be intended the Judges: And the Jury having found it to be *falſe & malitioſe*, that is ſufficient, tho' it might have been otherwiſe upon a Demurrer to the Declaration. *Sid.* 15. *Wine* verſus *Ware*. See *antea pl.* 18. See *Yelv.* 1. 46. *S. P.*

27. *Caſe*, *&c.* for *malitiouſly* indicting the Plaintiff on the Statute 8 *Eliz. cap.* 2. for procuring *W. R.* to be arreſted in another Man's Name; adjudged, that the Action lies. *Sid.* *Chamberlaine* verſus *Preſcott*. Antea pl. 10.

28 *Caſe* by the Plaintiff, who was a *Churchwarden*, for that the Defendant *malitiouſly* proſecuted him in the *Spiritual Court*, for not Accompting; adjudged, that the Action would lie, for tho' the Matter was * *Spiritual*, yet the Malice was a Temporal Injury. 2 *Jones* 132. *See* Prohibition (E) *S. P.* *See* Act. Caſe. (E) 9. *S. P.* Antea 3. S. P.

29. The Plaintiff being arreſted by Proceſs out of an *Inferior Court*, brought an Action againſt the Defendant, for ſuing him there without any Cauſe of Action, and for pretending great Damages, and impriſoning him for Want of Bail; adjudged, that the Action did lie. *Hill.* 18, 19 *Car.* 2. *Cooper* verſus *Cooper*.

30. *Caſe*, *&c.* in which the Plaintiff declared, that the Defendant *falſo & malitioſe* exhibited an *Indictment* againſt him, and that the Jury *dixerunt quod ignorabant*; after a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that the Action would not lie, becauſe exhibiting the *Indictment* was in a Courſe of Juſtice, and it would diſcourage Proſecutions, if the Action ſhould lie; as to the Words *falſo & malitioſe*, they are only Form: *Per Curiam*, the Judgment was reverſed. *T. Jones* 20. *Pawlin* verſus *Shaw*.

31. Motion upon an *Affidavit* againſt an Attorney, who being Plaintiff in the Action had ſued the Defendant to an *Outlary*, tho' he lived in the ſame Town, and was conſtantly at Mar-

ket every Market-Day, and never abſconded; and a Rule being made for him to attend, and all this Matter appearing to be true upon Examination, he was ordered to reverſe the Outlary at his own Charge, and to pay the Defendant ſuch Coſts as the Maſter ſhould tax, and to accept of the Defendants Appearance upon Common Bail. *T. Jones* 211. *Seabrooke* verſus *Howkin.*

1 Saund. 228. Raym. 176. S. C.

32. A Bill in Nature of a Conſpiracy againſt three, for that *Conſpiratione inter eos habita* they cauſed the Plaintiff to be arreſted in *London*, on purpoſe to vex and impriſon him, *knowing that he was not able to find Bail*, when in Truth they had no Cauſe of Action: Upon Not guilty pleaded, one of them was found guilty, and no more, and it was moved in Arreſt of Judgment, that the Plaintiff ought to have ſhewed, that he was *acquitted* upon an Indictment of Conſpiracy, for a Bill of Conſpiracy will not lie till *Acquittal*; but adjudged, that this Bill is in Nature of an Action on the Caſe, and the * *Conſpiracy* is alledged by Way of *Aggravation*, for the Ground of the Action, is the Cauſleſs *troubling* the Plaintiff to put in Bail, and that the Action would not fail, tho' there was but one found guilty. 1 *Vent.* 13. 18. *Skinner* verſus *Gunter.* See *Cro. Eliz.* 701. *Marſh* verſus *Rawſon. S. P.*

* Marriage (A) 20.

Sid. 261. Lev. 169. S. C. * Antea 28.

33. Caſe, *&c.* for *falſly and malitiouſly indicting* the Plaintiff for a *Reſcous*: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this Action would not lie, becauſe this *Indictment* was only for a bare Treſpaſs; and the Caſe of * *Chamberlaine and Preſcott Mich.* 1659. was cited, where the Plaintiff brought a Special Action on the Caſe againſt the Defendant, for malitiouſly *indicting* him upon the Statute 8 *Eliz. cap.* 2. for procuring him, (the Plaintiff) to be arreſted in another Man's Name, who diſowned the Suit, wherein the Plaintiff declared, that he being a Freeman of *London*, and a Merchant, and reciting the Statute, he ſets forth, that the Defendant cauſed him falſly and malitiouſly to be indicted upon that Statute; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Action would not lie, it being only a Treſpaſs in its Nature, and if it ſhould be allowed, it would diſcourage Proſecutions; but adjudged, that it would lie; 'tis true, this Judgment was reverſed by Writ of Error in the Exchequer-Chamber, but in the principal Caſe the Court inclined, that the Action would not lie. *Raym.* 135. *Low* verſus *Beardmore* But in the Caſe of *Sir Andrew Henley and Burſtall*, it was adjudged, that where the *Indictment* is preferred *malitiouſly*, and contains Matter of Imputation and * Slander, as well as Crime, that the Action will lie, tho' 'tis otherwiſe where the *Indictment* contains Crime without Slander. *See* Action on the Caſe, (V) 21. See *Hockin* verſus *Matthew.* 1 *Vent.* 87.

* 2 Mod. 51. Norris v. Palmer. S. P.

T. Jones 123.

34. *Caſe, &c.* in which the Plaintiff declared, that he being *Churchwarden* of the Pariſh of *B.* and having given an Accompt at the End of the Year, to his Succeſſor and the Pariſhioners, the Defendant *falſly and malitiouſly* cited him in the Spiritual Court to render an Accompt, and that the Judge, at the Requeſt of the Defendant, excommunicated him (the Plaintiff) for not giving an Accompt: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Court was to blame, and not the Defendant, for the Sentence was given by the Court; but adjudged, that the * Action lies againſt the Defendant. *Raym.* 418. *Grey* verſus *Day.* See *Carlton* verſus Mill, and *Steer* verſus *Scoble*, and *Weald* verſus *Peaſe*, and *Willis* verſus *Stroud. S. P.*

* *Becauſe the malitious Proſecution is a Temporal Injury.*

35. *Caſe, &c.* in which the Plaintiff declared, that the Defendant wickedly and malitiouſly intending and contriving *minus rite prægravare* (the Plaintiff) *& tam corporis impriſonamentum quam alios labores & expenſas prætextu Juſtitiæ & legis proceſſu opprimere, &c. ex malitia ſua habita* (ſuch a Day) *Virtute cujuſdam Brevis de quo minus e Curia Scaccarii ſine aliqua rationabili cauſa arreſtari ſubdole fraudulenter & injuſte cauſavit, &c.* and procured him to be impriſoned, until he gave a Warrant of Attorney to confeſs a Judgment in *B. R. C. B.* or Exchequer, *&c.* And upon a Demurrer to this Declaration it was objected, that an Action would not lie againſt the Defendant for proſecuting the King's Writ in a proper Court, becauſe it would deter the Subjects from ſuch Proſecutions; and 'tis true, a Man may be miſtaken in his Action, but then the Law provides a Remedy for the Perſon injured, and that is to reward him with *Coſts*; but adjudged, that it being laid *ex malitia præhabita & ſine aliqua rationabili cauſa*, and this being confeſſed by the Demurrer, the Action lies. 3 *Lev.* 209. *Webſter* verſus *Haigh.* See *Dowſe* verſus *Swaine S. P.* and *Stribler* verſus *Jones. S. P.*

Antea pl. 30.

Sid. 424. Raym. 176. 1 Mod. 4. antea 40. S. P. S. C.

36. *Caſe, &c.* for that the Defendant having no Cauſe of Action above the Value of 40 *l.* did *falſly and malitiouſly* bring an Action againſt the Plaintiff, and cauſed the Sheriff to arreſt him for 500 *l.* and to hold him to ſuch Bail which he could not find, and ſo laid in Priſon ſuch a Time: The Defendant pleaded, that he had Cauſe of Action to the Value of 200 *l.* and traverſed, that he informed the Sheriff that he had Cauſe of Action for 500 *l.* upon which they were at Iſſue, and the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that it appears by the Pleadings on both Sides, that the Defendant had a good Cauſe of Action, and that 'tis not a Crime to enlarge the Sum, becauſe he might not know certainly what is due; but adjudged, that the Plaintiff having declared, that it was done *falſly* and *malitiouſly*, and it being ſo found by the Jury, *&c.* the Action lies. 1 *Lev.* 275. *Dowſe* verſus *Swaine.* 1 *Lev.* 275. *Stribler* verſus *Jones S. P.*

37. *Caſe, &c.* for malitious proſecuting the Plaintiff upon an *Indictment for Perjury*, of which he was *acquitted*: Upon Not guilty pleaded, it appeared on the Evidence, that the Defendant was a Juſtice of Peace, and that he procured ſome Witneſſes to appear againſt the Plaintiff, and that his own Name was endorſed on the Indictment, to give Evidence; adjudged, that this did not

make him a Proſecutor, for a Juſtice of Peace ought to make any Perſon appear whom he knows can give Evidence upon an Indictment. 1 *Vent.* 47. *Girlington* verſus *Pitfeild.*

38. Caſe, *&c.* for malitiouſly impleading and cauſing the Plaintiff to be *excommunicated* in the Spiritual Court, and that he was taken upon *Excom. Cap.* and impriſoned until he was abſolved; upon Not guilty pleaded the Plaintiff had a Verdict, it was inſiſted in Arreſt of Judgment, that this Action would not lie for ſuing in a * Spiritual Court, tho' without Cauſe; but adjudged, that it would, for where there is a Citation *ex officio*, and 'tis proſecuted *malitiouſly* without Cauſe, the Party ſhall have his Action, the rather, becauſe, if acquitted, he can have no *Coſts* in that Court. 1 *Vent* 87. *Hocking* verſus *Matthews.* See *Hob. Walter* verſus *Freeman.* See *Low* verſus *Beardmore.* 1 Lev. 292. Sid. 463. * Antea 3, 29.

39. Caſe for ſuing the Plaintiff in an Action of Debt for 600 *l.* and for *falſly and malitiouſly* affirming to the Bailiff, that the Plaintiff owed him 600 *l.* by Reaſon whereof the Bailiff inſiſted upon extraordinary Bail *ad damnum, &c.* The Plaintiff had a Verdict, and the Judgment was affirmed. 1 *Mod.* 4. *Daw* verſus *Swaine.* 1 Lev. 275. 1 Sid. 423. Raym. 176.

40. *Caſe, &c.* againſt two Attornies and two Solicitors for proſecuting a Cauſe againſt the Plaintiff in an *inferior Court*, *falſo & malitioſe*, knowing that there was no Cauſe of Action; and alſo for that they ſued the Plaintiff in another Court, knowing him to be an Attorney of *C. B.* and privileged there, adjudged no Cauſe of Action; for if an Attorney ſue for a Debt which he knows is releaſed, and tho' he was a Witneſs to the Releaſe, yet an Action will not lie againſt him, becauſe he Acts for another, and in the Way of his Profeſſion; and for ſuing an Attorney in an inferior Court, knowing him to be privileged in *C. B.* is not actionable, becauſe no Man can tell whether he would inſiſt on his Privilege, or not. 1 *Mod.* 209. Antea(D) 32. S. C.

41. Caſe, *&c.* for malitiouſly *indicting and proſecuting the Wife for Felony*, of which ſhe was *acquitted*, in the Declaration the Indictment was recited *continen' materiam ſequen'*, and in the Recital of the Goods therein mentioned to be ſtolen, it was *Valoris* ſo much, whereas in the Indictment it ſelf it was *ad Valentiam*; it was ruled, that if the Plaintiff had undertaken to ſet forth the Indictment *in hæc verba*, this had been a fatal Exception, but that *Valoris* and *Valentiæ* were the ſame in Subſtance, and ſo it was *materia ſubſequens*; it was ruled, that the Plaintiff ought to prove a Bill of Indictment exhibited, and that it was found upon the Oath or Procurement of the Defendant; 'tis true, his Name was *endorſed* on the Indictment, but that is no Part of the Record, nor any Proof that he was ſworn to it; then as to the Defendant's Defence, he muſt prove that there was a Felony committed, for without it he had no probable Cauſe to proſecute the now Plaintiff, and here, becauſe no Body was preſent when the Felony was committed but the Defendant's Wife, and ſhe could not be a Witneſs for her Husband, *Holt* Ch. Juſt. allowed, that the Oath which ſhe made againſt the Plaintiff, upon the Trial of the Indictment againſt him, might be given in Evidence to prove a Felony committed. *Mod. Caſes* 216. *Johnſon* verſus *Browning.*

42. Caſe, *&c.* for that the Defendant cauſed him (the Plaintiff) to be *indicted for a common Treſpaſs*, and of which he was acquitted: *Et per Curiam* the Action will lie, for the Charges and Expences which the Plaintiff ſuſtained in being proſecuted, which the *Acquittal* proves to be falſe, and the *Indictment* proves to be *malitious*; 'tis true, it may not be ſo where the Indictment is for a *criminal Matter*, but this being in the Caſe of a *common Treſpaſs*, the Proſecutor of the Indictment might have brought a Civil Action and have recovered Damages; therefore, tho' there might be a probable Caſe, yet after an *Acquittal* it ſhall be taken to be malitious. 2 *Mod.* 306. *Anonymus.*

43. *Caſe, &c.* in which the Plaintiff declared againſt the Defendant for proſecuting him (the Plaintiff) in the Sheriffs Court of *London*, when he had no Cauſe of Action ariſing within the Juriſdiction; upon Iſſue joined the Parties went to Trial, and the Plaintiff had a Verdict: This was an Action brought in the *Sheriffs Court*, for *Rent of an Houſe in the Country*, and the Plaintiff coming to *London*, was arreſted and proſecuted as aforeſaid; it was inſiſted for the Defendant in Arreſt of Judgment, that tho' the Sheriffs Court had not an original Juriſdiction in this Caſe, yet when the Plaintiff came to *London*, that Court had a Juriſdiction over his Perſon; beſides, he might have pleaded to the Juriſdiction, or might have ſet forth in his Declaration, that he was held to unreaſonable Bail, and that might have been ſome Colour for an Action, but even in ſuch Caſe (*i. e.*) where a Man hath Colour of Action againſt the Defendant, and at the Trial it appears he hath none, that ſhall not entitle the Defendant to turn Plaintiff and bring an Action againſt the other, and for theſe Reaſons the Judgment was ſtayed. 4 *Mod.* 13. *Baugh* verſus *Killingworth.*

44. *Caſe, &c.* wherein the Plaintiff declared, that he being a Man of Credit and Repute, and that the Defendant *Colore legis*, deſigning to oppreſs and impriſon him, did *malitiouſly, and without Cauſe*, procure an Action to be entered againſt him in the Sheriffs Court for 180 *l.* and obtained Judgment, and took him in Execution, when in Truth he never appeared to that Action, by Reaſon whereof he was diſcredited, ſo that ſeveral Perſons charged him with Actions; and this he laid to his Damage of 500 *l. &c.* 1 *Lutw.* 67. *Lloyd* verſus *Street.*

45. *Caſe, &c.* in which the Plaintiff declared, that he was *Lord Mayor of London*, and that he ought to attend that Office for the better Government of that City, and that the Defendant being one of the Commonalty of the ſaid City, and under the Government of the Plaintiff, proſecuted a *Capias* againſt him, without any Cauſe, directed to the *Coroner*, who arreſted him by Vertue thereof, and kept him in Cuſtody ſix Hours, and this he laid to his Damage of 1000 *l.* 1 *Lutw.* 68. *Pritchard M.l.* verſus *Papillion. Paſch.* 36 *Car.* 2.

46. Caſe,

5 Mod. 394. * Antea 18. * Poſtea pl. 36.

46. Caſe, &c. for *falſly and malitiouſly*, and without any probable Cauſe, *indicting* the Plaintiff for a *Riot*, of which he was afterwards * *acquitted* by Verdict, &c. upon Not guilty pleaded the Plaintiff had a Verdict in *C. B.* and upon a Writ of Error in *B. R.* it was objected, that if this Action ſhould lie, it would * diſcourage all Proſecutions; but adjudged, that there is a Difference between Proſecutions in *Civil Actions* and upon *Indictments*, for in the one Caſe the bringing the Action is not actionable, tho' the Plaintiff hath no Manner of Right, becauſe in Civil Actions the Plaintiff either complains for an Injury done, or aſſerts a Right, and if 'tis found againſt him, then he is liable to *Coſts*; 'tis true, upon ſome *ſpecial collateral Injury the Action lies*, as where the Plaintiff hath cauſe of Action for a ſmall Sum, or no Cauſe of Action at all, and yet takes out a Writ in a very great Sum, on Purpoſe that the Defendant may be impriſoned for Want of *Bail*, there an Action will lie, but he muſt not declare generally, that the Defendant ſued him *malitiouſly, and without any Cauſe*, &c. *per quod*, he put the Plaintiff to great Charge, but he muſt ſhew the Injury ſpecially, as where he owed only 100 *l.* and the Defendant ſued him for 500 *l.* and to hinder him from Bail, affirmed to the Sheriff that 500 *l.* was due, *per quod* he was impriſoned for Want of Bail; but 'tis otherwiſe in the Caſe of a malitious Proſecution upon an *Indictment*, for there the Action will lie, if the Plaintiff is damnified in his *Perſon*, as by *Impriſonment*, in his *Reputation*, as by *Scandal* in his *Property*, as by putting him to *Expences*, and this, tho' the Indictment is inſufficient, or tho' * *Ignoramus* is found. 1 *Salk.* 13. *Savill* verſus *Roberts*. See *Sid.* 424. 1 *Saund.* 228. See *Yelv.* 15. 3 *Cro.* 378. See *Sid.* 46. *Lutw.* 122. *Style* 379. See *Hill.* 12 *Annæ*, *Rot.* 326. *Jones* verſus *Gwynn.*

*Holt *Ch. Juſt. was of Opinion in* Savil's *Caſe, that the Action would not lie unleſs the Bill was found, becauſe, if 'tis not found, the Party is not damnified.* 5 Mod. 410.

47. *Caſe*, &c. for that the Defendant, by Colour of meſne Proceſs, cauſed the Plaintiff to be arreſted, and tho' he offered a common Appearance, yet held him to *Bail*, where *by Law, Bail is not required*; upon Not guilty pleaded the Plaintiff had a Verdict, but in Arreſt of Judgment the Court held, that the Declaration was ill, for the Plaintiff ought to ſhew that he owed the Defendant ſo much, who took out a Writ for ſo much more than was owing, on Purpoſe to hold him to Bail; and as to the Objection, that this Writ is ſeldom returned; the Court upon a Motion will make a Rule on the Officer to return his Writ, but the original Action muſt be determined before this Action is brought. 1 *Salk.* 15. *Robins* verſus *Robins*. 2 *Salk.* 727. *the Pleadings.*

Poſtea 50. Mod. Caſes 26.

48. Caſe, &c. the proſecuting the Plaintiff upon a falſe and malitious Indictment for *Barretry*, whereof he was *Legitimo modo acquietatus*; upon Not guilty pleaded it appeared at the Trial, that the Plaintiff was no otherwiſe acquitted than by a *Nolle proſequi*, and this being made a Point for the Opinion of the Court, it was adjudged that this Evidence would not ſupport the Declaration, becauſe the *Nolle proſequi* was only a Diſcharge as to the Indictment, but no Acquittal of the Crime. 1 *Salk.* 21. *Goddard* verſus *Smith*. 2 *Salk.* 767. *the Pleadings.*

Antea 49.

49. Adjudged, that a Diſcharge by *Nolle proſequi* upon an Indictment, is not ſufficient to maintain an Action on the Caſe for a malitious Proſecution. 2 *Salk.* 456. *Goddard* verſus *Smith.*

(H)

For Miſfeazance, Nonfeazance, and Negligence. Poſtea (T) per totum. *Toll.* (A) 20.

1. CASE, for that *B. G.* was *excommunicated*, and the Inſtrument was delivered to the Defendant, who was Curate of the Pariſh where *B. G.* lived, in order to publiſh it in the Church, and that he malitiouſly raſed out the Name of *B. G.* and put in the Name of the Plaintiff, and read it in the Church, by Reaſon whereof he was forced to abſent himſelf from Divine Service, and to be at the Expence to procure a Diſcharge; it was objected, that this Action would not lie, becauſe the Matter was *ſpiritual*, but adjudged, that tho' the Excommunication and the Denouncing it was ſpiritual, yet the Raſing the Inſtrument was the Offence, and that is temporal. *Cro. Eliz.* 838. *Kenton* verſus *Wallenger.*

2. *Caſe*, &c. in which the Plaintiff did not declare upon the Cuſtom of the Realm, ſafely to keep Fire, &c. but that the Defendant ſtanding at his Door, ſhot at a Fowl, and fired his Neighbour's Houſe, for which the Action was brought, and adjudged good, but it had not been good; if he had declared on the Cuſtom. *Cro. Eliz.* 10.

Poſtea 13. S. P.

3. *Caſe*, &c. for that the Plaintiff brought a *Writ of Entry* againſt *B. G.* returnable *Octab. Mich.* and delivered it to the Defendant, who was then *Under-Sheriff*, to execute *in forma juris*, and gave him a Fee, who ſummoned the ſaid *B. G.* but intending to deceive the Plaintiff, did not *return the Writ* at the Day, *per quod retardatus fuit* to recover the Lands, the Plaintiff had a Verdict; it was inſiſted to ſtay the Judgment, that the Action ought to be brought againſt the *High-Sheriff* and not againſt his *Under-Sheriff*; but adjudged, that the Action is well brought againſt the *Under-Sheriff*, for 'tis Imbezilling the Writ. *Cro. Eliz.* 175. *Marſh* verſus *Aſtry*. 1 *Leon.* 146. *S. C.*

4. A *Cuſtom* was laid by the Lord of a Manor, that *all the Reſiants and Inhabitants* there had uſed to grind at his Mill, and that the Defendant being an Inhabitant there, had built a Mill contrary to the Cuſtom; now, tho' the Cuſtom was laid generally againſt *all the Inhabitants*, yet

'tis good, becauſe ſuch a *Preſcription* by Way of *Tenure* had been good, and if ſo, *a fortiori*, 'tis good by Way of Cuſtom. 2 *Bulſt.* 195. *Hix* verſu *Gardner.*

5. *Caſe*, for that the Defendant being a Surgeon had *undertaken* the Cure of the Plaintiff's *Servant*, who was bruiſed by a Cart, and that he was not only careleſs in the Cure, but applied unwholſome Medicines, *per quod ſervitium amiſit* for one Year; adjudged that the Action lay, becauſe the Defendant had *undertaken the Cure.* 2 *Bulſt.* 332. *Everard* verſus *Hopkins.*

6. *Caſe*, for that the Defendant *tam negligenter & improvide cuſtodivit ignem*, that the Plaintiff's Houſe was burnt; upon Not guilty pleaded it was found, that the Plaintiff was only * *Tenant at Will*; adjudged, that at Common Law no Action lay againſt *Tenant at Will, or for Years, for permiſſive Waſte*, but for voluntary *Waſte* 'tis otherwiſe. 5 *Rep.* 13. *Counteſs of Salop's* Caſe. * Poſtea 35.

7. If one is bound to repair a *Sea-Bank*, and the Danger is become inevitable thro' his Negligence, or if he is not able to repair it, by Reaſon whereof other Perſons are charged to repair it, in ſuch Caſe each of them may have an Action on the Caſe againſt him who ought to repair it, and recover Damages according to their Loſs. 10 *Rep.* 139. *Keighly's* Caſe.

8. *Caſe*, *&c.* in which the Plaintiff declared, that the Defendant took his (the Plaintiff's) *Gelding* to depaſture, at 2 *s. per* Week, and that he (the Defendant) was to keep the *Gelding* ſafely, and to redeliver him to the Plaintiff when he ſhould be thereunto required, but that he had kept him ſo negligently that he was taken away by Perſons unknown; upon a Demurrer to this Declaration, the better Opinion was, that the Action would lie, it being upon the *Negligence and the Special Promiſe* of the Defendant, *&c.* but that the Plaintiff ought to alledge a *Requeſt* for the Delivery, and likewiſe to alledge, that the Horſe was ſtrayed or loſt. *Moor* 543. *Moſſe* verſus *Foſſet.*

9. The Plaintiff, *Markham*, entered into a Recognizance with *Sir Francis Willoughby*, to one *Tracy*, and for the Debt of the ſaid *Sir Francis*, who, together with one *Fox*, his Servant, entered into a Bond to *Markham*, to ſave him harmleſs, *&c.* in which the Recognizance was recited, but there was a *Blank* left for the *Chriſtian Name* and *Dwelling-place* of the ſaid *Tracy*, which after the Sealing of the bond, and without the Aſſent of the Plaintiff *Markham*, was filled up by the Defendant *Gomaſton*, by Reaſon whereof the ſaid Bond was void, and thereupon the Plaintiff brought an Action on the Caſe againſt the Defendant, having before brought an Action of Debt againſt *Fox* upon this Bond; and this Matter being proved at the Trial upon the Bond he was nonſuited, and after a great Debate, adjudged that this Action on the Caſe would lie againſt the Defendant for *filling up this Bond after it was ſealed.* *Moor* 547. *Markham* verſus *Gomaſton*. *See* Bonds. (I) 3. *S. C.* Cro. Eliz. 626.

10. A Man had two Cloſes adjoining Time out of Mind, and he ſold one of the Cloſes to *W. R.* the Queſtion was, who ſhould repair and make the *Fences*, the Court was divided, (*viz.*) two Judges, that the Vendor ſhould do it, and two other Judges that the Vendee ſhould. *Moor* 775. *Doyly* verſus *Drake.*

11. *Caſe* againſt an *Apparator*, who having a Citation againſt the Plaintiff, returned, that he had ſummoned him, when in Truth he had not, by Reaſon whereof the Plaintiff was *excommunicated*; adjudged, that the Action would lie, and ſo it will againſt an *Archdeacon* for refuſing to induct a Clerk. *Moor* 835. *Pool* verſus *Godfrey.*

12. *Caſe*, *&c.* in which the Plaintiff ſet forth a *Cuſtom*, that all the Inhabitants in certain antient Meſſuages held of the *Biſhop of Salisbury*, in that City, uſed to grind *all the Corn* which they ſpent in their Houſes *or ſold*, at certain Mills called the *Biſhops Mills*, *&c.* and not elſewhere, without Leave of the Biſhop, and derived a Title to himſelf, under a Leaſe of thoſe Houſes made to him, *Anno* 11 *Jac.* and alledged, that the Defendant at ſeveral Times, *from* 2 *Jac. to* 12 *Jac.* had * ground his Corn elſewhere, *&c.* the Plaintiff had a Verdict, but could never get Judgment, becauſe the *Cuſtom* was unreaſonable for a Man to *grind all his Corn* at the Mills, *&c. which he ſhould ſell*, beſides, Damages were aſſeſſed for not bringing his Corn to be ground at the Mills ſeveral Times, from the *ſecond Year* to the twelfth Year of King *James*, when the Plaintiff's Leaſe commenced in the 11th Year of that Reign. *Moor* 887. *Harbin* verſus *Green.* Hob. 189. * Poſtea 35.

13. *Caſe*, *&c.* againſt a *Bailiff of a Liberty*, ſetting forth, that a Warrant upon a *Fi. fa.* was directed to him by the Sheriff, to levy a Debt at the Suit of the Plaintiff, and that the Defendant had levied the Money and concealed the Warrant, and made no Return thereof; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Action ought not to be brought againſt an *Under-Bailiff* but againſt the *Sheriff*, for even an *Under-Sheriff* ſhall not be charged for not *returning a Writ*; which is very true, where there is no perſonal Wrong ſuppoſed to be done by him, but in the principal Caſe the *Bailiff* is charged with a *perſonal Wrong* by concealing the Warrant after the Money was levied, therefore the Action lies againſt him. 1 *Roll. Rep.* 78. *Bell* verſus *Catesby.* Antea 3. S. P.

14. *Caſe* againſt a *Bargeman*, who juſtified, for that there were ſeveral Paſſengers in his Barge, and a ſudden *Tempeſt* ariſing, all the Goods in the Barge were thrown over-board to ſave the Lives of the Paſſengers, amongſt which the Goods of the Plaintiff were thrown over, and that he had not any Notice that there was *Money in the Pack*; adjudged, that the Action would not lie, becauſe what the Owner of the Barge did in this Caſe, was occaſioned by the *Act of God*, and in Defence of their Lives. 1 *Roll. Rep.* 79. *The Caſe of Graveſend Barge.*

15. Caſe againſt the Defendant for making a *falſe Affidavit* in Chancery, by Reaſon whereof he was damnified to ſuch a Sum; there was a Verdict for the Plaintiff, and Damages to 300 *l.* it was objected in Arreſt of Judgment, that the Action would not lie, but that the Plaintiff ought to take 2 Roll. Rep. 197. Poſtea 34. S. P.

take his Remedy by Indictment; for where a Man is compelled to give Evidence, if 'tis falſe, he ſhall not be puniſhed by an Action on the Caſe: *Et per Curiam*, the Judgment was ſet aſide. 2 *Roll. Rep.* 195. *Ayre* verſus *Sedgwick.*

16. Caſe, *&c.* for Taking away a *Box with Writings*, the Plaintiff had Judgment in an *inferior Court*; and upon a Writ of Error brought, the Error aſſigned was, that the Plaintiff in his Declaration had made no *Title* to the Box, neither did he ſet forth that it was *locked*, *ſealed*, or *nailed*, nor the Quality of the Writings, whether *Bonds*, Releaſes, or other Deeds, or Evidences in particular, and for theſe Reaſons, amongſt other, the Judgment was reverſed. *Godb.* 370. *Holmes* verſus *Wingreeve.* *Poſtea* Jurors. (B) 1. *S. C.*

17. *Caſe*, *&c.* in which the Plaintiff declared, that he was poſſeſſed of ſuch Goods in *London*, and that in Conſideration of 2 *s.* paid by him to the Defendant at *London*; he promiſed, that if the Plaintiff would deliver the Goods to the Defendant, he would carry them aboard ſuch a Ship, and averred, that he did *deliver the Goods* to the Defendant, but that he had not carried them aboard the Ship; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was objected in Arreſt of Judgment that the Declaration was ill, becauſe the Plaintiff did not ſhew *when and where* he delivered the Goods to the Defendant, but only *generally, that he did deliver them*; adjudged, that it need not be ſhewed preciſely, becauſe 'tis only an *Inducement* to the Promiſe. *Paſch.* 3 *Car. Godb.* 41. *Mole* verſus *Carter.*

18. *Caſe*, *&c.* wherein the Plaintiff declared, that he lent the Defendant an Horſe to ride from *London* to *Exceſter*, and there to deliver it to the Plaintiff, which the Defendant ſo abuſed it in riding that it was of little Value, and that he refuſed to deliver it at *Exceſter, but converted it to his own Uſe*; upon Not guilty pleaded, the Plaintiff had a Verdict, it was objected that theſe Actions ought not to be joined, which Objection was not allowed, becauſe it was after a Verdict; but my *Lord Hobart* was of Opinion, that the Defendant might have demurred, becauſe it was double. *Cro. Car.* 20. *See* Joint Action. (D) 14. *S. P.*

Cro. Car. 187. 19. *Leſſee for twenty Years* made an Under-leaſe to *T. S.* for one Year, who after the End of the Year, and before the firſt Leſſee re-entered, took up the *Planks* and other Things which were *fixed to the Freehold*, and the Leſſee for twenty Years brought an Action on the Caſe againſt him, and adjudged that it would lie. *W. Jones* 224. *Weſt* verſus *Trefuſis.*

Cro. Car. 325. 20. *Caſe*, *&c.* in which the Plaintiff declared, that he was poſſeſſed of an Houſe, *&c.* which had three Windows on the North-ſide *& adhuc poſſeſſionatus exiſtit*, and that the Defendant was poſſeſſed of an Houſe and a *void Piece of Ground* adjoining to the Plaintiff's Houſe on the North-ſide *& adhuc poſſeſſionatus exiſtit*, and that his (the Plaintiff's) *Lights were antient Lights*, Time out of Mind; and that the Defendant had built *ſuper vacuam peciam terræ*, and thereby ſtopped his (the Plaintiff's) Lights; upon Not guilty pleaded the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that the Declaration was repugnant, for the Ground could not be *Vacua*, ſince it appears that the Defendant built upon it: *Sed per Curiam*, that Part of the Declaration ſhall be rejected as *Surpluſage*; beſides, Part of it might be ſtill *Vacua* and not built on, and ſo it ſhall be intended. *W. Jones* 326. *Nerrers* verſus *Seabourne.*

Godbolt 329. Tithes (R) 10. 21. *ſſ. Caſe againſt the Parſon*, for that the Plaintiff laid out fifteen Cheeſes for him for *Tithes*, and the Defendant ſuffered them to remain in his Houſe without taking them away; adjudged, that when the *Tithes* are ſet forth, the Property is altered and in the Parſon, and if he ſuffer them to remain on the Land an Action lies againſt him. *Ley* 69. *Wiſeman* verſus *Denham.*

22. *ſſ. Caſe* againſt the Defendant *for procuring a Commiſſion of Bankruptcy* againſt him, by Vertue whereof *he broke open his Shop and took away his Goods*, by which he was *diſcredited in his Trade*, the Defendant pleaded a Recovery in *Treſpaſs* for Taking the ſame Goods, *&c.* but adjudged, that the Action is well brought, becauſe 'tis for Damages ſuſtained in his Trade, and the Breaking open the Shop and Taking the Goods is only an *Inducement* to the Action. *Style* 3. *Watſon* verſus *Norbury.*

23. *Caſe*, in which the Plaintiff declared, that the Defendant being a *Coachman*, did by careleſs Driving his Coach break a Pipe of Wine of the Plaintiff's which lay in the Street, by which *much Wine* run out and was loſt, and the Defendant being arreſted for the ſame, he promiſed, that if the Plaintiff would *forbear* to proſecute him for the ſaid Wine, he would pay him as much as he was damnified; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had not averred how much the Wine was worth which was thus ſpilt, and therefore the Defendant could not tell what Satisfaction to make, neither did the Plaintiff alledge that he required the Defendant to make Satisfaction; but adjudged, that by the Declaration it appears, that the Plaintiff had Damage done to his Wine, and that the Defendant had not ſatisfied for the Damages, or made any tender of Amends; and as to the Value, that was now made certain by the Jury, and the Defendant is bound to take Notice of what Damage he had done. *Style* 458. *Fowke* verſus *Preſcott.*

24. *Caſe*, *&c.* in which the Plaintiff declared, that the Defendant in ſuch a Pariſh *quendam Canem ad mordendum homines conſuetam, knowingly did keep*, after a Verdict and 100 *l.* Damages for the Plaintiff, it was objected in Arreſt of Judgment that the Declaration was ill, becauſe the Plaintiff had not ſet forth, that the Defendant *did know* the Bitch was accuſtomed to worry Men, for the Word *Knowingly* in this Caſe muſt relate to the *Keeping the Bitch*, (*viz.*) Knowingly did keep; and ſo is the Caſe, *Cro. Car.* 350, 487. *Kinion* verſus *Davis*, in Point: But adjudged, that it would be impertinent that the Word *Knowingly* ſhould relate to the *Keeping* the Bitch, becauſe he who keeps it muſt certainly know it; and as to the Caſe in *Cro. Car.* the Rule was given with-

out any Debate, that the Defendant ſhould have Judgment *niſi cauſa, &c.* ſo that it might be the Negligence of the Plaintiff, that the Rule ſtood. 2 *Sid.* 127. *Cropper* verſus *Matthews.*

25. *Caſe* againſt the Defendant *Pagett*, the *Cuſtos Brevium & Cuſtos Rotulorum* of *B. R.* in which the Plaintiff declared, that he had obtained Judgment againſt *W. R.* which by the Negligence of the ſaid Maſter was razed; but adjudged, that ſince the Clerk of the Errors, the Clerk of the *Niſi prius* Office in *Middleſex*, and the Pronotories Clerks, as well as their Maſters, have Liberty to enter into their Maſter's Office, and to intermeddle with the Rolls, which are more than 200 Bundles, the *Maſter* ſhall not be anſwerable for any Thing which may happen to the Rolls, unleſs Negligence is proved upon him. *Sid.* 77. *Herbert* verſus *Pagett.* 1 Lev. 64. Raym. 52. Poſtea Amendment, (A) 23. S. C.

26. In a Special Verdict the Caſe was, *ſſ.* The Leſſor built a *new Houſe* on Part of his Ground, and then made a Leaſe of it to *W. R.* and the Reſt of his Land he leaſed to *W. W.* who put Logs and other Things on the Lands ſo leaſed to him, and *darkened the Houſe of W. R.* for which he brought this Action on the Caſe, in which theſe Points were adjudged, *ſſ.* If the Leſſor lets Part of his Ground to one who builds a Houſe upon it, and lets other Part of his Ground to another, who digs a Cellar ſo near the Wall of the new built Houſe, that the Wall falls down, no Action lies againſt him, for which ſee *Piggot and Surey's Caſe*; That if I build a new Houſe upon my own Ground, and then let both the Houſe and Land, (*viz.*) the Houſe to one and the Land to another; in ſuch Caſe, if the Leſſor, or any claiming under him, ſtop up or *darken the Windows of the new Houſe*, and Action lies againſt him; but if a third Perſon has Land contiguous to the *new Houſe*, he may build Houſes upon his Land and darken the Lights of the new built Houſe, but if it had been an * antient Houſe he could not. *Sid.* 167. *Palmer* verſus *Fleſheers.* 1 Lev. 122. * *See* pl. 50. contr.

27. Caſe, *&c.* upon a *Wager*, whether the eldeſt Son of a Knight, or the Grandchild of an Elder Knight ſhould take Place, and this to be determined by the Judgment of an *Herald*, who gave Judgment for the Grandchild of the Elder Knight, *unde actio accrevit, &c.* the Plaintiff had Judgment in *C. B.* and upon a Writ of Error brought in *B. R.* that Judgment was affirmed. *Raym.* 5 *Newce* verſus *Parker.*

28. *Aſſumpſit, &c.* wherein the Plaintiff declared, that the Defendant in Conſideration, that the Plaintiff would give him 5 *s.* he would give the Plaintiff 40 *s.* if ever he played at a Game called *Even and Odd* for Money, or *Wine*, and averrs, that he gave him 5 *s.* and that the Defendant, *&c.* played at the Game for Money, *unde actio accrevit, &c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that there was not any ſuch Game as *Even and Odd*; but adjudged, that it was a good Conſideration to reſtrain young Men from Play, and ſo the Plaintiff had Judgment. *Raym.* 13. *Johnſon* verſus *Samworth.*

29. *Aſſumpſit, &c.* in which the Plaintiff declared, that if he would make it appear, that the Husband of the Defendant was in his Life-time indebted to him (the Plaintiff), then ſhe would pay the Money, and averred, that he had been at *all Times ready to make it appear* that the Husband owed ſo much Money to the Plaintiff: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that here was no *good Conſideration* to raiſe this Promiſe, becauſe the Defendant was neither Executrix or Adminiſtratrix to her Husband; but adjudged, that the Making the Debt appear to be due was Trouble and Pains to the Plaintiff, and therefore a good Conſideration. *Raym.* 32. *Traverſe* verſus *Meers. Sid.* 57. *S. C.*

30. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration of ſo much Money paid by him to the Defendant, he promiſed to deliver ſo many *Livers* within a Fortnight, *&c.* which he had not done: The Defendant pleaded, that within that Fortnight (*viz.*) on ſuch a Day, he delivered 25 Livers, and then the Plaintiff diſcharged him (the Defendant) to deliver any more until farther Order from the Plaintiff, who had not given any farther Order; and upon Demurrer, this was adjudged a good Plea, becauſe a Promiſe, before 'tis broken, may be diſcharged by Parol. *Raym.* 42. *Cook* verſus *Newcomb.* See *Cro. Car.* 283. *Lungeen* verſus *Stokes.*

31. *Aſſumpſit, &c.* in which the Plaintiff declared ſpecially, as an *Attorney* for ſeveral *Fees*, and Money laid out in ſeveral Suits for the Defendant's Teſtator, and that he demanded the Money, and that neither the Teſtator or the Defendant had paid, *&c.* The Defendant pleaded the Statute 3 *Jac. cap.* 7. and that the Plaintiff had not given the Teſtator, or to this Defendant, any Bill of Charges, before the Writ brought, according to the Statute; and upon Demurrer to this Plea, it was adjudged a good Plea. *Raym.* 245. *Brookes* verſus *Hague.*

32. *Caſe, &c.* in which the Plaintiff declared, that he was poſſeſſed of a *Hoy* loaded with Goods, and at Anchor in the River *Thames at Weſt-Thorock* in a convenient Place, and that the Defendant knowing thereof, and being Maſter of a Ship called the *Hound*, and there ſailing in the ſaid Ship in the ſaid River, did ſo negligently govern the ſaid Ship, that *volenter ruebat* on the Plaintiff's *Hoy* floating at Anchor, as aforeſaid, loaded with Goods, and broke and drowned it *ad damnum, &c.* Upon Not guilty pleaded, the Jury found that *quoad* the negligently governing the Ship, and ſo in the very Words in the Declaration, that the Defendant is guilty, and aſſeſs Damages to 50 *l.* and *quoad reſiduum de præmiſſis* Not guilty, and Judgment as to that *quod præd'* the Plaintiff *ſit in miſericordia pro falſo clamore*; and upon a Writ of Error brought, the Error aſſigned was, that there was no *Reſiduum* of which the Defendant could be found guilty, therefore the Judgment againſt him *pro falſo clamore*, is not good, for which Reaſon the Judgment was reverſed. *Raym.* 390. *Muſtard* verſus *Harnden.*

33. Caſe, *&c.* in which the Plaintiff declared, that he being an Officer in the Cuſtoms, the Defendant made a * *Falſe Affidavit* of him in *Chancery* concerning ſome Misbehaviour in his Office, and afterwards *petitioned* the Commiſſioners of the Cuſtoms againſt him, and thereupon cauſed him to be turned out; after a Verdict for the Plaintiff it was inſiſted, that an Action would not lie for making a *Falſe Oath*, nor for the *Petition*, becauſe it was done in a Courſe of Juſtice, but adjudged, that 'tis not founded on either of thoſe Facts, which are only *Inducements* to prove the *malitious* procuring him to be turned out, and the Jury found, that it was *falſly and malitiouſly* done. 1 *Lev.* 119. *Cox* verſus *Smith.*

* Antea 15. S. P.

1 Salk. 19. 34. *Caſe* againſt the Defendant upon the Cuſtom of *England* for ſafe *keeping his Fire, &c.* The Jury found a Special Verdict, that the Plaintiff was ſeiſed, *&c.* of ſix Stables, and demiſed one of them to the Defendant *for a Week* for 8 *s.* and ſo from *Week to Week*, as long as both Parties ſhould agree, and demiſed the other five Stables to other Perſons for divers Terms yet to come, by Vertue whereof they were poſſeſſed, and ſix Weeks afterwards a Fire, by the Negligence of the Defendant, began in the Stable demiſed to him, and burnt down the ſame and the other five Stables, and if for the Plaintiff, *&c.* then they aſſeſs Damages ſeverally, *(viz.)* 15 *l.* for the Stable demiſed to him, and 80 *l.* for the other Five; and upon arguing this Special Verdict, the Plaintiff had Judgment for the 80 *l.* and the Defendant had Judgment for the 15 *l.* becauſe no Action lay againſt him, for the Demiſe to him of this Stable could be for no longer *than three Weeks*, and for the Reſidue he was * *Tenant at Will*, againſt whom no Action lay for any *negligent Waſte*. 5 *Rep.* 13. *The Counteſs of Shrewsbury's* Caſe: But as to the other, tho' they were in Leaſe to other Perſons, yet the Action is well brought by the Plaintiff, for the Damages done to his Inheritance in * Reverſion, and the particular Tenants might alſo have ſeveral Actions for the Damages done to their Poſſeſſion. 3 *Lev.* 359. *Panton* verſus *Itham.* See *pl.* 52. *S. P.*

* Antea 6. S. P.

* *See* Reverſion, (A) 1.

1 Lev. 27. 2 Saund. 115. 35. *Caſe, &c.* wherein the Plaintiff declared, that there were *four antient Mills* in the Manor of *H.* and that the Plaintiff was ſeiſed in Fee of *two of them*, and that *J. H.* was ſeiſed of the *other two*, and ſo lays a *Preſcription* in each for the Tenants of the Manor to grind *omne frumentum ſpent in their Houſes*, at the Mills of the one or the other, but that the Defendant had ſpent Corn in his Houſe which was not ground at either of the Mills; and upon Demurrer to this Declaration, it was inſiſted, that this Preſcription was * unreaſonable, becauſe a great deal of Corn which is proper to be ſpent in an Houſe, may not be proper to grind, therefore it ſhould not be to grind *omne frumentum* generally, but *omne frumentum triturandum & conſumendum* in their Houſes; adjudged, a material Exception. 1 *Vent.* 167. *Sir John Coriton & al'* verſus *Lithby.*

Antea 12. poſt. 46.

2 Vent. 25. 2 Lev. 50. 36. Caſe, *&c.* Againſt the *Lord Mayor of London, for refuſing a Poll* for the Office of *Bridg-Maſter*, when the Plaintiff and another were Competitors, and the Plaintiff averring, that he had the Majority, which the other denying, the Plaintiff deſired a *Poll, &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and in Error it was inſiſted for the Defendant, that the Action would not lie, becauſe it was incertain, whether the Plaintiff would have been elected, and he cannot bring an Action for *poſſible Damages*; but adjudged for the Plaintiff, becauſe the Defendant had deprived him of the Means by which it might appear whether he was elected or not; ſo the Judgment in the Common Pleas was affirmed, and afterwards, that Judgment was affirmed in the Exchequer-Chamber. 1 *Vent.* 206. *Sir Sam. Sterling* verſus *Turner.*

37. *Caſe, &c.* for that the Defendant, and the Tenants *and Occupiers* of ſuch a Cloſe adjoining to the Plaintiff's Cloſe, have Time out of Mind maintained the * *Fences*, and that from the 28*th of April to the* 25*th of May*, and after, the *Fences* lay open, and that the Plaintiff's Mare went through the Gap, and fell into the Ditch, *on the* 28*th of May*, and was drowned *in defectu fenſurarum.* Upon Not guilty pleaded, the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that this Preſcription was ill, becauſe it was laid in *Occupiers*, without ſhewing what Eſtate they had; but adjudged good, becauſe the Plaintiff is a Stranger to their Eſtate; but it had been otherwiſe, if the Defendant had ſo preſcribed. 1 *Vent.* 265. See *Bolus* verſus *Hinſtorke. S. P.*

* *See* Antea 10.

38. *Caſe, &c.* for that the Defendant being a *Taylor*, he (the Plaintiff) *retained* him to make a *Coat* well and artificially, and that the Defendant malitiouſly intending to abuſe and damnify the Plaintiff, made it *tam inepte, negligenter & inartificialiter*, that it became of no Value or Uſe to him (the Plaintiff) *ad damnum* 20 *l.* The Defendant demurred, for that the Plaintiff did not alledge, that he delivered him *any Materials*, that the Action might lie for Spoiling them, for otherwiſe it doth not appear that the Plaintiff had any Damage; beſides, he did not ſhew how, or in what Manner he ſpoiled the Coat, or what Defect there was in it, and this ought to be ſet forth, and ſo it was adjudged. 1 *Vent.* 268. *Beſt* verſus *Yates.*

2 Lev. 172. 39. Caſe, *&c.* for that the Defendant did *ride an unruly Horſe in Lincolns-Inn-Fields, &c.* which broke from the Defendant and run over the Plaintiff, and grievouſly hurt him, *&c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was inſiſted in Arreſt of Judgment, that it appears by the Declaration, that this happened againſt the Defendant's Will, and ſo *damnum abſque injuria*; but adjudged, that the Defendant was in Fault to bring an unruly Horſe into a Place where Miſchief might enſue by Reaſon of the Concourſe of the People; and that it had been adjudged an Action lay againſt a *Butcher*, who had made an Ox run from his Stall and gored the Plaintiff, and this was alledged in the Declaration to be in Default of penning him up. 1 *Vent.* 295. *Michael* verſus *Alleſtree. S. C.* See *Weaver* verſus *Ward.*

40. *Caſe, &c.* for that it was agreed between the Plaintiff and the Defendant, that he, (the Plaintiff) ſhould carry the Defendant's Timber from a certain Place to the Defendant's Houſe, and there deliver it *at ſuch Place as the Plaintiff ſhould appoint*; then he ſets forth, that on ſuch a Day, *&c.* he did carry it, *&c.* and was ready to deliver it, but the Defendant delayed to appoint a Place for the Space of ſix Hours, ſo that his (the Plaintiff's) Horſes being hot, *&c.* and ſtanding in the open Air, died ſoon after *ad damnum, &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment, for he had no Cauſe of Action, becauſe it was his Fault to let his Horſes ſtand abroad when they were hot, and ſince the Defendant did not appoint a Place, the Plaintiff might have brought an Action againſt him upon the Agreement, becauſe he had done all he was obliged to do. 1 *Vent.* 310. *Vertue* verſus *Bird.* See *the Caſe of Baily* verſus *Merritt.* 2 Lev. 196.

41. Caſe, *&c.* for that he kept a *Stage-Coach*, and got his Livelihood by carrying Paſſengers, and that Defendant ſpoke ſuch ſcandalous Words of his (the Plaintiff's) Wife, that reflected upon him and made him ſo rediculous, that no Body would ride in his Coach, and thereby *he loſt his Cuſtomers*; after a Verdict for Plaintiff, it was adjudged, that this Action did not lie, becauſe a *Stage-Coach-Man* could not have any Damage in his Employment by defaming his Wife; 'tis not like the Caſe of an *Innkeeper*, who brought an Action againſt the Defendant for proſecuting his Wife at the *Leet for a Scold*, and that ſuch Gueſts had abſented from his Houſe, becauſe that ill Quality of an Inn-keeper's Wife might make his Houſe troubleſome to his Gueſts; beſides, in this Caſe the Plaintiff had not ſet forth in Particular what Cuſtomers he loſt. 1 *Vent.* 348. and 14 *Car.* 2. C. B. *Lumley* verſus *Bodingſley.* *Raym.* 401. *Maſon* verſus *Jennings. S. P.*

42. Caſe, *&c.* for that the Plaintiff had Common in the Lands of the Defendant, *& habere debuit, &c.* Upon *Demurrer* to the Declaration, it was objected in *C. B.* that the Plaintiff had not ſet out any *Title* to the Common, either by Grant or Preſcription; but the Plaintiff had Judgment there, becauſe the Action was founded on the Poſſeſſion againſt a Wrong-Doer, and upon a Writ of Error brought in *B. R.* the ſame Matter was aſſigned for Error, but the Judgment was affirmed; and to make the Declaration good, there were theſe Caſes cited, (*viz.*) 2 *Cro.* 43, 122. *Dent* verſus *Olliver*, and *Cro. Car. Sands* verſus *Treſuſis, &c.* 1 *Vent.* 356. *Bound* verſus *Brooking.* T. Jones 148.

43. *Caſe, &c.* wherein the Plaintiff declared, that the *Provoſt and Scholars of King's College in Cambridge* were ſeiſed in Fee of a Meſſuage in *Granceſter*, and of 160 Acres of arable Land lying in the Common Fields of *Granceſter*, and that they, and *all thoſe whoſe Eſtate* they had in the ſaid Tenement, have Time out of Mind, *&c. libertatem faldagii* of all Sheep on the ſaid one Hundred and ſixty Acres, as aforeſaid, and depaſturing on the Common Fields *& territoria* of *Granceſter*, and then ſets forth a Leaſe made by them of the ſaid Meſſuage and 160 Acres, under which the Plaintiff claimed, ſetting forth, that he was *poſſeſſed*, and ſo brings his Caſe within the Preſcription: Upon Not guilty pleaded, the Plaintiff had a Verdict, it was objected againſt him in Arreſt of Judgment, that the Declaration was ill, as not ſetting forth a ſufficient Cauſe of Action, becauſe he did alledge, that the Defendant had not folded his Sheep on the 160 Acres, *ſicut debuit*; now it doth not appear what it was that the Defendant ought to do; for if it was to drive his Sheep to fold on the Land, then the Plaintiff ſhould have alledged, that it was the *Cuſtom* ſo to do, and that it was the Uſage for the Lord to provide *Hurdles*, and to prepare a *Fold* to receive them, for he is to do the firſt Act, and all this Matter cannot be implied by the Word *faldagium*, for that is only to have the Sheep folded on his Ground; therefore, for the Incertainty of that Word *ſicut debuit*, 'tis inſufficient, and ſo it was adjudged; 'tis true, where the Plaintiff declares upon his *Poſſeſſion* againſt a Wrong-Doer, 'tis good without ſetting forth a *Title*, and ſo is *Dent* and *Olliver*'s Caſe, where the Plaintiff declared for a Diſturbance in taking Toll, *ad Feriam ſuam ſpectan'*, and ſo is *St. John and Moody*'s Caſe; but in the principal Caſe *ſicut debuit* is not good, for the Reaſon before mentioned. 2 *Vent.* 138. *Dickman* verſus *Allen.*

44. *Caſe, &c.* for the Profits of an Office; it was ruled at a Trial at Bar, that in an Action of this Nature, 'tis not neceſſary to prove every particular Sum received by the Defendant; but 'tis good *Evidence* of the Damage received by the Plaintiff to ſhew, that the Profits of the Office are worth ſo much *Communibus Annis.* 2 *Vent.* 170. *Earl of Mountague* verſus *Lord Preſton.*

45. *Caſe, &c.* wherein the Plaintiff declared, that *John Specott* was ſeiſed in Fee of the Manor of *Torrington*, and of ſeven antient Water Corn-Mills, ſufficient to grind all the Corn of the Inhabitants within that Manor, *&c.* and that the Plaintiff was *Tenant at Will* of the ſaid Mills to the ſaid *Specott*, and *had & habere debuiſſet* the Toll of Corn ground at the ſaid Mills, and that all the Inhabitants of antient Meſſuages within the ſaid Manor, *de jure debuerunt molere*, their Corn at the ſaid Mills, or one of them, which they ſpend in their Houſes, and to pay Toll for the ſame; and that the Defendant lived in an antient Houſe there, and had built a Mill in the Manor, and had and did grind ſeveral Buſhels of Corn there, which he ſpent in his Houſe: Upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment, and upon a Writ of Error brought in the Exchequer-Chamber, it was inſiſted for the Defendant, that the Plaintiff had not ſet forth a *Title* to the Toll either by Cuſtom or Preſcription, for the Inhabitants of theſe antient Houſes to bring their Corn to the Mills, *&c.* and for grinding it there; but the Judgment was affirmed; for 'tis ſufficient in theſe Poſſeſſory Actions to alledge, that he *had and* 2 Saund. 115. Antea 12.

ought

ought to have the Toll, and that the Inhabitants, *&c.* ought to grind it there, *&c.* 2 *Vent.* 291. *Chapman* verſus *Flexman.*

1 Lev. 296. Raym. 195. 1 Mod. 69. 1 Vent. 98.

46. *Caſe, &c.* wherein the Plaintiff declared, that he was ſeiſed in Fee of the *Borough* of *Newton-Abbot in Devonſhire*, and of an *antient Market to be held every Wedneſday* in the ſaid *Borough* for the Buying and Selling all Manner of Goods, together with *Toll, Stallage, Piccage*, to the ſaid *Market* belonging; and that the Defendant *abſque aliquo legali Warranto ſive authoritate*, had erected another Market at *Aſhburton*, within ſeven Miles of *Newton-Abbot*, to be held on *Tueſday every Week*, and had continued the ſaid *New Market* from 20 *Octob.* 16 *Car.* 2. to the Time of exhibiting the Bill, by Reaſon whereof a great Quantity of Yarn, and other Goods, were ſold in the ſaid *New Market*, which otherwiſe would have been brought to the Plaintiff's Market, *ad grave nocumentum* to his Market, and by Reaſon thereof the Plaintiff loſt his Toll, *&c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and 60 *l.* Damages, and it was inſiſted for the Defendant in Arreſt of Judgment, that upon the Plaintiff's own ſhewing he could not be damnified, becauſe the Defendant's Market was held the Day before the Plaintiff's Market, and being on another Day, could be no Damage to him; but adjudged, that it being held the Day before, it muſt be a Damage to the Plaintiff, for 'tis a Sort of Foreſtalling his Market; 'tis true, this might be Doubtful, if the Defendant had a Grant to hold his Market on a *Tueſday*, but the Plaintiff having declared, that he held it *ſine aliquo legali Warranto ſive authoritate, (i. e.)* without any Title, either by Grant or Preſcription, *ad nocumentum* of an antient Market of the Plaintiff's, 'tis plain, that the Defendant was a Wrong-Doer, and therefore Judgment was given againſt him. 2 *Saund.* 173. *Yard* verſus *Ford.*

* *See* Sta. 6. Annæ cap. 13.

47. Caſe, *&c.* for *negligently keeping his Fire*, by Reaſon whereof the * Plaintiff's Houſe was burnt, *(viz.) in parietibus in partitionibus & in ornamentis, &c.* Upon Demurrer to this Declaration, it was objected, that it was incertain and too general, for Damages could not be given for *Walls and Ornaments* of an Houſe; but adjudged, that the Action was well brought for negligently keeping his Fire, and 'tis good without the *(viz.)* for the enumerating the Particulars which were burnt was only to aggravate the Damages, which in this Action may be divided, and given only for what is well laid in the Declaration. 5 *Mod* 181. *Littleton* verſus *Cole.*

48. Action *for practiſing Phyſick within ſeven Miles of London without Licence*: The Jury found a Special Verdict. *Iſſ.* That the Defendant was an *Apothechary*, and that *W. R.* being ſick ſent for him, who came, and ſeeing the Diſtemper, did without the Advice of any Doctor, and without any Fee for his own Advice, compound and ſell ſeveral Parcels of Phiſick, as proper for the Diſtemper, and took only the Price of his Drugs; the Queſtion was, whether this was *Practiſing Phiſick* within the Statute; adjudged, that Practiſing Phiſick conſiſts in judging the Diſeaſe and Conſtitution of the Patient, and the moſt proper Remedies for the Diſeaſe, and in directing the Application of ſuch Remedy; that the Buſineſs of an *Appothecary* is only to make and compound, and not to judge of the Deſeaſe, or the Remedy, ſo the Plaintiff had Judgment; but it was afterwards reverſed in the Houſe of Peers. *Mod. Caſes* 44. *College of Phiſicians* verſus *Roſe.*

2 Salk. 459. Poſtea (I) 15. * Antea 26.

49. Caſe, *&c.* for *Stopping the Plaintiff's Lights*, in which the Plaintiff declared, that he was poſſeſſed of ſuch a Meſſuage for a Term of Years, *& habuit, & habere debuit, ſuch Lights, &c.* The Queſtion was, whether this Declaration was good, without alledging that it was an *antient Meſſuage and antient Lights?* Adjudged, that where a Man builds * a Meſſuage upon Ground where none was built before, and this new built Meſſuage hath good *Lights*, and he grants a Leaſe of it to another, and afterwards builds himſelf upon a contiguous Piece of Ground, or lets it to another, who builds on it to the Nuſance of the *Lights* of the new Houſe, the Leſſee ſhall have an Action on the Caſe againſt the Builder, becauſe the Houſe was leaſed to him with all Eaſements which it then had; 'tis true, formerly the Way was to declare, of *antient Houſes* and *antient Lights*, but that is altered. *Mod. Caſes*, 116. *Roſewell* verſus *Prior.*

50. *Caſe, &c.* wherein the Plaintiff declared, that he was poſſeſſed of a Meſſuage for a Term of Years, *adtunc & adhuc ventur'*, and being ſo poſſeſſed, he leaſed it to the Defendant *for three Years*, who entered, *&c. (reverſione inde eidem quer' ſpectan')* and ſo negligently kept *his Fire* that the Houſe was bunt down; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that here was no *Reſiduary Intereſt* in the Plaintiff, for he might be poſſeſſed for a Term of Years, *then and yet to come*, and yet not ſo long as the *Term of three Years* leaſed to the Defendant; but adjudged, that this appeared to be an under Leaſe, and not an Aſſignment, and that the Defendant had a *Reſiduary Intereſt.* 1 *Salk.* 13. *Hicks* verſus *Downing.* 2 *Salk.* 723. *The Pleadings.* See 1 *Cro.* 187.

Placito 35. S. P. 48. S. P.

51. *Caſe, &c.* upon the Cuſtom of the Realm for negligently keeping *his Fire in clauſo ſuo*, by Reaſon whereof the Plaintiff's Corn was burnt in another Cloſe; after a Verdict for the Plaintiff, it was objected, that the Cuſtom extends only to the negligent Keeping Fire *in a Houſe*; but adjudged, that *Fire in his Cloſe* is as much as Fire in *his Houſe*; he made it, and muſt take care that it doth no Damage to his Neighbour; but if a ſudden Storm had happened, he might have given it in Evidence by Way of Mitigation of Damages. 1 *Salk.* 13. *Turbervill* verſus *Stamp.* 2 *Salk.* 724 *The Pleadings.*

2 Mod. 108. 5 Mod. 455.

52. *Caſe, &c.* againſt the *Poſt-Maſter-General* for Exchequer-Bills loſt out of a Letter delivered at the *Office in London*, wherein the Plaintiff declared, that the Defendants were *Poſt-Maſters-General*, conſtituted by Letters Patents by Vertue of the Statute 12 *Car.* 2. *cap.* 35. that they had Power to make *Deputies*, and to appoint Servants, and to take Security of them in the Name

and to the Uſe of the King, that this was granted to them with Fee of 1500 *l. per Annum*, that the Plaintiff encloſed Exchequer-Bills in a Letter directed to one *Jones at Worceſter*, which he delivered at the *Poſt-Office in London to one Breeze*, who was appointed by the Defendants to receive Letters, and had a Salary; that this Letter was opened *at the Office* by a Perſon unknown, and the Exchequer-Bills taken out, *&c.* upon Not guilty pleaded, all this Matter was found ſpecially, and three Judges held, that this Action would not lie, becauſe the *Poſt-Office* is for Intelligence and not for Inſurance, becauſe the Officer *Breeze* is liable, becauſe 'tis impoſſible that the Defendants ſhould ſecure all Letters, becauſe they are to execute this Office in ſuch diſtant Places, and by ſo many Hands; and laſtly, becauſe *Exchequer-Bills* are new Things, and the Office is not a Conveyance for Treaſure: But *Holt* Ch. Juſt. held, that the Action would lie, becauſe the Care of the Whole is committed to the Defendants, that the reſt are only their *Deputies and Servants*, and by Law they are anſwerable for them, whether the Truſt ariſe by the Common Law, or by any Statute; for what is done by the *Deputy* is done by the *Principal*, and 'tis his Act; 'tis true, *Breeze* is likewiſe chargeable, not as an Officer but as a Wrong-doer, beſides, in this Caſe the Defendants have a Reward of 1500 *l. per Annum*, which brings them within the Reaſon of *Inn-keepers*, *Hoymen*, *Carriers*, *&c.* who are bound to keep ſafely, and to anſwer all Neglects of thoſe whom they employ, and it would be hard to make the Plaintiff prove a particular Neglect amongſt ſuch a Multitude of Officers; 'tis true, *Exchequer-Bills* are new Things, but ſuch Things may be governed by old Laws, when they fall within the Reaſon of thoſe Things which were originally the ſubject Matter of thoſe Laws; however, by the Opinion of the other Three, the Defendants had Judgment. 1 *Salk.* 17. *Lane* verſus *Cotton & al'*. 2 *Mod.* 108. *the Pleadings*. *Antea* (A) 12 *S. C.*

53. Caſe, *&c.* in which the Plaintiff declared, that the Defendant promiſed to *take up a Hogshead of Brandy* in one Cellar and lay it down in another, and that he *tam negligenter* laid it down, *&c.* that it was ſtaved and the Brandy loſt; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that here was no *Conſideration*, for the Defendant was to have no *Reward*, 'tis true, where a Man undertakes to do a Thing without a Reward, an Action will not lie for *Nonfeaſance*, but if once he enters upon the Doing it; adjudged, that an Action lies for any *Misfeaſance* thro' his own Neglect or Miſmanagement, becauſe 'tis a *Deceit*, otherwiſe if the Misfeazance was by Accident; ſo where Money is delivered to pay over to another immediately, tho' the Party hath no Benefit, yet if he take the *Truſt* upon him, he is bound to perform it. 1 *Salk.* 26. *Coggs* verſus *Bernard*. 2 *Salk.* 733. *the Pleadings*.

54. *Caſe* for diſturbing him in the Office of a *Pariſh Clerk*, and hindring him to ſit in his *Seat*, *per quod* he loſt the Profits of his Office; upon a Demurrer to the Declaration it was objected, that this was a Service or Imployment and not an Office, or if it was, 'tis Eccleſiaſtical, becauſe of common Right the Parſon appoints the *Clerk*, and the Court will not intend a Cuſtom for the Pariſhioners to appoint a Clerk, unleſs 'tis pleaded, nor grant a *Mandamus* without an *Affidavit*, that he is appointed by the *Pariſhioners*; beſides, it doth not appear that any *Fees* belong to this Office, and an Action will not lie at Common Law for a Diſturbance in a Seat in the Church without a temporal Right. 2 *Salk.* 468. *Lee* verſus *Drake*.

55. Caſe, *&c.* for managing the Defendant's Ship ſo negligently, that it run over the Plaintiff's *Barge*, in which the Plaintiff declared, that he was poſſeſſed of the Barge laden with divers Goods, *&c.* The Ch. Juſt. *Holt* would not allow any Damages to be given for the Goods, becauſe not ſpecially ſet forth in the Declaration. 1 *Salk.* 287. *Martin* verſus *Hendrickſon*.

(I)

For Nuſances. Quod permittat per totum. *See* Poſtea Litera (R), (S), (T) 4.

1. CASE, *&c.* for that the Defendant kept and *maintained*, *quandam molem* in a Brook, whereof he the ſaid Defendant was ſeiſed, by Reaſon whereof the Plaintiff's Lands were drowned; adjudged, that the Action did not lie, but a *Quod permittat*, which is the proper Writ, for *Caſe* ſhall never lie where the Plaintiff hath any other Remedy by a Writ in the Regiſter, and that if this Nuſance was there before the Defendant had the Brook, 'tis no Offence in him to continue it. *Cro. Eliz.* 402, 520. *Beſwick* verſus *Cunden*. Moor 353, contra 449. S. C. 599. Yelv. 143. Noy 48.

2. One Man ſhall not have an Action on the Caſe for a *common Nuſance* done in the Highway, for 'tis puniſhable in the *Leet*, or at the Aſſizes by Preſentment; but if one Perſon hath a more * particular Damage by it than another, he may have an Action. 5 *Rep.* 72. *Williams*'s Caſe. *Paſch.* 8 *Eliz. Dyer* 250. *S. P. Cro. Eliz.* 664. *Fineux* verſus *Hovenden*. *S. P.* * 2 Cro. 446.

3. Where a *Nuſance* is done to the Lands of *Tenants in Common*, they muſt all *join* in the Action, and for a Nuſance done in the Time of the Teſtator and continued afterwards, the Deviſee muſt join. 2 *Cro.* 231. *Some* verſus *Baugh*.

4. Caſe againſt the Defendant *for laying Logs in the Highway*, whereby it was ſtraitned, and the Plaintiff riding there in the Evening, his Horſe ſtumbled on the Logs, and hurt him by a Fall; the Defendant preſcribed, that the Inhabitants of *B.* had, Time out of Mind, laid Logs in the waſte Places of the Way before their Doors for Fuel, leaving ſufficient Room for Carts, Horſes, *&c.* and that the Plaintiff riding careleſly on the Way, turned his Horſe on the Logs and fell; adjudged, that

that tho' this was a common Nuſance on the Highway, yet the Plaintiff might have an Action for his particular Damage, and that the Preſcription to make a Nuſance is void. 2 *Cro.* 446. *Fowler* verſus *Sanders*. See *Williams*'s Caſe, 5 *Rep.* 71.

5. *Caſe* by the Plaintiff an *Inn-keeper*, againſt the Defendant for erecting a *Tallow Furnace*, and melting ſtinking Tallow, by Reaſon whereof many of his Gueſts and Family became unhealthful; adjudged, that the Action lay. *Cro. Car.* 367. *Morley* verſus *Pragnell.*

Palm. 537. *The Court divided.*

6. Caſe, *&c.* for that he was poſſeſſed of an Houſe wherein he dwelled, and that the Defendant had built an *Houſe of Office and Brew-houſe*, in which he burnt *Coal ſo near the Houſe*, that by the Stink and Smoke he could not dwell there without Danger of his Health; adjudged, that the Action lay, for tho' a Brew-houſe is neceſſary, and ſo is burning Coal in it; yet it being found that it was built to deprive the Plaintiff of the Benefit of his Houſe, he hath a proper Remedy againſt it. *Hutton* 135. *Jones* verſus *Powell.*

7. *Treſpaſs quare Vi & Armis* for a *Nuſance*, in cauſing *ſtinking Water* in his Yard to run to the Walls of the Plaintiff's Houſe, and piercing them, ſo that it run in his Cellar; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that Treſpaſs *Vi & Armis* would not lie againſt the Defendant for this Matter, becauſe a Man cannot be a Treſpaſſer with Force and Arms in his own Ground, he ought to have brought an *Action on the Caſe*; at firſt the Court ſeemed to be of Opinion againſt the Plaintiff, but afterwards they gave Judgment for him. *Hardres* 60. *Preſton* verſus *Mercer*.

8. In an Action on the *Caſe* for a *Nuſance* in ſtopping *up Lights*; upon Demurrer to the Declaration it was objected, that the Plaintiff did not ſet forth, that it was *antiquum Meſſuagium*, *Hales* ſaid, if a Man builds an Houſe on his own Ground, he who hath Ground contiguous may alſo build, but then he muſt not ſtop *the Lights of the other Houſe*, unleſs there is a Cuſtom to the contrary as in *London*; and in ſuch Caſe the Plaintiff need not declare that 'tis *antiquum Meſſuagium*, for if he declare that he was *poſſeſſed* for ſeveral Years yet to come (and doth not ſay how many) of an Houſe, and that Time out of Mind the Light came in at his Windows, this is a good Form of alledging a Preſcription. 1 *Vent.* 239. 237. *Cox* verſus *Matthews*, and 248. *S. P.*

9. Complaint was made, that *Jacob Hall* was building a *Booth* near *Charing-Croſs*, intending to dance on the Ropes, which drew together Apprentices and idle People, and being ſent for into Court, the *Chief Juſtice* appointed an Indictment to be exhibited againſt him to the Grand Jury, and ordered him not to build the Booth, but being diſmiſſed, he diſobeyed the Order of Court and proceeded in his Building, whereupon being again brought into Court by the Marſhal, he affirmed, that *he had the King's Warrant and Promiſe to bear him harmleſs*, but yet he was required to give a Recognizance in 300 *l.* that he would not proceed, which he refuſing, was committed; and a Record was made of this Nuſance, as upon their own View, and a Writ to the Sheriff of *Middleſex* to proſtrate it. 1 *Vent.* 169. *Jacob Hall*'s Caſe. 1 *Mod.* 96. *S. C.*

10. Caſe, *&c.* for a *Nuſance* in Building a *Smith's Forge* near the Plaintiff's Houſe in *Stonebridge*, and for making ſuch a Noiſe with Hammers that the Plaintiff could not ſleep, by which he was annoyed and loſt the Benefit and Eaſement of his Houſe; the Defendant pleaded *in Bar*, that he had uſed the Trade of a *Blackſmith* twenty Years and upwards in *Stonebridge*, and that he was Apprentice to that Trade, that the Plaintiff adviſed him to dwell in the Houſe, and follow his Trade there, and accordingly he did dwell there and ſet up a Forge in an *old Room*, and worked there with his Servants at ſeaſonable Times, and traverſed, that he newly built a Smith's Forge, *aliter* than as aforeſaid; and upon Demurrer to this Plea it was adjudged for the Plaintiff that the Action lies; for tho' a *Smith* is a neceſſary Trade, and ſo is a Lime-burner and a Hog-Merchant yet theſe Trades muſt be uſed ſo as not to be injurious to the Neighbours. 1 *Lutw.* 69. *Bradley* verſus *Gill.* 9 *Rep.* 57. *Hutt.* 135. *S. P.* *Palm.* 536. *S. P.*

11. *Caſe*, for that the Plaintiff being ſeiſed of a Meſſuage in *Norwich*, and of an *antient Garden* thereunto belonging, which was planted with Fruit and Flowers, and had fine Walks in it; that the Defendant had a Houſe contiguous, and that he built a Waſh-houſe and Stable, *&c.* and that he burnt Sea-Coal in the Waſh-houſe, which ſpoiled the Plaintiff's Fruit-trees, and that the Air in his Garden became unwholeſome by the burning Sea-Coals there: The Defendant pleaded in *Bar*, *a Cuſtom in Norwich* to build ſuch Houſes, and preſcribed to burn Sea-Coal in them, and to put Horſes in the Stables as often as Men had Occaſion, and ſo juſtifies the Building, *&c.* and the burning Sea-Coal, *&c.* the Plaintiff replied *de injuria ſua propria*, and traverſed the *Cuſtom*, the Defendant rejoined and alledged the Cuſtom; and upon this they were at Iſſue, and there were two Trials about the Cuſtom, which I mention, becauſe the Cuſtom is ſo very reaſonable and common, and the Book doth not tell us what became of the Caſe. 1 *Lutw.* 91. *Hewett* verſus *Copland.*

Mod Caſes 311. *See* Repairs.

12. *Caſe*, *&c.* wherein the Plaintiff declared, that he was poſſeſſed of a *Cellar* adjoining to the Defendant's *Houſe of Office*, and parted by a Wall of his Houſe, which the Defendant *debuit & ſolebat reparare*, and that for Want of *Repairing* thereof the Filth of the Privy ran into his Cellar; there was Judgment for the Plaintiff by Default, and after a Writ of Enquiry, it was moved in Arreſt of Judgment, that the Plaintiff ſhould have ſhewed *a Title*, ſince this is a Charge laid upon the Defendant as Tertenant, but adjudged, that 'tis a Charge laid on him of *common Right*, to which he is ſubject by Law, for he is bound to uſe his own ſo as to do no Injury to his Neighbour. 1 *Salk.* 21. and 360. *Tenant* verſus *Golding.* 2 *Salk.* 766. *the Pleadings.* See *Sands* verſus *Trefuſis.* *S. P.* See *Poſtea* (R) *placito* 11.

13. The Plaintiff and Defendant had contiguous Houſes in *London*, and the one had *Lights* into the other's Yard, who put up *Blinds*, and the Court of Aldermen ordered them to be abated by Vertue of the Statute 19 *Car.* 2. *cap.* 4. for rebuilding the City, but *B. R.* granted a Prohibition, for they had only a temporary Power by that Act during the Rebuilding the City, and when they had appointed Lights, the Party had a lawful Title to them, and may maintain an Action at Common Law for obſtructing them. 2 *Salk.* 424. *Arnott* verſus *Brown.*

14. In a *Quod permittat proſternere quædam Ædificia*, adjudged, that *Ædificium* is as certain as *Fabrica*, and that there may be Buildings which have no other certain Name, and whether the Nuſance is done by the Tenant or a Stranger, 'tis the ſame Prejudice to the Plaintiff; and tho' in a *Quod permittat* the Jury may have a View, yet that is no Direction to the Sheriff, tho' it may be to them. 2 *Salk.* 458. *Palmer* verſus *Poultney.* See *Noy* 68, and *Cro. Eliz.* 520. 402. *S.P.*

15. *Caſe, &c.* for erecting a *Shed* ſo near the Plaintiff's Houſe that it ſtopped his *Lights*, in which the Plaintiff declared, that he was poſſeſſed of an Houſe which had Windows, *per quas lumen inferrebatur & inferri conſuevit, &c.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not declare that it was an *antient Meſſuage*, for if not, then the Defendant was no Wrong-doer, for he might build a Shed on his own Ground; but adjudged, that the Word *conſuevit* imported an Uſage Time out of Mind, and if ſo, then the Meſſuage muſt be *antiquum Meſſuagium*, and ſo it ſhall be intended after a Verdict. 2 *Salk.* 459. *Roſewell* verſus *Prior.* See *Cro. Eliz.* 118. *Cro. Car.* 325. *Poph.* 170. 2 *Cro.* 373. *Yelv.* 215. *S. P.* Mod. Caſes 116, and (H) pl. 50. S.C.

16. *Caſe* againſt the ſame Defendant brought by the ſame Plaintiff as laſt mentioned, for *continuing* this Nuſance after he had aſſigned his Leaſe to *T. P.* now, tho' there was a former Recovery againſt him for erecting this Shed, yet adjudged that the Action would lie againſt him for *continuing it*, tho' he had aſſigned his Leaſe, becauſe it was transferred with the original Wrong, and his Aſſignment affirms the *Continuance*; beſides, he hath a Rent as a Conſideration for the *Continuance*, and therefore he ought to anſwer the Damages occaſioned by it. 2 *Salk.* 460. *Roſewell* verſus *Prior.* See 2 *Cro.* 372, 555, and *Jones* 272. *S. P.*

17. Adjudged, that if *T. P.* builds an Houſe ſo near mine that it ſtops my *Lights*, or ſhoots the Water on my Houſe, or is by any other Means a Nuſance, I may enter and pull it down; and in this Caſe the Defendant was indicted for a Riot, in pulling down ſome Part of an Houſe, and had a ſmall Fine ſet on him, becauſe having brought an Action for Stopping his Lights, the Right was found to be in him. 2 *Salk.* 459. *The King* verſus *Roſewell.*

18. Caſe, *&c.* for *Stopping the Water* going to his *Mill* with a *Continuando, &c.* The Defendant pleaded, that on ſuch a Day, between the firſt and laſt Day laid in the *Continuando*, the Plaintiff himſelf had abated this Nuſance, and ſo had no Cauſe of Action; and upon Demurrer to this Plea, *per Curiam*, there is a Difference between a *Quod permittat* and *Aſſiſe of Nuſance*, and *an Action on the Caſe* for a Nuſance; for the two firſt are to abate the Nuſance, but the laſt is not to abate it, but to recover Damages ſuſtained before the Action brought; and tho' 'tis laid with a *Continuando* for a longer Time than the Plaintiff can prove, yet he ſhall have Damages for no more than he can prove before the Nuſance was abated. 2 *Mod.* 253. *Kendrick* verſus *Bartland.*

(K)

Aſſumpſit, &c. Where the Action will not lie for Want of a Conſideration, or where the Conſideration is not good in it ſelf.

1. THE *Conſideration* is the Ground of an Action on the Caſe upon a *Promiſe*, and it muſt be either a Charge to the Plaintiff or a * Benefit to the Defendant, and therefore where one promiſed, that in Conſideration the Plaintiff would not ſue that the other would pay, this is a good Conſideration, but where an *Infant* was indebted to *R. B.* upon a *Contract*, and he died, and the *Executor* of the ſaid *R. B.* promiſed to pay the Money, the Conſideration was not good. *Owen* 94. *Stone* verſus *Withypool.* 1 Leon. 113. Cro. Eliz. 126. S. C. * March 203.

2. The *Servant* of *R. B.* being arreſted in the Abſence of his Maſter, two of his Friends bailed him, and the *Maſter*, for their Friendſhip, promiſed to ſave them harmleſs, afterwards they were ſued, for which they brought an Action againſt the Maſter, but adjudged it did not lie for Want of a Conſideration, for the Plaintiffs bailed the Servant of their own Heads, and not at the * *Requeſt* of the Maſter, and this before the Promiſe made. *Dyer* 272. *Hunt* verſus *Baker*, and *Godb.* 33. *Sidenham* verſus *Worlington.* * Report (A) 27.

3. A *Feme Covert* being *Executrix* had *Aſſets* ſufficient, which ſhe left in the Poſſeſſion of her *Husband*, and died; the Plaintiff demanded a Legacy of the Husband, who promiſed to pay it, if he would *forbear till Michaelmas*; adjudged no good Conſideration, becauſe the Husband could not be ſued for the Legacy. *Owen* 133. *Smith* verſus *Jones.* *Yelv.* 184. *S. C.* 2 *Cro.* 257. *S. C.* *Poſtea* Baron and Feme. (H) 7. *S. C.* See (M) *placito* 118. *contra.*

4. *Aſſumpſit, &c.* the Plaintiff declared that he had taken *B. G.* in Execution, and that the Defendant, in Conſideration he would permit the ſaid *B. G.* to go at large, promiſed the ſaid Plaintiff that he would pay all the Money for which he was taken in Execution; adjudged, that the Promiſe

was void as well as a Bond, by the Statute 23 *H.* 6. See *Plowd.* 60. *Dyve* verſus *Maningham.* *Cro. Eliz.* 199. *Fetherſtone* verſus *Hutchinſon.* 4 *Leon.* 3. *Rawſon* verſus *Brown.* *S. P.*

5. *Aſſumpſit, &c.* wherein the Plaintiff declared, that the Conuſor acknowledged a Recognizance of 1000 *l.* to him, and afterwards made Feoffment of his Lands to the Defendant, who promiſed to pay in Conſideration the Plaintiff would aſſign the Recognizance to him, *&c.* upon *Non Aſſumpſit* pleaded, there was a Special Verdict, wherein, amongſt other Things it was found, that the Defendant promiſed *ut ſupra*; it was moved in Arreſt of Judgment, that this Conſideration was unlawful, for it was to aſſign a Recognizance to another, which is Maintenance; but adjudged, that a Conſideration of an Aſſignment of a Debt or a Recognizance to a Stranger, is a void Conſideration, but an Aſſignment of it to the Tertenant (as in this Caſe) in Diſcharge of his Land, is good. *Cro. Eliz.* 551. *Barrow* verſus *Grey.* *Poſtea* Releaſe. (D) 11. *S. C.*

6. *Aſſumpſit, &c.* for that *B. G.* being *outlawed* after Judgment, the Defendant promiſed in Conſideration the Plaintiff would *forbear* to proceed upon the *Capias Utlagatum*, if the ſaid *B. G.* did not pay the Debt, he would; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was inſiſted, that the Conſideration was againſt Law, becauſe the Proceſs was at the Suit of the King, but the Plaintiff had Judgment, for the Proceſs is at the Suit of the Party as well as of the King. *Cro. Eliz.* 909. *Jennings* verſus *Hartley.* *Yelv.* 19. *S. C.*

7. There being a Difference between the Plaintiff and the Defendant for the Profits of certain Lands which were taken by his Father in his Life-time, and the Plaintiff intending to exhibit a Bill in Equity againſt the Defendant, and a *Subpœna* being taken out, the Defendant promiſed, that in Conſideration the Plaintiff would *forbear* the Suit, and if the Plaintiff could prove that the Defendant's Father had taken the Profits, *&c.* then he would pay for the ſame; adjudged, this was no good Conſideration for an *Aſſumpſit*, it being grounded on an unjuſt Suit; for the Plaintiff did not alledge that the Father held the Land by Leaſe or otherwiſe, nor that the Defendant was either Executor or Adminiſtrator, and ſo there was no Colour of Reaſon to charge him. *Cro Eliz.* 207. *Tooley* verſus *Windham.*

8. *Aſſumpſit, &c.* In Conſideration the Plaintiff had let certain Lands to the Defendant for a Year, he promiſed at the End of the Year to pay him 20 *l. pro firma terra prædict'*; after a Verdict for the Plaintiff it was adjudged, that this Action would not lie, becauſe it was a meer Debt for the Rent, for which an Action of Debt would lie. *Cro. Eliz.* 786. *Simcock* verſus *Payne.*

Moor 684. S. C.

9. *Aſſumpſit* againſt an Adminiſtratrix, wherein the Plaintiff declared, that the Defendant's Husband died Inteſtate and indebted to the Plaintiff, and that the Defendant, in Conſideration the Plaintiff would *permit her to adminiſter* and give her a Day for the Payment of the Money, promiſed to pay, *&c.* at the Day: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, which was reverſed upon a Writ of Error, for here was no Conſideration to ground an *Aſſumpſit*, for the Wife was to *adminiſter by Law*, and the Giving a further Day to pay will not raiſe the Promiſe. 1 *Leon.* 240. *Fillcoks* verſus *Holt*, and *Holt* verſus *Fillcoks.*

10. *Aſſumpſit* by an *Executor*, for that in Conſideration of two *Weighs of Corn* delivered by his *Teſtator* to the Defendant, he promiſed to pay 10 *l.* The Defendant pleaded, that after the Promiſe the Corn was loſt in a Tempeſt, and in Conſideration the Defendant would pay 3 *s.* 4 *d.* for every *Weigh*, the Plaintiff would diſcharge him of the Promiſe to pay the 10 *l.* adjudged this was no good Plea, becauſe the Plaintiff had no Profit, nor the Defendant any Loſs or Labour by this new Agreement. 1 *Leon.* 19. *Richards* verſus *Bartlet.*

11. *Aſſumpſit, &c.* the Plaintiff declared, that in Conſideration he by his Servant had delivered to the Defendant two Bills of Exchange of 300 *French* Crowns, amounting to, *&c.* the ſame to be received at *Roan* in *Normandy* to his own Uſe; the Defendant promiſed to pay to the ſaid Plaintiff 60 *l.* after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that here was no Conſideration for this Promiſe, becauſe the Plaintiff did not alledge, *for what thoſe* 300 *French Crowns were due*, and ſo it was adjudged. *Cro. Eliz.* 155, and 170. *Perſon* verſus *Hickbed.*

12. *Aſſumpſit, &c.* in Conſideration the Plaintiff *had delivered* to the Defendant twenty Sheep, he promiſed to pay him 5 *l.* on the Day of his *Marriage*, and alledged in Fact, that on ſuch a Day and Place he was married; adjudged, that the Action did not lie, becauſe the Conſideration was in the * *Preter Tenſe*, and by Conſequence it was paſt. *Cro. Eliz.* 442. *Jeremy* verſus *Goochman.*

* Poſtea (M) 6.

13. There was a *Colloquium* between the Plaintiff and Defendant, at the Requeſt of the Defendant, concerning a *Marriage* between the Plaintiff and the Daughter of the Defendant, whom the Plaintiff married, and afterwards the Defendant promiſed to pay him 100 *l.* adjudged, that the Action did lie, tho' the Conſideration was paſt, for the Plaintiff was married before the Promiſe made. *Cro. Eliz.* 59. *Marſh* verſus *Ravenſcroft.*

Moor 643. Poſtea 21.

14. *Aſſumpſit, &c.* that whereas the Plaintiff, on a certain Day *then paſt*, at the Requeſt of the Defendant, had lent him 30 *l.* for ſuch a Time, he promiſed to lend to the Plaintiff 30 *l.* for one Year, upon Requeſt, or otherwiſe to give him 40 *s.* which he had not done; adjudged that the Action did not lay, becauſe the *Conſideration and Promiſe ought to go together*, or elſe the Conſideration ought to be continuing. *Cro. Eliz.* 885. *Docket* verſus *Vowell.*

15. *Aſſumpſit, &c.* wherein the Plaintiff declared, that he was to deliver to *W. R.* twenty Combs of Barley on ſuch a Day, and that the Defendant, in Conſideration the Plaintiff would deliver the ſame to him (the ſaid Defendant) promiſed to deliver the ſaid Barley over to the aforeſaid *W. R.* at the Day, which he had not done; adjudged, upon Error brought in the *Ex-*

chequer-Chamber, that this was no good Conſideration, for the Defendant had *no Eaſe or Benefit* by it, but only the Credit of having the Barley delivered to him. *Cro Eliz.* 883. *Rich* verſus *Bridges*.

16. Caſe, *&c.* wherein the Plaintiff declared, that whereas he had the *Preſentation to the Church of N.* and one *W. R.* had likewiſe a *Preſentation* to the ſame Church from another Patron, and there being a Diſcourſe between them concerning the ſame, the Defendant promiſed, that if the Plaintiff would ceaſe to get Inſtitution upon his Preſentation, then he would give him 30 *l.* and a Gelding, *&c.* Adjudged no good Conſideration to ground an *Aſſumpſit*. *Mich.* 21 *Jac. Bendl.* 150. *Wilſon* verſus *Bradſhaw*. 2 Roll. Rep. 463.

17. *Leſſee for Years*, Reverſion to one *Moor*, the Leſſee having ſpent Money, and being at Charges in Ejectments brought againſt him in Defence of the Title, acquainted *Moor* with it, and deſired him to contribute towards his Charges, or to make him ſome other Recompence, whereupon *Moor* promiſed, that for the Conſideration aforeſaid, he would grant him a new Leaſe at the Expiration of the Leaſe now in Being, and ſuch a Leaſe which he had before, which he afterwards refuſing to do, the Plaintiff brought an Action, *&c.* but adjudged, that it would not lie, becauſe the *Conſideration was executed* before the Promiſe made. *Moor* 220. *Moor* verſus *Williams*.

18. *Aſſumpſit*, *&c.* wherein the Plaintiff declared, that in Conſideration he would relinquiſh a Suit, which then he had againſt *W. R.* he promiſed to ſave the Plaintiff harmleſs from all Actions concerning ſuch Leaſe, which he had not done; adjudged, this was no good Conſideration, becauſe the Plaintiff might afterwards proſecute the Suit when he pleaſed. *Moor* 539. *Roſſe* verſus *Moor*.

19. *Aſſumpſit*, *&c.* in Conſideration the Plaintiff *had lent* the Defendant 20 *l.* he, the ſaid Defendant promiſed to lend the Plaintiff 10 *l.* when he ſhould be thereunto required; upon a Demurrer to this Declaration, the Defendant had Judgment, becauſe a Conſideration for a *Thing paſt*, is no Ground for a Promiſe. *Moor.* 643. *Dogget* verſus *Vowell*. Cro. Eliz. 885. Antea 16.

20. *Aſſumpſit*, *A.* owed *B.* 20 *l.* and *C.* owed the ſaid *A.* 30 *l.* who aſſigned the ſaid Debt of 30 *l.* to *B.* in Satisfaction of the ſaid Debt of 20 *l.* and made a Letter of Attorney to ſue in his Name, and both of them acquainted *C.* with this Agreement, who promiſed *B.* in Conſideration he would *forbear* him till ſuch a Day, to pay the Money. Upon *Non Aſſumpſit*, this was adjudged no good Conſideration, becauſe the *Letter of Attorney* was only an Authority to ſue, which is always *revocable* by *A. Winch* 7. *Potter* verſus *Turner*. See (M) *pl.* 76. *S. C.*

21. Executor ſued out an *Elegit*, which he delivered to the Sheriff, the Defendant *ut amicus Executoris* promiſed the Sheriff, that if he would execute the Writ, he would give him 6 *l.* for which the Action was brought; but adjudged the Conſideration was not lawful, but rather *Extortion*, for by the Duty of his Office he was bound to execute it. 2 *Cro.* 103. *Bridge* verſus *Cage*.

22. *Aſſumpſit*, for that the Defendant promiſed the Plaintiff, who was a Gaoler, that in Conſideration he would ſuffer *B. G.* who was then in Execution, to go at Large, he would give him ſuch a Sum; adjudged, that the Promiſe was void, it being grounded on a Conſideration againſt Law. 2 *Bulſt.* 213. *Blithman* verſus *Martin*. *Yelv.* 197. *S. C.* *Dyer* 19 *Eliz.* *Doctor Onley's* Caſe. *S. P.*

23. *Aſſumpſit*, in Conſideration the Plaintiff would procure *R. B.* to be preſented and inſtituted to the Chapel of the Tower, the Defendant promiſed to pay him 20 *l.* after he was Rector; adjudged upon Error brought, that the Conſideration is unlawful, for to have Money to procure a Benefice is a Simoniacal Contract; and the Promiſe being to pay after he was Rector can never be, becauſe he never was Rector, being diſabled ſo to be by Simony. *Cro. Car.* 263. *Mackaller* verſus *Toderick*.

24. *Error* on a Judgment in *Aſſumpſit* by the Defendant, as Adminiſtraſtrix, in Conſideration the Plaintiff would *forbear* to ſue *till ſhe had taken out Letters of Adminiſtration*, ſhe promiſed to pay, *&c.* adjudged no good Conſideration, becauſe the Defendant was not liable to be ſued as *Adminiſtratrix* till ſhe had taken out *Admiſtration*; neither is ſhe compellable to adminiſter, for it may be granted to the next of Kin. *Style* 248. *Roſier* verſus *Langdale*.

25. *Aſſumpſit*, in Conſideration the Plaintiff would ſurrender a *Copyhold* to the Defendant and his Heirs, he promiſed to pay the Plaintiff 500 *l.* it was moved for the Defendant in Arreſt of Judgment, that the Conſideration was not performed on the Part of the Plaintiff, for it was to ſurrender to the Defendant and his Heirs, and he had ſet forth a Surrender into the Hands of two Tenants of the Manor out of Court, *&c.* which is no Surrender till preſented. *Style* 256. *Shame* veſus *Shame*.

26. Caſe, *&c.* in which the Plaintiff declared, that in Conſideration he would accept one *W. R.* to be his Debtor, *in the Room of Mr. Cooper*, and would not ſue the ſaid *W. R.* till ſuch a Day was paſt, if the Money was not then paid, he, this Defendant, promiſed to pay it: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment; but the Reporter tells us, it was reverſed in *B. R.* upon a Writ of Error, becauſe it was *nudum pactum*: This Caſe is no good Authority, becauſe, upon peruſing the Roll *Paſch.* 1650. *Rot.* 62. there are no ſuch Words as, *in the Room of Mr. Cooper*, and there is no Judgment entred on the Roll. *Style* 249. *Newcomen* verſus *Leigh*. But Juſtice *Twiſden* affirmed, there was a Rule for Judgment. *Sid.* 396. See (M) *placito* 113.

1 Saund. 210. 1 Vent. 9. 1 Lev. 248, 262.

27. One, who owed Money to the Plaintiff, wrote a Letter to the Defendant to pay it, who accordingly promiſed to pay the Money, if the Plaintiff would take his Word for a Fortnight; an Action was brought upon this Promiſe, and upon *Non Aſſumpſit* pleaded, that Plaintiff had a Verdict and Judgment, but it was arreſted, becauſe here was no Conſideration to raiſe a Promiſe, *for the Defendant was not indebted to the Plaintiff. Sid.* 396. *Clipſam* verſus *Morrice.* See *poſt.* (M.) 113. See *Winch* 7. *Wilmot* verſus *Sprigg. S. P.*

28. *W. R.* owed Money to *W. N.* who aſſigned the Debt to the Plaintiff, then *W. R. the Debtor died*, and the Plaintiff brought an Action againſt his *Executor*, wherein he declared, that in Conſideration the Plaintiff would *accept the Defendant to be his Debtor*, he promiſed to pay the Money; and upon Demurrer to this Declaration, it was adjudged againſt the Plaintiff, becauſe the Conſideration was only, that the Plaintiff ſhould *accept the Defendant to be his Debtor*, which in Truth he was not, and the true Debtor was ſtill liable to the Action. 1 *Lev.* 262. 1 *Saund.* 210. *S. C.*

29. So where the Father owed Money, and he *and his Son* came to this Agreement with the Plaintiff, that if he would *accept the Son for his Debtor*, that he would pay the Money; and in an Action brought *againſt the Son* upon this Promiſe, and upon a Demurrer to the Declaration, it was adjudged againſt the Plaintiff, becauſe this was a void Conſideration. *Raym.* 440. *Barber's* Caſe. *Palm.* 185. *S. P.*

30. *L. O.* owed the Plaintiff 250 *l.* and the Defendant having more than 250 *l.* of the Money of *L. O.* in his Hands, promiſed the Plaintiff, if he would accept 220 *l.* in full Satisfaction of his Debt, then he, the ſaid Defendant, would pay it; and in an Action brought againſt him upon this Promiſe, and *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe this was no good Conſideration. 2 *Jones* 87.

31. *Aſſumpſit, &c.* for that the Plaintiff being *Bailiff to T. S.* the Defendant, in Conſideration he (the Plaintiff) would diſcharge the Defendant of 20 *l.* due to *T. S.* promiſed to lay out 40 *l.* in Repairing the Plaintiff's Barge; after a Verdict, and Judgment for the Plaintiff, it was reverſed in Error, becauſe the Conſideration is illegal, for the Plaintiff cannot diſcharge a Debt due to his Maſter. 2 *Lev.* 161. *Harvey* verſus *Gibbons.*

32. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would give the Defendant 20 *s.* he promiſed to give the Plaintiff 40 *s. if he did not beat T. S. out of ſuch a Cloſe*: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; but it was ſet aſide, becauſe the whole Agreement was unlawful, and the Conſideration void. 2 *Lev.* 174. *Allen* verſus *Reſcous.*

33. *Caſe* upon a *Bill of Exchange*, ſetting forth the *Cuſtom of Merchants*, that where ſuch Bill is drawn, and accepted, that the *Acceptor* is liable to pay it; that one *N. L.* drew a Bill upon the Defendant, payable to *W. R.* that the Defendant accepted the Bill, and then *W. R.* died, and that the Plaintiff was his Executor; then he lays a Promiſe made by the Defendant to pay the Money, *&c.* and another Promiſe, on which this Action was brought, (*viz.*) *Cumq; etiam*, the Defendant, in Conſideration that the Teſtator, at the Inſtance of the Defendant, would accept him to be his Debtor, (*inſtead of him who drew the Bill*) he promiſed to pay the Money: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, which was affirmed upon a Writ of Error in the Exchequer-Chamber, by four Judges againſt three. The Caſe being no more than this, (*viz.*) A Creditor accepts a *Stranger* to be his Debtor, inſtead of him who really owed the Money, and thereupon the *Stranger* promiſed to pay the Money, the Queſtion was, whether the Acceptance of him for the Debtor, was a ſufficient Conſideration to raiſe this Promiſe? and in the Principal Caſe adjudged, that it was, which is contrary to ſome of the Caſes before mentioned, and that might occaſion theſe different Opinions amongſt the Judges. *Lutw.* 899. *Haugh* verſus *Roe.*

34. *Aſſumpſit, &c.* for that one *Parrie* was indebted to the Plaintiff, and likewiſe to the Defendant, and that *T. S.* was indebted to *Parry* in ſo much, *&c.* and that the Defendant, in Conſideration that *Parrie* would permit him to ſue *T. S.* in his Name, promiſed to pay the Sum which *Parrie* owed to the Plaintiff. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could not get Judgment, for he could not bring the Action, becauſe he was a Stranger to the Conſideration. 1 *Vent.* 6. *Bowrne* verſus *Maſon.* See *Qu. placito.* 16.

35. *Indebitatus Aſſumpſit, &c.* for a *Fine* ſet upon the Defendant, for not holding the *Office of Sheriff* of the City of *York*; and upon a Demurrer to the Declaration, it was objected, that this Action would not lie for a *Fine*, becauſe it being impoſed on the Defendant againſt his Will, by Conſequence there could be no Privity or Aſſent to it, and the Court ſeemed to be of that Opinion; and that it was hard, that Cuſtoms, By-Laws, and Rights to impoſe *Fines*, ſhould be tried by Juries. 5 *Mod* 404. *City of York* verſus *Town.*

36. *Aſſumpſit, &c.* for ſo much Money received by the Defendant to the Plaintiff's Uſe: The Caſe was, *three were jointly* bound in an uſurious Bond, one of them paid Part of the Money, and the other two being ſued upon this Bond, pleaded the Statute of Uſury, and avoided the Bond, and now he, who had paid the Money, brought an Action againſt the Obligee, who had received it; but it was held, that an *Indebitatus Aſſumpſit* will lie for Money paid by Miſtake, or received by Deceit, but not for Money paid knowingly upon an unlawful Conſideration, as in this Caſe. 1 *Salk.* 22. *Tomkins* verſus *Barnet.*

37. *Aſſumpſit, &c.* for, that *in Conſideration the Plaintiff would deliver* ſuch Goods to the Defendant, he promiſed to pay, *&c.* and averred, that he did deliver the Goods, *&c.* but did not

ſay where; and upon a *Demurrer* to the Declaration it was held ill, becauſe this being an *Exetory Conſideration*, 'tis traverſeable, therefore a Venue muſt be laid. 1 *Salk.* 22. *Sexton* verſus *Miles.*

38. *Indebitatus Aſſumpſit* will lie in no Caſe but where *Debt lies*, therefore it will not lie upon a *Wager*, nor upon *mutual Promiſes*, *&c.* 1 *Salk.* 23. *Hard's* Caſe. *See* Bills of Exchange. (A) 13. *S. C.*

39. *Aſſumpſit*, *&c.* for that in Conſideration the Plaintiff, at the Requeſt of the Defendant, would *lend his Son any Money*, and let him have any Goods, not exceeding five Pounds, he, the Defendant, promiſed to pay, *&c.* and the Plaintiff averred, that he *lent the Son* 5 *l.* and let him have Goods to the Value of 5 *l.* more; and he declared alſo, upon a *mutuatus* for ſo much Money to the Son, at the Defendant's Requeſt: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; but it was adjudged in Arreſt of Judgment, that the Declaration was ill, becauſe an *Indebitatus* will not lie againſt the Defendant for Money *lent to his Son*, the Plaintiff ſhould have brought a Special *Aſſumpſit* againſt the Defendant, as being collaterally bound by his Promiſe, for the ſame Money cannot be *lent to two*; 'tis true, if the Money had been *delivered* to the Son, or had been received by him at the Father's Requeſt, then the *Loan* had been to the Father, and the Action had been good. 1 *Salk.* 23. *Butcher* verſus *Andrews.* 2 *Salk.* 731. *The Pleadings.*

40. In a *Special Aſſumpſit*, the Plaintiff declared, that whereas *W. R.* had a Rent-Charge iſſuing out of the Defendant's Lands, he, (the Defendant) promiſed the Plaintiff, that in Conſideration he would ſave him, (the Defendant) harmleſs from all *Diſtreſſes* to be taken on the ſaid Land by *W. R.* that then he, (the Defendant) promiſed to pay the Plaintiff ſo much. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe it did not appear, that *W. R.* had *any Right to diſtrain*, and if ſo, then there was no Conſideration to raiſe this Promiſe. *Mod. Caſes*, 265. *Strong* verſus *Courtney.*

(L)

Where an Aſſumpſit will not lie for the Incertainty of the Promiſe, and ſeveral other Cauſes, where the Contract is entire, and where Debt, and not Caſe, muſt be brought.

1. *Aſſumpſit*, *&c.* in Conſideration of a *Marriage* had between the Plaintiff's Son and the Defendant's Daughter, he promiſed to pay to the Plaintiff 400 Marks *in ſeven Years next following*, at certain Feaſts, by equal Portions: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could not get Judgment, becauſe by his Declaration it appeared, that one of the ſeven Years was to come when the Action was brought, and ſo he had no Cauſe of Action. *Bendl.* 3. *Joſſelin* verſus *Shelton.* *Moor* 13. *S. C.*

2. *Aſſumpſit* in Conſideration the Plaintiff, at the Requeſt of the Defendant, would *yield up all his Intereſt* in ſuch a Cloſe to *B. G.* the ſaid Defendant promiſed to pay the Plaintiff 70 *l.* and alledged, that he did *deliver a Deed* containing a Leaſe of the Cloſe, *ſimul cum toto ſtatu ſuo* to the ſaid *B. G.* adjudged, that this was not a good Conſideration, becauſe it was no good *Surrender* of his Intereſt, for it was by Word only and not by Deed. *Cro. Eliz.* 487. *Sly* verſus *Bateman.*

3. Tho' *natural Affection* is ſufficient to raiſe an Uſe, yet 'tis not a good Conſideration to raiſe an *Aſſumpſit*, for in ſuch Caſe there muſt be *Quid pro Quo.* *Cro. Eliz.* 755. *Brett's* Caſe.

4. *ſſ.* Error of a Judgment on a *Parol Aſſumpſit* to find the Plaintiff *meat*, *drink*, *&c.* which Agreement was afterwards put in *Writing*; adjudged, that the putting it in Writing made the *Aſſumpſit* void, and ſo the Judgment was reverſed. *Style* 19. *Curtis* verſus *Columbine.*

5. *Aſſumpſit*, *&c.* wherein the Plaintiff declared, that in Conſideration of ſuch a Thing, *&c.* the Defendant promiſed to do another Thing, and upon *Non Aſſumpſit* pleaded it was found, that in Conſideration of that Thing *and another*, he did promiſe; adjudged, that the Plaintiff had failed in this Action. *Cro. Eliz.* 79. *King* verſus *Robinſon.* Cro. Eliz. 147. Moor 466. Sid. 5. 2 Vent. 151, 223.

6. *Aſſumpſit*, *&c.* wherein the Plaintiff declared, that he and *W. R.* were jointly and ſeverally bound for the Debt of the ſaid *W. R.* who died, and that the Defendant married his Widow, and ſo the Goods of her firſt Husband came to his Hands; that the Money became due on the Bond 1. *May*, after which Day the Plaintiff paid 25 *l.* to avoid the Penalty of the Bond, and that the Defendant, *as well in Conſideration* of the Premiſſes, *as that he might peaceably enjoy the Goods*, promiſed to pay the ſaid 25 *l. &c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that the Plaintiff had declared upon two Conſiderations; one was, in Conſideration that he had paid the Money, to avoid the Forfeiture of the Bond, the Defendant promiſed to repay it, and that was a good Conſideration, and the Promiſe was good; the other was in Conſideration, *that he might peaceably enjoy the Goods*, he likewiſe promiſed to pay the 25 *l.* and as to that the Jury found, that he promiſed to pay the Money, *if he might peaceably enjoy the Goods*, ſo the Promiſe found by the Jury was not the Promiſe alledged in the Declaration, for the Plaintiff declared on an *abſolute Promiſe*, and the Jury found it to be *Conditional.* *Hill.* 31 *Eliz.* 1 *Leon* 173. *Muſtard* verſus *Hopper.*

7. *Aſ-*

7. *Aſſumpſit, &c.* for that the Defendant in Conſideration he owed to the Plaintiff 20 *l.* he promiſed to pay him *in Watches*; the Queſtion was, whether the Action ought to be brought for the Money or the Watches; and *per Curiam*, it ought to be brought for the *Money*, becauſe as to the *Watches* 'tis incertain how many, or of what Value; but where a Man ſells a Horſe for 10 *l.* to be paid in *Wheat*, if the Quantity of Wheat is *made* * *certain* by the Agreement, the Action muſt be brought for the *Wheat*. 1 *And.* 117.

* 39 H. 6 to 36.

8. *Aſſumpſit*, in Conſideration the Plaintiff would marry his Daughter, he promiſed to give her *a Child's Part, and as much at his Death as to any of his Children*, excepting his eldeſt Son, and ſhewed, that a younger Son had ſo much; adjudged, that the Promiſe of a *Child's Part was incertain*, but the ſubſequent Words had made it *certain enough, (viz.) as much as to any of his Children*, and the Plaintiff ſhewing his Younger Son had 100 *l.* *Poph.* 48. *Silveſter*'s Caſe, and 183. *Arnold* verſus *Dickſon*.

9. *Aſſumpſit*, in Conſideration of a Sum of Money paid to the Defendant, he promiſed to aſſure *Copyhold Lands* to the Plaintiff, in ſuch Manner as *R. B.* ſhould adviſe, who adviſed, that the Defendant ſhould *ſurrender* at next Court, *&c. and ſhould enter into a Bond of* 40 l. *to the Plaintiff* to do it, which he had not done; adjudged, that the Breach in not *entring into the Bond*, was not good, becauſe it was out of the *Aſſumpſit*. 2 *Cro.* 115, 194. *Stanirod* verſus *Locock*.

10. *Aſſumpſit*, for that the Defendant, 10 *Feb.* being indebted to the Plaintiff in 40 *l.* promiſed to pay it *ante inceptionem proximi itineris* of the Plaintiff to *London*, and the Plaintiff alledged, that on the 23 *Day of February* following, *incepit iter ſuum to London*, but did not ſay *proximum*, for which Cauſe it was held ill. 2 *Cro.* 245. *Rook* verſus *Rook*.

11. *Aſſumpſit*, in Conſideration of a Sum of Money paid to the Defendant, he promiſed to take the Plaintiff's Son *Apprentice* for ſeven Years, and to find him Meat, Drink and Cloaths, *durante termino prædicto*, and aſſigns the Breach in not finding him Meat, *&c. durante Termino Apprenticii*, but did not aver in his Declaration, that he put him Apprentice, or that the Defendant accepted him as Apprentice, and for that Cauſe the Declaration was held ill. 2 *Cro.* 406. *Talkern* verſus *Wrigg*. 3 *Bulſt.* 221. *S. C.*

12. *Aſſumpſit*, in Conſideration the Plaintiff would make a Leaſe to the Defendant of Lands for twenty-one Years, *under the yearly Rent of* 10 *l.* the Defendant promiſed to give him a Horſe, and ſets forth, that he made him *a Leaſe of the Lands*, but that he had not given him the Horſe; adjudged, that having ſet forth generally, that *he made the Leaſe*, without mentioning *any yearly Rent*, he had not purſued the Contract, and ſo not entituled himſelf to the Action. 3 *Bulſt.* 35. *Lea* verſus *Adams*.

13. *Aſſumpſit, &c.* Wherein the Plaintiff declared, that in Conſideration he would procure ſix Pounds to be lent to the Defendant for a Year, he promiſed to make him a Leaſe of an Houſe, from *Michaelmas* next, for three Years, and alledged, that on ſuch a Day he procured *B. G.* to lend the Defendant 3 *l.* for one Year, and about five Months after, on ſuch a Day, he procured *R. L.* to lend him the other 3 *l.* for on Year: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could not get Judgment, becauſe the Conſideration on his Part was not performed, for he did not procure the whole Money to be lent at one Time; and he having not performed his Promiſe, the Defendant is diſcharged from performing his Part, and by Conſequence the Action doth not lie. *Yelv.* 89. *Dorrington* verſus *Eaſt*.

14. *Aſſumpſit*, in Conſideration the Plaintiff would lend the Defendant a Horſe to ride to *York*, he promiſed to pay, *&c.* and to redeliver the Horſe by ſuch a Day; The Defendant pleaded, that he was ready to deliver the Horſe at the Day, and that *B. G. vi & armis & contra voluntatem*, of the Defendant, took the Horſe from him, claiming a Property; adjudged the Plea was good, and had diſcharged him of the Promiſe. *Yel.* 22. *Selbury* verſus *Scotford*.

15. *Aſſumpſit, &c.* for that in Conſideration of 10 *s.* paid, and 20 *l.* more to be paid on ſuch a Day, *&c.* and in Conſideration the Plaintiff, on the ſame Day, *would bring* a ſufficient Man to be bound to the Defendant for the Payment of the Money, he promiſed that the Plaintiff ſhould have ſuch a Wood to his own Uſe: The Plaintiff alledged Performance on his Part, and upon *Non Aſſumpſit* pleaded, it was adjudged for the Defendant, becauſe the Plaintiff ought not only to ſhew, that he brought *B. G.* a ſufficient Man to be bound, *&c.* but he ſhould have alledged in Fact, that he was bound, or offered himſelf to be bound, for the Plaintiff might bring him to be bound, and when he came to the Place he might refuſe; and in every *Aſſumpſit* the Matter of the Promiſe muſt be alledged certainly, and not be taken by Implication. *Yelv.* 48. *Allen* verſus *Randall*.

16. *Aſſumpſit, &c.* for that he ſold to the Defendant 189 Hundred and twenty-one Pound Weight of *Prunes*, at the Rate of 18 *s.* 8 *d. per* Hundred, which *in toto ſe attingunt to* 174 *l.* 19 *s.* 8 *d.* and that the Defendant in Conſideration thereof, promiſed to pay him the ſaid Sum at the End of one Month: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and upon Error brought, it was aſſigned for Error, that the Sum contracted for amounted *to more* than 174 *l.* 19 *s.* 8 *d.* according to 18 *s.* 8 *d.* the Hundred Weight, and this was adjudged to be Error, for here the Promiſe is to pay the 174 *l.* 19 *s.* 8 *d.* which is the Sum caſt up, and that is apparently Falſe; there 'tis a Promiſe to pay a Sum which was not the Bargain to pay. 2 *Cro.* 247. *Anderton* verſus *Dunſtar*.

17. *Aſſumpſit, &c.* wherein the Plaintiff declared, that *W. R.* had a Leaſe of Lands granted to him for a Term of Years by Sir *J. W.* and there being a Communication between him the ſaid

W. R. and the Defendant, for his Eſtate and Intereſt in the Lands, he promiſed the Plaintiff, that in Conſideration he would procure the ſaid Sir *J. W.* to licenſe the ſaid *W. R.* to aſſign his Leaſe and Intereſt to the Defendant, he would pay all his Charges and *tantum quantum meruit* for obtaining thereof, not exceeding 44 *s.* and averred, that he at *M.* did procure the ſaid Sir *J. W.* to grant the Defendant a Licence, *&c.* and that he deſerved for his Pains 20 *s.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and thereupon the Defendant brought a Writ of Error, and the chief Error aſſigned was, that the Plaintiff had ſet forth the Promiſe to pay *tantum quantum meruit*, which is an incertain and void Promiſe, becauſe it cannot appear what he deſerved, but adjudged that it was certain enough, for he ſhall demand what he deſerved; and if too much, the Jury may abridge it according to their Diſcretion. *Paſch.* 19 *Jac.* 2 *Cro.* 618. *Hall* verſus *Wallard.* *Poſtea* (M) *placito* 33. *S. C.*

18. *Caſe, &c.* in which the Plaintiff declared, that in Conſideration he had ſold to the Defendant fourteen Cows, *&c.* he promiſed to pay the Money, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment; and upon Error aſſigned in the Exchequer-Chamber, that the Plaintiff ought to have brought an *Action of Debt on the Contract*, and not an *Action on the Caſe*, the Judgment was reverſed. *Moor* 703. *Paramour* verſus *Payne* 711. *Maylard* verſus *Keſter.* *S. P.*

19. *Aſſumpſit, &c.* for ſeveral Wares ſold and delivered; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe it was *de trecentis & duobus ponderibus Prunorum Anglice Prunes*, which is inſenſible, becauſe *Pondus* ſignifies a Weight, which is more or leſs in ſeveral Things, and ſo it was adjudged at firſt, but afterwards doubted. *Sid.* 139: *Clerke* verſus *Newton.*

20. *Aſſumpſit, &c.* in Conſideration the Plaintiff *multa Beneficia intulit* to the Defendant, he promiſed to pay him 20 *l.* after a Verdict for the Plaintiff the Judgment was ſet aſide, becauſe here was no Manner of Conſideration to raiſe a Promiſe; for to do any neighbourly Kindneſſes to one, or ſuch *voluntary Acts*, which the Plaintiff may think *beneficial*, thoſe are *multa Beneficia.* *Sid.* 413. *Cluffe* verſus *Moor.* See *Hutt.* 84. See *Poſtea* (M) *placito* 98. *contra.* Vent. 27.

21. *Error* of a Judgment in *Aſſumpſit*, wherein the Plaintiff declared, that there was a Diſcourſe between him and the Defendant concerning the Bark of ſuch a Wood, and that they agreed for 2 *s. per Seam*, for all the Bark of the Trees which the Defendant ſhould fell, and that the Defendant had entered into Articles to perform this Agreement, and had given Bond for Performance of the Articles, but did not ſay in what Sum; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and the Error aſſign'd was, that the Declaration was ill, becauſe the Agreement was incertain and not compleat for Want of expreſſing in what Sum the Bond ſhould be; for if the Sum had been certain, then the Agreement could have been reduced into a Certainty concerning the Quantity of Bark; but as 'tis now it may be five Seams of Bark, or 500 Seams, which is very true; and this Declaration had been ill upon a Demurrer, or upon a ſpecial Iſſue, but 'tis cured by the General Iſſue. *Sid.* 270. *Peaſe* verſus *Palfry.*

(M)

Where Aſſumpſit will lie for Forbearance, and where not, and for other Conſiderations which are good. See (H) 28. (K) 33.

1. *Aſſumpſit*, for that *R. B.* being indebted to the Plaintiff in 100 *l. pawned Goods* to him to the Value of 200 *l.* and the Defendant promiſed in Conſideration the Plaintiff would deliver up the *Pawn*, that he the Defendant would pay the Debt; adjudged a good Conſideration, for he who hath Goods in *Pawn* hath a Property in them, and may uſe them in ſuch Manner as the Owner would. *Owen* 123. *More* verſus *Conham.*

2. A Widow, in Conſideration that the Plaintiff, at her Requeſt, had expended 1500 *l.* on her Suits and other Buſineſs, promiſed to pay all the Charges which he had expended, at *her Requeſt*; adjudged a good Conſideration, for 'tis charitable to aſſiſt a Widow in her Suits. *Dyer* 356. *Only's* Caſe. *Antea* Acceptance. (E) 4.

3. *Aſſumpſit*, for that the Defendant was indebted to him in a certain Sum of Money, and ſhewed *how*, and that in Conſideration the Plaintiff * *per parvum tempus* would defer the Payment, the Defendant promiſed to pay, *&c.* it was moved in Arreſt of Judgment, that *parvum tempus* was incertain, for it may be *punctum temporis*; but adjudged, that the Forbearance of the Debt is a ſufficient Conſideration. 1 *Leon.* 61. *Gill* verſus *Harewood.* * Poſtea, 23,70,86.

4. *Aſſumpſit*, for that *R. B.* owed *A.* Money on Bond, which he recovered, and brought a *Sci. fa.* againſt the *Bail*, and afterwards the Defendant promiſed, that in Conſideration the Plaintiff (who was the Bail) would pay the Debt, that he the Defendant *A.* would aſſign over the Bond to him, this was held a good Conſideration. *Goldſ.* 156. *Dixon* verſus *Adams*; but in *Moor* 710. *S. C.* Judgment reverſed in Exchequer-Chamber, no good Conſideration. Moor 710.

5. *Error* on a Judgment in *Aſſumpſit* againſt an *Executor*, wherein the Plaintiff declared, that he had delivered Goods to his Brother the Teſtator; and the Defendant being his *Executor*, promiſed, that if the Plaintiff could prove the Goods were delivered to the Teſtator, that he would pay the Value thereof to the Plaintiff; now, tho' the Plaintiff had not averred that he had *proved* the Delivery of the Goods to the Teſtator, or if he had, that even in ſuch Caſe the Defendant could

could have no Profit or Benefit by the Delivery of them to his Brother, yet the Judgment was affirmed. 1 *Leon.* 93. *Howell* verſus *Trevanion.*

6. *Aſſumpſit*, for that the Defendant leaſed Lands to the Plaintiff, rendring Rent, and promiſed, that in Conſideration the Plaintiff *had occupied the Land and paid the Rent*, that he the Defendant would ſave him harmleſs againſt all Perſons, for the Occupation thereof, for the *Time paſt* and to come, and that afterwards *R. B.* diſtrained the Plaintiff's Cattle on the Land; it was objected, that the *Payment of the Rent* could be no *Conſideration*, becauſe he occupied the Land for it, and that the *Conſideration was paſt*; but adjudged, that the Action did lie, for the *Occupation*, which is the Conſideration, continues, and the *Payment* of the Rent is *executory* every Year. 1 *Leon.* 102. *Pearle* verſus *Edwards.*

7. *Aſſumpſit*, wherein the Plaintiff declared, that the Defendant pretended a Legacy was deviſed to him by the Laſt Will of *R. B.* and that the Plaintiff libelled in the Prerogative Court to ſet aſide the Will, which he might have done, if *ultra proſecutus fuiſſet*; thereupon the Defendant, in Conſideration that the Plaintiff * *ultra non procederet* promiſed to give him 100 *l.* and avers, that he did not proceed any further; it was objected, that here was no Conſideration, for tho' he did ſurceaſe his Suit he might begin again, it was no Releaſe or diſcharge of it, but reſolved that the Action did lie. *Rivet* verſus *Rivet.* 1 *Leon.* 118.

* Poſtea, (O) 2. S. C.

8. *Aſſumpſit*, in Conſideration the Plaintiff could produce a Deed to ſhew that Rent was due to him from the Defendant; he promiſed to pay the Arrears, which Deed the Plaintiff did produce; adjudg'd a good Conſideration. *Cro. Eliz.* 67. *Clecot* verſus *Dennis.*

9. *Aſſumpſit*, *&c.* in Conſideration the Defendant retained the Plaintiff to go to *Paris* upon his Occaſions, he promiſed to give him as much as would *content him*, and alledged, that 25 *l.* would *content him*, which he required the Defendant to pay, but he refuſed; adjudged, that the Action did lie, tho' he ſhewed neither *Time or Place* when he required him to pay, or gave Notice what would content him. *Cro. Eliz.* 132. *Baccot* verſus *Haſſat.*

10. The Obligor entered into a Bond of 200 *l.* to the Obligee, and afterwards gave all her Goods to *B. G.* for the Payment of her Debts; the Defendant promiſed the Plaint, that if he and two Witneſſes would * *depoſe* before the *Mayor of L.* that the Bond was read to the Obligor as a Bond conditioned for the Payment of 200 *l.* that he would pay the Money, and the Plaintiff and two other Perſons did *depoſe* before the Mayor, *&c.* adjudged, that it was a lawful Oath and a good Conſideration. *Cro. Eliz.* 469. *Knight* verſus *Ruſhworth.*

* Poſtea 105.

11. *Aſſumpſit*, *&c.* for Payment of Money, the Defendant pleaded, that after the Promiſe it was agreed between the Plaintiff and him, that he with two other Perſons ſhould enter into a Bond to the Plaintiff for the Money which the Defendant had promiſed to pay, and that ſuch a Bond was made, which they were ready to deliver to the Plaintiff, *&c.* The *Chief Juſtice* held, that the Plaintiff ſhould releaſe the Bond and take Judgment upon the Promiſe. 2 *Leon.* 181. *Freeman* verſus *Drew.* *Cro. Eliz.* 54. *Alford* verſus *Lee. S. P.*

12. *Aſſumpſit*, for that the Plaintiff had a Recognizance, which at the Inſtance of the Defendant he delivered to him to inſpect and ſafely to keep; and in Conſideration thereof he promiſed, that if he did not redeliver it within ſix Days, he would pay 1000 *l.* where required, *&c.* upon Demurrer to the Declaration this was adjudged a good Conſideration. *Cro. Eliz.* 75. *Preſton* verſus *Tooley.*

13. *Aſſumpſit*, *&c.* for that the Defendant being *arreſted* at the Suit of the Plaintiff, in Conſideration that the Plaintiff would permit him to *go at large*, and would give Authority to the Bailiff to ſuffer him to go at large; he promiſed to appear at the Day of the Return of the Writ, and would give the Plaintiff 10 *l.* upon *Non Aſſumpſit* pleaded the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Promiſe was void, being contrary to the Statute 23 *H. 6.* but adjudged, that it had been void if it had been made to the *Sheriff* himſelf; but being to the Party who had Authority to diſpence with his *Appearance*, 'tis therefore good. *Cro. Eliz.* 190. *Milward* verſus *Clerke.*

14. A Feoffment was made to *W. R.* to the *Intent and Purpoſe*, that he ſhould convey the Lands to *R. W.* and afterwards the Feoffee ſold the Lands to another, whereupon *R. W.* brought an Action on the Caſe againſt him; and adjudged that the Action did lie for a Truſt to convey the Land to another, is a good Conſideration in Equity. *Godbolt* 64. *Megot's* Caſe.

15. *Error* of a Judgment in *Aſſumpſit*, in which the Plaintiff declared that the Defendant was bound in a Bond of 40 *l.* conditioned to pay 20 *l.* on a certain Day, and that the Defendant had got the Bond, and pretending that he had paid the Debt, and the Plaintiff intending to exhibit a Bill in Chancery againſt him, and to take out a *Subpœna* returnable on a Day certain; thereupon the Defendant in Conſideration the Plaintiff would deſiſt from the ſaid Suit in Chancery, promiſed to reſtore the Bond upon Requeſt; and alledged, that he had deſiſted the Suit, and required the Defendant to deliver the Bond, which he refuſed; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and upon Error brought the Error aſſigned was, that the Conſideration was not ſufficient, it being to ſtay a Suit in Chancery, which is only Matter of Conſcience, but the Judgment was affirmed. *Cro. Eliz.* 768. *Dowdenny* verſus *Oland.*

16. *Aſſumpſit*, *&c.* in Conſideration the Plaintiff *would make a Leaſe* unto the Defendant of ſuch Lands, he promiſed to pay 20 *l.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was objected in Arreſt of Judgment, that the Plaintiff had not performed the Conſideration, for he being to *make a Leaſe*, *&c.* it ſhall be intended a *Leaſe for Life*, which he had not made; but adjudged, that the Promiſe being general to *make a Leaſe*, it may as well be intended a Leaſe

at Will as for Life, which Leaſe he might determine as ſoon as he made it. *Cro. Eliz.* 566. *Ferby* verſus *Larkin.*

17. *Error* of a Judgment in *Aſſumpſit*, wherein the Plaintiff declared, that whereas the Defendant owed him 200 *l.* on Bond, which Bond the Plaintiff had aſſigned to the Queen (he being indebted to her) the Defendant, in Conſideration the Plaintiff would *forbear to procure any Proceſs to iſſue out againſt him till Hillary-Term* following, promiſed to pay the Plaintiff 200 *l.* the Plaintiff had a Verdict, and the Error aſſigned in the Exchequer-Chamber was, that this Forbearance was no good Conſideration; for the Debt being aſſigned to the Queen, the Forbearance of procuring any Proceſs to iſſue was no Benefit to the Defendant, and ſo it was adjudged. *Cro. Eliz.* 653. *Bowes* verſus *Pawlett.* Moor 701.

18. *Aſſumpſit, &c.* that whereas the Plaintiff had ſold to the Defendant's Son a certain Quantity of Cheeſe, the Defendant promiſed, that in Conſideration the Plaintiff *would deliver the ſaid Cheeſe* to his Son, that if he did not pay for them the Defendant would; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that to *deliver the Cheeſe to his Son* was no good Conſideration, becauſe 'tis no more than what the Law appoints, (*viz.*) that the Vendor ſhould deliver the Goods ſold to the Vendee; but adjudged a good Conſideration, becauſe 'tis an Eaſe to the Vendee to have his Goods delivered without any Suit, for probably he could not have them without. *Cro. Eliz.* 700. *Sherwood* verſus *Woodward.*

19. *Aſſumpſit, &c.* that whereas the Defendant was indebted to *W. R.* in 120 *l.* he *promiſed* that in Conſideration *at the Requeſt* of the Defendant he the ſaid Plaintiff *had promiſed to pay* 120 *l.* to the aforeſaid *W. R.* that he the ſaid Defendant would repay it to the Plaintiff *when he ſhould be required*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that here was no Conſideration to ground this Action, for it was no Benefit to the Defendant, becauſe his Debt was not diſcharged, he was ſtill bound for that Money; but adjudged, that here being *mutual Promiſes*, one Promiſe againſt another is a good Conſideration. *Cro. Eliz.* 703. *Wickall* verſus *Jones.*

20. *Aſſumpſit, &c.* in Conſideration that the Plaintiff, at the *Requeſt* of the Defendant, had *given and granted* to him the firſt and next Avoidance of the Church of *L.* the Defendant promiſed to pay to the Plaintiff 100 *l.* after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that this was no Conſideration, becauſe it was for a * *Thing paſt*, but adjudged good, for the Grant of the next Avoidance being made at the *Requeſt* of the Defendant, it was a ſufficient Conſideration, tho' it was done many Years paſt, for it ſhall be intended ſtill to *continue*, it being to the Defendant himſelf and not to a Stranger. *Cro. Eliz.* 715. *Riggs* verſus *Bullingham.* * Antea (K) 14.

21. *Aſſumpſit, &c.* in which the Plaintiff declared, that the Teſtator was *indebted to him in* 8 *l.* and that he left ſufficient Aſſets, *&c.* and he intending to ſue the Executrix, in order to recover the ſaid Debt *according to the Courſe of Law*; the Defendant promiſed, that if he would *forbear* the Executrix till ſuch a Time he would pay the Debt, which he had not done; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Action did not lie, becauſe the Plaintiff having declared that the Teſtator was indebted to him in 8 *l.* generally, this ſhall be intended a *Debt upon a ſingle Contract*, with which the Executrix is not chargeable *at Law*, and by Conſequence the *Forbearing* to ſue her can be no good Conſideration, and for this Reaſon the Judgment was ſtayed, but if he had alledged, that he intended to exhibit a *Bill in Chancery* againſt her, then the *Forbearance* had been a good Conſideration. *Cro. Eliz.* 804. *Peck* verſus *Loveden.*

22. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would deliver to *W. R.* ſuch Cattle as he ſhould buy of him for ſuch a Sum of Money to be paid *at any Time or Times hereafter*, which ſhould be agreed on between them; in ſuch Caſe, that if *W. R.* did not pay the Money, the Defendant promiſed he would pay it, and the Plaintiff alledged that he ſold twenty Beaſts to the ſaid *W. R.* for 38 *l. whereof* 20 *l. to be paid in Hand*, and the other 18 *l. at a Day to come*, and that the ſaid *W. R.* had not paid the 18 *l.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought by the Defendant, it was objected, that the Conſideration was not performed, for that was to pay the Money, which *at any Time hereafter was to be paid* for the Cattle; and here the Plaintiff had alledged that 20 *l.* of the Money *was agreed to be paid in Hand*, ſo that he promiſed only to pay for thoſe which were ſold for Money, to be paid *at a Day to come*, and not in Hand; but adjudged good, for when *Part* of the Money is to be paid at a Day to come, 'tis within the Promiſe, and ſo the Judgment was affirmed. *Cro. Eliz.* 807. *Phillips* verſus *Turner.*

23. *Aſſumpſit, &c.* for that there being a Controverſy between the Plaintiff, Lord of the Manor of *L.* and the Defendant claiming ſome Lands, Parcel of the ſaid Manor, and to hold it by *Copy*, both Parties ſubmitted to the Award of *W. R.* Counſellor at Law; and the Defendant in Conſideration, that the Plaintiff promiſed to him, that if the ſaid *W. R.* ſhould adjudge the Copy to be good, then he would ſuffer the Defendant to enjoy the ſaid Lands, he the ſaid Defendant promiſed the Plaintiff, that if the ſaid *W. R.* ſhould adjudge the Copy not to be ſufficient, that then he would ſurrender and deliver up the Poſſeſſion to the Plaintiff without Suit, and aſſigned the Breach; adjudged, that this Promiſe was made upon a good Conſideration, it being to avoid Suits at Law. *Paſch.* 30 *Eliz.* 1 *Leon.* 103. *Cook* verſus *Songate.* 4 *Leon.* 31. *S. C.*

24. *Adjudged*, that a Promiſe made by an *Executor* to pay a Debt owing by his Teſtator, good, if he hath Aſſets. *Hill.* 30 *Eliz. Cro. Eliz.* 91. *Trewman* verſus *Howell.* The Plaintiff need not aver that the Executor had Aſſets, for he may have Judgment, *&c. cum Aſſets acciderint.*

25. The Plaintiff declared, that whereas the Defendant was indebted to him in 10 *l.* he promiſed, that if the Plaintiff would *forbear him one Week*, he would pay the Money, and alledged *in facto*, that he did *forbear him one Week*, *&c.* after a Verdict for the Plaintiff a Writ of Error was brought, and the Error aſſigned was, that the Declaration was ill, becauſe the Plaintiff alledged he did *forbear for one Week*, but did not ſay *one Week after the Promiſe made*, *or one Week following*; adjudged no Error, for it cannot be otherwiſe intended than one Week following. *Hill.* 34 *Eliz. Cro. Eliz.* 272. *Tracy* verſus *Brown.*

26. *Aſſumpſit*, for that *B.* owed the Plaintiff 100 *l.* on Bond; and the Defendant, in Conſideration the Plaintiff would, at his *Requeſt*, *forbear* to ſue *B.* he (the Defendant) promiſed, that if *B.* did not pay the Money, the Defendant would; adjudged, that where the Conſideration is ſuch as can be no Benefit to the Party, 'tis not good; as where 'tis to *forbear for an Hour*, *&c.* but where 'tis to *forbear generally*, without limiting any Time, there it ſhall be intended for a convenient Time, or altogether. *Hutton* 46. *May* verſus *Sydley*. See 2 *Cro.* 683. *Poph.* 183. *Beven* verſus *Cowling*. *Smith* verſus *Smith*. *Hob.* 219. *Yardly* verſus *Ingram*. *S. P.*

Yelv. 55. 27. *Aſſumpſit* againſt an *Executor*, for that the *Teſtator* being indebted to the Plaintiff upon *ſimple Contract*, and the Executor having *ſufficient Aſſets*, promiſed, that if the Plaintiff would *forbear* to ſue him till ſuch a Time he would pay the Debt, adjudged a good Conſideration. 2 *Cro.* 47. *Fiſher* verſus *Richardſon*. 4 *Leon.* 3. *Eſcrigs*'s Caſe. *S. P.* 4 *Leon.* 6. *S. P.* and *Booth* verſus *Compton.* 613. *S. P.*

28. *Aſſumpſit* againſt an *Executrix*, for that the Teſtator being indebted to the Plaintiff, and ſhe having proved the Will, and by Vertue thereof having poſſeſſed her ſelf of a *Leaſe for Years*, promiſed, in Conſideration the Plaintiff would *not moleſt her*, but give her Time till *Michaelmas next*, ſhe would pay the Debt, here it was not averred that ſhe had *Aſſets*, but adjudged, that it being alledged ſhe had the Term, it ſhall be intended ſhe had it as *Aſſets*, and Forbearance of a Suit is a good Cauſe of Action. 2 *Cro.* 273. *Bond* verſus *Paine.*

29. *Aſſumpſit* againſt an Executor, for that the Plaintiff being an *Attorney* ſued the Teſtator, who promiſed, that in Conſideration he would *forbear* any farther Suit, that he would pay the Debt; adjudged a good Cauſe of Action *againſt the Executor*, tho' the Plaintiff did not aver, that he had good Cauſe of Action againſt the *Teſtator*, and that *Forbearance* was a Benefit to one and a Loſs to the other. *Hob.* 216. *Bidwell* verſus *Cotton.*

Moor 854. 1 Roll. Rep. 379. 30. *Aſſumpſit*, for that *R. B.* being indebted to the Plaintiff, for which he *purpoſed to ſue him*; the Defendant, in Conſideration he would forbear, *for a reaſonable Time*, promiſed to pay the Debt; here, tho' 'tis not ſhewed *how R. B.* came to be indebted to the Plaintiff, nor what *certain Time* he did forbear, yet the Declaration was good, for the Court ſhall determine what is a *reaſonable Time.* 3 *Bulſt.* 206. *Lingen* verſus *Broughton.*

31. *Aſſumpſit*, for that the Defendant being *Rector* of *H.* and entituled to the *Tithes*, and the Plaintiff occupying 100 Acres of Land in that Pariſh, the Defendant promiſed, that in Conſideration the Plaintiff would *Plant* his Land with Hops, and ſo make the *Tithes better*, that he, the Defendant would allow 40 *s.* towards the Planting of every Acre, *&c.* and it was objected, that here was no Conſideration, becauſe the Tithes were not better by *Planting*, but by the *Growing* of the Hops, and the Plaintiff had not averred that the Tithes were better than before; the Court doubted, but were of Opinion it had been clear if the Plaintiff had ſhewed, that he might have more Benefit of his Land than by Planting it with Hops. *Winch* 80. *Summers* verſus *Duggs.*

2 Cro. 618. Antea (L) 31. 32. *Aſſumpſit*, for that the Defendant was poſſeſſed of a Leaſe of Lands held of *Sir J. Warner*, which he could not ſell without his Conſent, and promiſed, that in Conſideration the Plaintiff would procure *Sir John*'s Conſent, he would pay the Plaintiff what he ſhould lay out and deſerve for the ſame; adjudged a good Conſideration. *Hutt.* 39. *Hall* verſus *Woollen.*

33. *Aſſumpſit*, for that if the Plaintiff would diſcharge *R. B.* of an *Execution*, the Defendant promiſed to pay the Plaintiff 10 *l.* and avers, that *exoneravit eum de executione* generally, but did not ſay it was by *Writing*; adjudged, that the Diſcharge by Word was ſufficient. *Popham* 206.

34. *Aſſumpſit*, for that the Defendant deſired the Plaintiff to give Credit to *R. B.* in Behalf of *D. R.* for Goods bought of him to the Value of 50 *l.* whereupon the Plaintiff gave Bond to *R. B.* Yel. 44. of 100 *l.* for the Payment of 50 *l.* upon which, being afterwards ſued, and *having paid* 30 *l.* of the Money, the Defendant in Conſideration thereof, promiſed to pay the 50 *l.* at ſuch a Day; in this Caſe it was adjudged, that the Conſideration was good and *not paſt*, becauſe *D. R.* had Credit given him by *R. B.* at the Defendant's Requeſt, and by the Undertaking of the Plaintiff. 2 *Cro.* 18. *Boſden* verſus *Sir John Thynn*, and 287. *Somerſhall* verſus *Barneby.*

35. *Aſſumpſit*, for that the Lord *B.* 1 *April*, 39 *Eliz.* being poſſeſſed of Goods to the Value of 500 *l.* did on the ſame Day and Year, *pawn* them to the Plaintiff for 403 *l.* 6 *s.* 8 *d.* and that the ſaid Lord being likewiſe indebted to the Plaintiff in 25 *l.* for Plate ſold and delivered to his Lady, who being dead, he the Defendant 9 *May*, 40 *Eliz.* in Conſideration, that at his Requeſt the Plaintiff would deliver to the ſaid Widow Lady the *pawned* Goods, *then being of the Value of* 500 *l.* he promiſed to pay the ſaid 25 *l.* to the Plaintiff; it was objected, that the Conſideration was not good, becauſe the Plaintiff had not averred, that the *Lord B.* had agreed to the Sale and Delivery of the Plate to his Wife, and did not aver that the Goods were of the *Value of* 500 *l.* when delivered to the Widow; but reſolved, that as to the firſt Objection, the Husband's *Conſent* ſhall neceſſarily be *intended*; and as to the ſecond, that the Goods being delivered on the ſame Day the Promiſe was made, ſhall likewiſe be intended to be of the Value of 500 *l.* and being of that Value and delivered for 400 *l.* that is a good Conſideration. 2 *Cro.* 256. *Bereblock* v. *Michell.*

36. *Aſſumpſit* againſt a *Common Carrier*, for that Goods were delivered to him to be carried to a certain Place in *London*, and that the Plaintiff did undertake to content him *rationabiliter* for the Carriage, and in Conſideration thereof, the *Carrier* promiſed to deliver the Goods at the Place; here the Conſideration *rationabiliter* to content him, tho' not promiſing any *certain Sum*, was adjudged ſufficient. 2 *Cro.* 262. *Rogers* verſus *Head.*

37. *Aſſumpſit*, for that the Defendant having a *Fi. fa.* to levy 61 *l.* on the Goods of *R. B.* he delivered it to the Sheriff, and affirmed to the Plaintiff, that the Cloth in the Shop of *B. R.* was liable to this Execution, and the Defendant required the Plaintiff to execute the Writ, and in Conſideration he would take the ſaid Cloth in Execution, he, the Defendant, promiſed, when required, to give Bond to the Sheriff in *any reaſonable Sum* to indemnify both him and the Plaintiff for entring the Shop, and Taking the Goods in Execution; it was objected, that this Promiſe was grounded upon a Conſideration very unlawful, (*viz.*) to ſave a Man harmleſs for Taking another Man's Goods in Execution; but adjudged, that the Conſideration was good, and that the Defendant requiring the Sheriff to execute the Writ, it was reaſonable he ſhould indemnify him, and a Promiſe to give a Bond in a *reaſonable Penalty*, without mentioning any certain Sum, is good. 2 *Cro.* 652. *Arundell* verſus *Gardner.*

38. *Aſſumpſit*, for that *R. B.* being in Execution for 40 *l.* the Defendant ſaid, *deliver him out of Execution, and what it coſts I will pay*, whereupon the Plaintiff diſcharged him; the Defendant pleaded, that after the Promiſe, and before the Diſcharge, he did forbid the Plaintiff to meddle and ſaid he would not ſtand to his Promiſe; and upon Demurrer to the Plea, the Plaintiff had Judgment, for a Man may diſcharge a Promiſe made *to himſelf*, but not *by himſelf.* 2 *Cro.* 483. *Hurford* verſus *Pile*, and *Treſwellar and Raine*'s Caſe. 619.

39. *Aſſumpſit* to the Mother in Conſideration, that ſhe, at the Requeſt of the Defendant, *would conſent* to the Marriage of her Daughter with him, the ſaid Defendant, he promiſed to give her 100 *l.* it was objected in Arreſt of Judgment, that this was no good Conſideration, for the Mother was not at any Pains or Charge, ſhe was only to give * *her Conſent*, which was not neceſſary to the Marriage; but adjudged a good Conſideration, becauſe the Mother having a natural Affection for the Daughter, may influence her in Marriage, and it ſhall be preſumed, that her Conſent is of ſome Importance, which being had at the *Defendant's Requeſt*, ſhall be a good Conſideration to ground this Action. *Hob.* 10. *Griſley* verſus *Lother.* Moor. 857. * Poſtea 79, 81.

40. *Aſſumpſit*, for that Goods were *pawned* by *R. B.* and the Pawn-broker ſaid, in the Preſence of the Defendant, that if *R. B.* would not pay him the Money, he would ſell the Goods and pay himſelf, thereupon the Defendant promiſed, that if the *Pawn-broker* would keep the Goods till ſuch a Day, and if *R. B.* did not then pay the Money, he, the Defendant, would pay it and take the Goods; adjudged, this was a good Conditional Bargain and Sale of the Goods, and a good Conſideration to raiſe a Promiſe. 3 *Bulſt.* 70. *Copper* verſus *Dickenſon.*

41. *Aſſumpſit*, for that the Defendant did deſire his Wife might ſojourn with the Plaintiff for a Year, to which he conſented, and afterwards, about the Middle of the Year, the Defendant promiſed, that in Conſideration the Plaintiff would ſuffer his Wife to continue there as a Sojourner for a Year, that he would pay him ſo much for the whole Year, as well for that *which was paſt*, as for that which was to come; it was objected, that an *Aſſumpſit* would not lie, it being grounded on a Conſideration *which was paſt*; but reſolved, that the Conſideration was good, for tho' the Plantiff conſented to ſojourn the Defendant's Wife for a Year, yet there was no Sum agreed to be paid for the ſame, and therefore he might put her away before the End of the Year, and probably might have put her away, if the Defendant had not made this Promiſe, in the Middle of the Year, to pay the Money. 3 *Bulſt.* 187. *Cotton* verſus *Weſtcott.*

42. *Aſſumpſit*, for that the Plaintiff having delivered certain Goods to the Defendant for ſo much, *& ſic indebitatus fuit, &c.* the Defendant *poſtea*, in Conſideration thereof, promiſed to pay the Money a Year after; it was objected, in Arreſt of Judgment, that this Promiſe did not bind, becauſe 'tis grounded upon a *Conſideration paſt*, (viz.) *poſtea in conſideratione inde*; but reſolved, that it was good, not as a Promiſe in Law, but as an actual Promiſe upon a Conſideration continuing, for the Debt remained, which could not be diſcharged but by the Payment. 3 *Bulſt.* 222. *Hodge* verſus *Vaviſor.* 1 Roll. Rep. 413.

43. *Aſſumpſit*, for that the Plaintiff and Defendant *accompted*, and the Defendant being found in Arrears in ſuch a Sum, did *in Conſideratione inde* on the ſame Day, promiſe to pay it at a Day to come; it was objected in Arreſt of Judgment, that the Plaintiff did not ſhew the Promiſe to be made in Conſideration of *Forbearance*, but *in conſideratione inde*; but adjudged, that was a good Conſideration, for here was a Duty preſently to be paid. 3 *Bulſt.* 208. *Johnſon* verſus *Cullimore.* 1 Roll. 396.

44. *Aſſumpſit*, that whereas the Teſtator was indebted to the Plaintiff in 100 *l.* he deviſed Goods to the Defendant to the Value of the Debt, in order to ſatisfy the Plaintiff, and that he required the Defendant to ſatisfy him out of the Goods in his Hands, who promiſed, that in Conſideration *he would forbear him* for a certain Time, he would then pay the Debt; adjudged for the Plaintiff, for by the Deviſe of the Goods to the Defendant to ſatisfy the Debt, he had an *Iatereſt and Property* in them, and in ſuch Caſe, *Forbearance* for a Time is a good Conſideration; but where he hath only the bare Cuſtody, without any Property, there *Forbearance* is no Conſidetion. *Yelv.* 164. *Brand* verſus *Liſle*, and 128. *Pike* verſus *Guite. S. P.*

45. *Assumpsit, &c.* for that the Plaintiff had a House in *London*, in which *B. G.* who owed him 100 *l.* had a Chamber, and died there, leaving several Writings and Money in the said Chamber, which the Plaintiff, according to the Custom of the City, *attached*, thereupon the Defendant, in Consideration the Plaintiff would suffer him to enter the Chamber, and to carry away the Goods, Money, and Writings, promised to pay the Money; it was objected, that here was no Consideration, for the Debt due to the Plaintiff must be upon Simple Contract of the Intestate, with which the Administrator is not chargeable, and 'tis not shewed, that there was not any Action depending at the Time of the Attachment; but adjudged, that since there are two Considerations set forth, if the first should be void, yet the other was sufficient to ground an *Assumpsit*. *Yelv.* 56. *Pikard* versus *Cottell.*

46. *Assumpsit*, that whereas the Defendant was indebted to him in 200 *l.* for a Legacy given to the Plaintiff's Wife, he promised, that if the Plaintiff would *forbear the Payment*, he would pay him for it according to the Rate of 10 *l. per Cent.* and alledged, that he did forbear the Defendant from 26 *Aug.* 17 *Jac.* which was the Day on which he made the Promise, to the Time of the Bill exhibited, which was 26 *January* in the same Year, and that he had not paid the 200 *l.* nor 9 *l.* 4 *s. for the Forbearance* for the said Time, *&c.* Upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that the Declaration was ill, because the Plaintiff had laid the Promise to be in Consideration of Forbearance, and did not shew *for* * *any Time*; besides, he alledged, that 9 *l.* 10 *s.* was due for the Time of Forbearance, and did not say, that it was according to the Rate of 10 *l. per Cent.* and for these Reasons the Plaintiff could never get Judgment. 2 *Cro.* 603. *Baylie* versus *Parley.*

* Postea 56. S. P.

47. Covenant with the Defendant to let a Ship to Freight (*viz.*) that she should sail to *Lyme*, and take Freight there, and proceed to *Yarmouth*, *&c.* and the Defendant covenanted to pay the Plaintiff 184 *l. pro tota transfretatione præd'*. *Serjeant Rolls* tells us, that the Plaintiff might have an Action of Covenant, without *averring any Perfomance* on his Part; but *Bulstrode*, who reports the same Case, says otherwise; 'tis true, the Plaintiff had Judgment in the Common Pleas, but it was reversed upon a Writ of Error, because these are not *distinct Covenants*, upon which *mutual Remedies* might be had, for the Words *pro tota transfretatione* makes it Conditional, and to refer to some Thing precedent, and to be done before the Money is payable, which is Preparing a Ship, Taking in Freight, *&c.* and this must be performed before the Plaintiff can be intitled to an Action for the Money, and the Performance must be alledged in the Declaration. 1 *Bulst.* 167. *Gurwell* versus *Clerke.* *Roll. Abr.* 415. *S. C.* See (p) *pl.* 13. *See* Condition (A) 19.

See Covenant, (N) 21.

48. *Case*, wherein the Plaintiff declared, that in Consideration he would lend 7 *l.* 10 *s.* to the Defendant, and *would promise to release all Actions against him*, that then the Defendant would on such a Day pay to the Plaintiff so much, *&c.* the Plaintiff averred, that he had lent the Money, and executed a Release of all Actions; the Question was, whether this *Release* had extinguished the Action? and adjudged, that it had not, because it was Part of the Consideration upon which the Action did arise. *Potter* versus *Phillips.* 2 *Cro.* 623. *S. C.*

49. *Case, &c.* in which the Plaintiff declared, that *Issue being joined* in Ejectment between him and the now Defendant, which was intended to be tried at the next Assises, in Consideration that the Defendant would *forbear* to make out a Title, and would make a slender Defence, he promised to pay, *&c.* Upon *Non Assumpsit* pleaded, the Jury found *quod Assumpsit*; but that there were *two Issues* joined between the Parties, and that the Promise was made, in Consideration of making a slender Defence in both Issues; but the Plaintiff had Judgment, because whether there is one or more Issues between the Parties, 'tis usual and proper to say, that Issue is joined. *Moor.* 351. *Blackwell* versus *Eyre.*

50. *Assumpsit, &c.* in Consideration he *had submitted* himself to the Award of *W. R.* the Defendant *adtunc & ibidem* promised to pay the Plaintiff 10 *l.* Upon a Demurrer to the Declaration, it was objected, that the *Consideration was past and executed* before the Promise made; but adjudged for the Plaintiff, because the Words *adtunc & ibidem* make the Time of the Submission to be the same Time the Promise was made. *Moor* 376. *Sheffield* versus *Rice.*

51. *Assumpsit, &c.* that whereas the Defendant had recover'd 4 *l.* of the Plaintiff, he promised, in Consideration of the Payment of 3 *l.* to him (the Defendant) he would acknowledge Satisfaction, which he had not done: Upon Demurrer to this Declaration, it was objected, that to pay what is due could be no Consideration; but adjudged, that prompt Payment was a good Consideration. *Moor* 412. *Reynolds* versus *Purchase.*

52. The Plaintiff and Defendant were Shooting at Buts, and having but one Shot a Piece left to win the Game, they laid a Wager one with another of 40 *l.* on the winning Shot, and the Plaintiff, who won, brought an *Assumpsit*, that in Consideration the Plaintiff had promised to pay the Defendant 40 *l.* if he won, the Defendant promised to pay the Plaintiff 40 *l.* if he won; there was a Judgment by Default against the Defendant, and all the Court, but the Chief Justice held the Declaration to be good. *Moor* 549. *Metcalfe's* Case.

53. *Assumpsit* in Consideration, the Plaintiff had promised *W. R.* to pay a Debt due to him from the Defendant, he the said Defendant promised to pay it to the Plaintiff; adjudged a good Consideration, without *averring*, that the Plaintiff had paid the Money. *Moor* 574. *Whitcalfe* versus *Jones.*

54. *Aſſumpſit* to pay twenty Marks after ſuch a *Marriage* had in Conſideration, that the Plaintiff would give his good Will and Furtherance to the *Marriage*, and alledged, that he did give his good Will and Furtherance. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had not alledged in particular, how, and in what Manner he gave his good Will and Furtherance to the *Marriage*; but adjudged well enough in an Action on the Caſe, where the Conſideration is not traverſable; but it had been otherwiſe in an Action of *Debt* on a Bond, with ſuch a Condition. *Moor* 595. *Alderton* verſus *Man.*

55. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that one *E. B.* was indebted to him in 460 *l.* and that the Defendant, in Conſideration the Plaintiff would *forbear to ſue* the ſaid *E. B.* for the ſaid Debt, promiſed to pay, *&c.* and he alledged, that he had forbore, *&c.* and ſtill did: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and upon a *Writ of Error* brought in the *Exchequer-Chamber*, the Errors aſſigned were, that the Plaintiff did not alledge, that he did forbear *at the Requeſt* of the Defendant, but the Principal Error was, that he did not ſet forth any *certain* * *Time of his Forbearance*, but only generally, that he did forbear, and for this Cauſe the Judgment was reverſed, *Paſch.* 36 *Eliz. Moor* 689. *Sackford* verſus *Phillips.* * Antea pl. 47. S. P.

56. *Caſe*, *&c.* in which the Plaintiff declared, that the Defendant's Teſtator being indebted to the Plaintiff in 35 *l.* promiſed to pay it, *when he ſhould be thereunto required*, and that the ſaid Teſtator had made the Defendant Executor, and left ſufficient Aſſets, and in Conſideration the ſaid Debt was not paid, and that the Plaintiff had given him Time till *Lady-day* next to pay it, he promiſed to pay, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, and upon a *Writ of Error* brought in the *Exchequer-Chamber*, the Error aſſigned was, that the Conſideration was inſufficient, becauſe the Teſtator had promiſed to pay the Money *upon Requeſt*, and he being now dead, the Defendant, who is his Executor, is not bound by Law to pay it after his Death, therefore the Giving a longer Day to pay Money, which by Law he is not obliged to pay, is no good Conſideration to raiſe a Promiſe. *Moor* 702. *Matthew* verſus *Matthew.*

57. *Aſſumpſit*, *&c.* in Conſideration the Defendant *had received* 24 *l.* of ſeveral Perſons, to and for the Plaintiff's Uſe, he (the Defendant) promiſed to pay it on ſuch a Day: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe 'tis not expreſly alledged, of *what Perſons* he received the Money; but adjudged good, becauſe 'tis a *Conſideration executed.* *Moor* 854. *Babington* verſus *Lambert.*

58. *Aſſumpſit*, *&c.* in Conſideration, that the Plaintiff and Defendant *had accompted* together, and the Defendant was found in Debt ſo much, *&c.* to the Plaintiff, he the Defendant promiſed to pay; adjudged a good Conſideration. *Colimore* verſus *Jenſon. Moor* 854.

59. *Aſſumpſit* by an Attorney, wherein he declared, that in Conſideration he would ſtay a Proſecution againſt the Defendant, of an Attachment of Privilege, he promiſed to pay, *&c.* Adjudged, that the Plaintiff need not ſhew in the Declaration, that he had any Cauſe of Suit againſt the Defendant, becauſe that is implied in the Promiſe. *Hob.* 216. *Bidwell* verſus *Catton.*

60. *Caſe*, *&c.* in which the Plaintiff declared, that *W. Mallorie* owed him 200 *l.* and that *Sir John Wentworth* and another, owed *William Mallorie* ſeveral Sums upon Statutes; and that the ſaid *W. Mallorie* delivered the Statutes to the Plaintiff, to the Intent that he might ſatisfy himſelf the ſaid Debt, but made no Aſſignment or Letter of Attorney to ſue; that *Wm. Mallorie* died, and that *H. M.* pretending to be his Executor, promiſed the Plaintiff to pay the Debt, in Conſideration he would *deliver up the Statutes to him*; and the Money not being paid after the Delivery of the Statutes to the Defendant, this Action was brought, and the Defendant pleaded the *General Iſſue*, and the Plaintiff had a Verdict and Judgment; and upon a *Writ of Error* brought, it was objected, that here was no Conſideration, for it was no *Benefit* to the Defendant, nor *Loſs to* the Plaintiff, that the Statutes were delivered, becauſe there was *no Aſſignment* made of them, or Letter of Attorney to ſue: *Sed per Curiam*, where the Plaintiff gives up any Thing of which he was lawfully poſſeſſed, tho' 'tis no Benefit to the Defendant, yet, 'tis a good Conſideration to raiſe an Action, becauſe he departed with the Poſſeſſion of thoſe Things which he might have cancelled, ſo the Judgment was affirmed in the *Exchequer-Chamber.* 1 *Roll. Rep.* 26. *Lane* verſus *Mallory.*

61. *Aſſumpſit*, *&c.* in Conſideration of 10 *l.* in Hand paid to the Defendant, (who was Sheriff) and 10 *l.* more when *T. S.* ſhould be taken and carried to *Newgate*, the Defendant promiſed to arreſt the ſaid *T. S.* upon a Writ of *Ne exeat Regnum*, which he then had, and to carry him to *Newgate*, and for not doing it, this Action was brought; after a Verdict for the Plaintiff Judgment was ſet aſide, becauſe the *Conſideration was unlawful*, to give Money to the Sheriff to arreſt a Man. 1 *Roll. Rep.* 313. *Shirley* verſus *Packer.*

62. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that he and the Defendant were bound in a Bond to *T. S.* to pay a certain Sum for the Debt of *D.* and the Bond being forfeited, the Defendant promiſed, that in Conſideration the Plaintiff would pay the whole Debt, he (the Defendant) would repay a Moiety, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but it was moved in Arreſt of Judgment, that here was no Conſideration to raiſe this Promiſe, becauſe the Plaintiff himſelf was bound to pay the whole Debt, and the Obligee might charge him with it: *Sed per Curiam*, here was a Charge to the Plaintiff, which is a ſufficient Conſideration in this Action. 1 *Roll. Rep.* 354. *Bagg* verſus *Slade.*

63. Caſe,

63. Caſe, *&c.* in which the Plaintiff declared, that *Sir Francis Bacon* the *Attorney-General*, had proſecuted a *Subpœna* in the Star-Chamber againſt him, for ſeveral Miſdemeanors, and that in Conſideration he would *withdraw his Suit, and forbear to proſecute it*, the Deſendant promiſed to ſtand to the Award of *Serjeant Hitcham*, who ordered, that the Plaintiff ought to withdraw the ſaid Suit, and that in Conſideration thereof the Defendant ſhould pay him 40 *s.* and avers, that he did *withdraw the ſaid Writ*, and had forborn to proſecute it, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Plaintiff had not purſued his Promiſe, which was, *to withdraw his Suit*, and he avers, that he had *withdrawn the Writ*, and that is not the *Suit*, for the Bill is the Suit; but *per Curiam*, the Plaintiff had Judgment. 2 *Roll. Rep.* 103. *Brand* verſus *Cox.*

64. *Caſe*, in which the Plaintiff declared, that one *Baine* was indebted to him in 10 *l.* and died Inteſtate, and that Adminiſtration was granted to the Defendant, and that on ſuch a Day, *&c.* there being a Diſcourſe between him and the Defendant concerning the ſaid Debt, he, the Defendant, did then and there promiſe, that if the Plaintiff would *forbear* till *Michaelmas*, he (the Defendant) *would pay* him, and ſhews, that he did forbear *the Debt*, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Conſideration was incertain, becauſe the Plaintiff did not ſet forth *what ſhould be paid*, but generally, that the Defendant would *pay him*, and it was generally *to forbear*, and did not ſhew for what Cauſe; but the Plaintiff had Judgment. 2 *Roll. Rep.* 488. *Gardiner's* Caſe.

65. *Caſe*, *&c.* in which the Plaintiff declared, that the Defendant was taken in Execution upon a *Capias ad ſatisfaciend' de debito & damnis unde convictus fuiſſet*, and promiſed the Plaintiff, that if he would conſent, that the *Sheriff* ſhould let him go at Large, that he would pay, *&c.* and ſets forth, that he did conſent, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſhew, *where*, or in what Court, or in what Action, the Defendant was convicted; for it might be in ſuch a Court or Action where a *Ca. ſa.* would not lie. *Sed per Curiam*, 'tis the Conſent to let him go at Large, which is the Conſideration of this Action, the Conviction is only an *Inducement* to it. 2 *Roll. Rep.* 495. *Cole* verſus *Routh.*

66. *Aſſumpſit*, *&c.* in Conſideration the Plaintiff would lend him 40 *l.* he (the Defendant) promiſed to pay the Plaintiff 5 *s. per* Month till the 40 *l.* was paid, and the Plaintiff declared, that the Defendant had not paid the 40 *l.* nor any Part thereof; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that it appeared in the Pleading, that only two Months were paſt, and that the Plaintiff ought to ſtay till all were paſt within which the 40 *l.* was to be paid. *Sed per Curiam*, the *Promiſe is entire*, and a Breach of Payment the firſt Month is a Breach of the whole Promiſe. 2 *Roll Rep.* 47. *Beckwith* verſus *Potts.*

Poſtea (N) pl. 11. 2 Cro. 596. W. Jones 13.

67. *Caſe*, *&c.* in which the Plaintiff declared, that he and the Defendant being Mercers, at *Newport in the Iſle of Wight*, and the Defendant being an old Shop-keeper there, and having old Goods in his Shop, in Conſideration the Plaintiff would give him (the Defendant) 500 *l.* for his ſaid Goods, which in Truth were not worth 300 *l* he promiſed to depart and go out of the Town, and not trade there any more, and avers, that he did give him 500 *l.* and that he ſtill continued in the Town, and did not leave his Trading there: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment in *C. B.* and upon a *Writ of Error* brought in *B. R.* it was objected, that the Action would not lie, becauſe the Reſtraining him in his *Trade* was not only prejudicial to him, but to the Publick; for by the ſame Reaſon one Man may be reſtrained in one Place, ſo many may be reſtrained in many Places, and ſo *in infinitum*, and the * Conſideration will not make that good which is againſt Law; and of this Opinion was Juſtice * *Haughton*, but the other three Judges *contra*; 'tis generally true, that 'tis againſt Law to reſtrain a Man in his *Trade*, but here the Defendant hath a Benefit by leaving off his *Trade*, and is not reſtrained from uſing it in any other Place, but only in *Newport*. 2 *Roll. Rep.* 201. *Broad* verſus *Jollie.*

* Dyer 355. Onely's] Caſe. * Cro. El. 352.

68. *Aſſumpſit*, *&c.* for curing a *Fiſtula*; the Plaintiff averred, that he, on ſuch a Day, *&c.* and at divers other Days and Times, between ſuch a Day and ſuch a Day, cauſed ſeveral Medicines to be applied to the Defendant, and that he deſerved ſo much, *&c.* the Plaintiff had Judgment. 2 *Cro.* 370. *Sheppard* verſus *Edwards. Sid.* 428. *S. P.* without averring the Cure. * *Lee* verſus *Edwards.*

Poſtea 112.

Antea 1.

69. *Aſſumpſit*, for that the Deſendant being indebted to the Plaintiff in ſuch a Sum, promiſed, in Conſideration he would *forbear*, *&c. pro aliquo tempore*, that he would pay the Debt; adjudged, that *pro aliquo tempore*, or * *per paululum tempus*, is ſo ſhort a Time, that 'tis no Conſideration. *Cro. Car.* 316. *Tolſon* verſus *Clerke. Cro. Car.* 241. *Coke* verſus *Dowſe. Contra* is not Law.

* 2 Roll. Rep. 368. Paulter v. Heaver.

70. *Error* upon a Judgment in *Aſſumpſit*, wherein the Plaintiff declared, that at the Requeſt of *R. B.* he made her a *Gown*, which lay by him, not being paid for, and that the Defendant promiſed, that in Conſideration the Plaintiff would *deliver the Gown to R. B.* he, the Defendant, *would pay as much as* it was worth; it was objected, that it was incertain to whom the *Payment* ſhould be made, and that the Conſideration was not good, becauſe the Defendant had no Benefit by the Delivery of the Gown to *R. B.* and 'tis not averred, that the Delivery was to the *Uſe* of the ſaid *R. B.* but reſolved, that the Promiſe *to pay* ſhall be intended to the Plaintiff, and that the Delivery of the Gown out of his Hands, is a good Conſideration, it being at the Defendant's Re-

queſt, and that 'tis uſual to alledge an Incertainty, as *tantum quantum meruit*. *Cro. Car.* 55. *Roberts* verſus *Sharp*.

71. *Aſſumpſit*, for that *R. B.* deviſed a Legacy of 60 *l.* to the Plaintiff, and made his Wife Executrix, and died, ſhe afterwards married the Defendant, and the Husband and Wife paid 53 *l.* Part of the Legacy to the Plaintiff, who gave them a *general Releaſe*; afterwards the Defendant, (the Husband) in Conſideration, that *at his Requeſt the Plaintiff had given a general Releaſe*, promiſed to pay the 7 *l.* Reſidue of the Legacy after the Death of his Wife, if ſhe did not pay it in her Life-time; it was objected, that this was *nudum pactum*, and no continuing Conſideration, but executed; but adjudged, that if the Promiſe had been made *at the Time of the Releaſe*, it had been clearly good; and tho' it was made after the Releaſe, yet ſince it was at the Defendant's *Requeſt* that the Releaſe was given, and he had the Benefit of the Continuance of the Releaſe, the Conſideration is good. *Cro. Car.* 295. 408. *Townſend* verſus *Hunt*. W. Jones 365.

72. *Aſſumpſit*, *&c.* for that the Defendant being indebted to the Plaintiff on Bond, and he intending to put the Bond in Suit, the Defendant promiſed, that in Conſideration the Plaintiff would *defer* the Payment of the Money *& non implacitaret* the Defendant, upon the Bond he would pay the Money; adjudged, that by the Promiſe *non implacitare* the Plaintiff had waived the Benefit of putting the Bond in Suit, but the Force of the Obligation was not taken away, for he might ſue upon the Bond, but if he did, the Defendant would ſue him upon the Promiſe *non implacitare*, which ſhall be intended for Life, and not for a Day or Year. *Latch* 161. *Cowlin* verſus *Cook*.

73. Where an Agreement is to do a Thing on a certain Day, and in Conſideration thereof, the Defendant agrees to pay Money, or to do ſome other Act; there, if the *Day is paſt* before any Thing done, the Agreement is diſſolved; as for Inſtance, the *Teſtator* and one *Crook*, and *another Perſon*, had ſeparate Intereſts in Lands in *D.* and in Conſideration that the *Teſtator* had promiſed to grant his Intereſt, *&c.* to the Defendant, he promiſed to pay 500 *l.* at *Michaelmas* following: *If he* (the Defendant) *could agree with* Crook *for his Part*: The Teſtator died, the Plaintiff brought an Action for the 500 *l.* ſetting forth, that *after the Death of the Teſtator*, the Defendant had agreed with *Crook* for his Part, and that the Teſtator in his Life-time, and the Plaintiff after his Death were ready to convey the other Part; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the whole Bargain depended upon the *Agreement to be made with* Crook, ſo that if he ſhould diſagree, then the Defendant was not to pay any Money; and if that was not paid, then the Plaintiff was not to convey, ſo that the Agreement was conditional, and the Teſtator dying before the Defendant had agreed with *Crook*, the Bargain between them was diſſolved, becauſe he could not make a Conveyance after he was dead. *Jones* 218. *Dyer* 76. a. *S. P.*

74. In *Aſſumpſit*, *&c.* the Caſe was, Leaſe for Years, rendring Rent quarterly, in which the Leſſee covenanted to pay the Rent and to repair the Houſe, *&c.* and he and one *Morris* were bound in a Bond for Performance of Covenants; there was 33 *l.* due for Rent for one Quarter, and not paid, whereupon *Morris* offered the Leſſor, that if he would promiſe to put the Bond in Suit againſt the Leſſee, but at the Charge of *Morris*, and that what he recovered on ſuch Suit ſhould be to the Uſe of *Morris*, then he would pay the 33 *l.* to the Leſſor, and would repair the Houſe before the next Quarter-Day: The Leſſor accepted the 33 *l.* and promiſed to put the Bond in Suit, and *Morris*, before the next Quarter-Day, did ſufficiently repair the Houſe; the Bond was put in Suit, and the Leſſor recovered ſo much, which he refuſed to pay, *&c.* it was objected, that this Action would not lie, there being no Conſideration to raiſe a Promiſe, but ſuch as was void in Law, becauſe it was to pay a Sum of Money, in Conſideration he would ſue a third Perſon, which is *Maintenance*: But adjudged a good Conſideration, 'tis true, the Bond was forfeited, but yet the Leſſor could not have the Penalty *without a Suit*, which would be a Charge and Trouble to him; but by this Agreement he had it quietly, without Suit, which is a good Conſideration; beſides, the Promiſe is good, for it was no more than to put a Bond in Suit at the Charges of the Obligor himſelf, which is lawful for him to do. *Palm.* 169, 189. *Morris* verſus *Badger*.

75. *Aſſumpſit*, *&c.* The Caſe was, *Turner*, the Defendant, owed *Barwick* 30 *l.* upon Bond, and *Barwick* owed *Potter* 50 *l.* upon Bond, then *Barwick* aſſigned his Bond to *Potter*, and gave him a Letter of Attorney to ſue in his Name; *Potter* demands the 30 *l.* of *Turner*, who promiſed to pay it in Conſideration he would *forbear* till next *Sturbridge-Fair*, and for Non-payment brought this Action and had Judgment; and now it was objected, that the Action did not lie, becauſe here was no Conſideration to ſupport it, for *Potter*, the Plaintiff, had *no Intereſt*, but only a *bare Authority* to receive the Money; 'tis true, he might ſue for it, but notwithſtanding he promiſed not to ſue till after ſuch Time, yet *Barwick*, to whom the Money was * really due, might ſue him before *Sturbridge-Fair*, and if ſo, then the Defendant could have no Benefit of this Promiſe, and for this Reaſon the Judgment was reverſed *Palm.* 185. *Potter* verſus *Turner*. See (K) 20. *S. C.* Winch 7. * Poſtea 84, 113. S. P.

76. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that he being indebted to *T. S.* in ſo much, *&c.* he *delivered* the Money to the Defendant, who promiſed to deliver it over to the ſaid *T. S.* which he had not done, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was objected againſt him in Arreſt of Judgment, that here was no Conſideration to ſupport this Action, becauſe the Promiſe, as ſet forth by the Plaintiff, was *immediately to deliver over the Money to* T. S. ſo the Defendant could have no Benefit by it; but adjudged, that the Plaintiff was damnified by the Non-payment of the Money, and that by the Receipt of it, the Defendant was ſubject to an Action of Accompt, which Action is now diſcharged by this now brought againſt him, and that is a ſufficient Conſideration to ſupport it. *Palm.* 281. *Loe's* Caſe.

77. *Aſ-*

2 Roll. Rep. 259.

77. *Aſſumpſit, &c.* in which the Plaintiff declared, that the Defendant's Teſtator being indebted to him, died, having made the Defendant Executor, and that the Plaintiff demanded the Debt of him, who promiſed, that if he (the Plaintiff) would *forbear till Michaelmas following*, that he would pay the Debt and *the Intereſt thereof* then due, and ſets forth, that at the Requeſt of the Defendant he did forbear, and that there was 5 *l. due for Intereſt*, and that the Principal was not paid, for which, and for the *Intereſt, actio accrevit, &c.* after a Verdict for the Plaintiff it was objected, that this Action would not lie, becauſe the Promiſe was founded upon an unlawful Conſideration, *Uſury* being prohibited both by the Law of God and Man; but adjudged, that the Conſideration is good, ſince *Intereſt is allowed by the Statute*, and in moſt other Kingdoms it being for the Benefit of Trade. *Palm.* 291. *Sanderſon* verſus *Warner.*

78. The Plaintiff granted an Annuity to a Feme Covert for her Life, and afterwards the Huſband and Wife, in Conſideration of a certain Sum of Money paid to them by the Plaintiff, promiſed to acquit him of the ſaid Annuity; the Wife died, and an *Aſſumpſit* was brought againſt the Husband, in which the Plaintiff declared, that the Husband and Wife had promiſed to diſcharge him of the ſaid Annuity, *&c.* after a Verdict for the Plaintiff it was objected, that the Declaration was ill, and that the Action would not lie, becauſe a Promiſe made by a *Feme Covert* is void, but adjudged, that the Action lies againſt the Husband, and that 'tis good after a Verdict, tho' it might have been otherwiſe upon a Demurrer. *Palm.* 312. *Priſley* verſus *Stafford.*

Poph. 177. Latch. 141.

79. *Caſe, &c.* in which the Plaintiff declared, that the Defendant's Husband, upon *an Accompt between them, was indebted* to the Plaintiff in ſo much Money, and promiſed to pay it, and died; and that the Defendant being his Widow, and having Notice of the ſaid Promiſe, and alſo Notice that the Plaintiff intended to ſue her, ſhe promiſed, that if he would not ſue her until ſuch a Time, then, in Conſideration thereof ſhe would pay, *&c.* upon *Non Aſſumpſit* pleaded the Plaintiff had a Verdict, but it was moved in Arreſt of Judgment, that here was no Colour to ſue the Defendant, for 'tis not ſhewn that ſhe was *Executrix*, or any Ways chargeable with this Debt of her Husband; but adjudged, that a *Requeſt to the Plaintiff to forbear* is a good Conſideration, and this was upon the Authority of *Gale* and *Cloberry*'s Caſe, which was thus, *Gale* required *Cloberry* to deliver to *T. S.* Six hundred Pounds worth of Wine, which was accordingly delivered; afterwards one *Clare* promiſed *Cloberry*, that in Conſideration *at Gale*'s *Requeſt Cloberry* had delivered Wine to ſuch a Value to *T. S.* that he the ſaid *Clare* would pay the Money if *T. S.* did not, *T. S.* paid only 300 *l.* adjudged by all the Judges of *England* in Error, that *Cloberry* had a good Action againſt *Clare* upon this Promiſe and Conſideration at the Requeſt of another. *Palm.* 441. *Goodwin* verſus *Willoughby.*

80. *Caſe*, in which the Plaintiff declared, that whereas he had put one *I. W.* his *Grandchild* Clerk to the Defendant to ſerve him, *&c.* and that the Defendant was to find him meat, drink, *&c.* and had given him 30 *l. &c.* The Defendant, in Conſideration that the Plaintiff would *give his Conſent* that the ſaid *I. W.* ſhould depart out of his Service, and if he ſhould depart accordingly, promiſed to pay the Plaintiff 15 *l.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, and upon a *Writ of Error* brought in *B. R.* it was aſſigned for Error, that here was no Conſideration, it being that the Plaintiff ſhould *give his Conſent, that* I. W. *ſhould depart his Service*, when he might have left his Service without any ſuch Conſent; but adjudged for the Plaintiff, becauſe he being ſo nearly related to the ſaid *I. W.* might have ſuch an Intereſt in him, that his Conſent might be an effectual Means to cauſe him to depart the Defendant's Service. *Allen* 78. *Ward* verſus *Prinn.* See *Antea, placito* 40. *S. P.*

81. *Aſſumpſit*, for that if the Plaintiff would *forbear* his Suit againſt one who had aſſaulted and beaten him, that he the Defendant would pay the Plaintiff as much as he was damnified by the ſaid *Aſſault*; now, tho' the Plaintiff did not aver that he had an Intention to ſue for the Aſſault; and tho' he did not ſet forth what Damages he ſuſtain'd, and Notice thereof to the Defendant, yet the Action did lie, for the Defendant took Notice of it when he made the Promiſe, and the Requeſt to perform his Promiſe implies *Notice. Style* 57. *Finer* verſus *Jefferies.*

82. *Aſſumpſit*, for that the Defendant promiſed, in Conſideration the Plaintiff would *forbear to proteſt a Bill of Exchange* drawn upon the Defendant, that he the ſaid Defendant would pay the Money when he ſhould come *next* * *to London*; it was objected in Arreſt of Judgment, that this was no Conſideration, becauſe the Plaintiff did not ſhew that he came to *London*; but adjudged 'tis not material, for the Payment of the Money was a Duty and a good Conſideration. *Style* 416. *Pinchard* verſus *Fowks.*

* Antea 3, 29.

83. In an Action of Debt upon a Bond conditioned for Payment of 369 *l.* and Intereſt, the Plaintiff obtained a Judgment, and afterwards made a *Letter of Attorney to the Plaintiff* to receive the ſaid principal Sum and Intereſt to his own Uſe; and in Default of Payment to proſecute the Obligor upon the ſaid Judgment, and thereupon the Plaintiff intending to take out Execution againſt the Obligor in the Name of the Obligee, of which Intention the Plaintiff gave the Defendant, *&c.* Notice; he the ſaid Defendant, 7 *June* 1654, at *London, &c.* in Conſideration that the Plaintiff would *forbear to proſecute the Obligor*, &c. *till the End of* Michaelmas-Term *enſuing*, promiſed then to pay the Money, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was objected in Arreſt of Judgment, that this was not a good Conſideration, for where the Plaintiff hath *no Prejudice* by *Forbearance*, nor the Defendant *any Benefit*, there 'tis * no good Conſideration; now in this Caſe the Plaintiff can have no *Prejudice*, becauſe he is not the real Creditor, he having only a Letter of Attorney to proſecute in the Name of another, and his Forbearing might be no Benefit to the Defendant, becauſe the Creditor himſelf, to whom the Debt

* *See* Newcomen *ver.* Leigh. S. P.

was actually due, notwithſtanding he had given a Letter of Attorney to another, might ſtill † ſue the Defendant, and recover the Money: But adjudged, that the Conſideration was good. *Hardres* 71. *Reynolds* verſus *Proſſer*. † Poſtea 112. S. P. Antea 75. S. P.

84. *Caſe, &c.* in which the Plaintiff declared, that whereas the Defendant (the Father) was indebted to him (the Plaintiff) in ſix Pounds, and his Son was indebted to him *pro diverſis negotiis, &c. in 63 l.* that the Defendant, in Conſideration he would *forbear* to ſue *for thoſe Debts* for one Month, promiſed to pay them; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Action would not lie, becauſe the Father had no Benefit of the *Forbearance* to ſue for his Son's Debt; but adjudg'd that he ſhall be charged with the whole Debt of *69 l.* for tho' he was not liable to his Son's Debt, nor was it reduced to any Certainty, yet when he promiſed to pay upon *Forbearance* he ſhall be liable, becauſe the *Forbearance* was a Damage to the Plaintiff; 'tis true, as to the Son's Debt, it was no Benefit to the Defendant, but where there are two Conſiderations, and one void, (but not againſt Law) Damages ſhall be intended to be given for that Conſideration which is good. *Sid.* 38. *Beſt* verſus *Jolly*.

85. *Aſſumpſit*, in which the Plaintiff declared, that in Conſideration he would *forbear till he or they ſhould ſend to* Liverpool, the Defendant promiſed to pay, and that he did forbear, *&c.* adjudged a good Conſideration after Verdict, and that Forbearance generally, or for a convenient Time, is a good Conſideration, but * *aliquo tempore*, or *paululum tempus*, is not; but in the principal Caſe, the Conſideration was to forbear till *he or they ſhould ſend, &c.* and the Plaintiff declared, that he did forbear *till they*, omitting *till he or they did ſend*, and for that Cauſe the Judgment was arreſted. *Sid.* 49. *Tricket* verſus *Manlee*. * Antea, 3. 23. S.P.

86. *Aſſumpſit, &c.* The Caſe was, that the Principal in the Bond died, and having made his Executor, the Surety paid the Money, and the Executor promiſed, that in Conſideration he (the Surety) would forbear to ſue for ſo long Time, he promiſed to pay the Money, and for Non-payment the Action was brought; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that this Conſideration is void, becauſe the *Executor was not obliged to pay the Debt*; but adjudged, that he was obliged in Equity, *&c.* *Sid.* 89. *Scot* verſus *Steevens*. *See* Bane's *Caſe*. See *Dyer* 356. a. See *Yelv.* 40. 1 Lev. 71.

87. *Aſſumpſit, &c.* in which the Plaintiff declared, that he is a *Bailiff*, and having arreſted *W. R.* on a Warrant, the Defendant promiſed, that in Conſideration the Plaintiff would permit the ſaid *W. R.* to be in his Houſe, he (the Defendant) would deliver him to the Plaintiff the next Day; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that the Promiſe was void, becauſe againſt Law, for to leave a Priſoner in another Houſe is an * Eſcape; but adjudged that it ſhall be intended, that the Plaintiff was always preſent in that Houſe. *Sid.* 132. *Benskin* verſus *French*. See *Ruſhout* verſus *Waite*. *S. P.* See 2 *Lev.* 17. *Freak* verſus *Chettle*. *S. P.* 1 Lev. 98.

88. *In Aſſumpſit, &c.* the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the *Aſſumpſit* was void, for one was to give ſo much Money in Conſideration the other would *aſſign a* Judgment to him, which Judgment was obtained againſt *W. R.* in the *Marſhal's Court*; now this is a *Choſe in Action* not aſſignable, and if it was, 'tis Maintenance; beſides, the Judgment is entire, and therefore the Damages and Coſts ought to be aſſigned, which is not done, but adjudged a good Conſideration, and 'tis common for one to give another a Letter of Attorney to ſue in the Name of him who gave it without Maintenance, and the Damages and Coſts follow the Judgment as acceſſary. *Sid.* 212. *Loder* verſus *Cheſlyn*.

89. *Aſſumpſit*, in Conſideration he would put his Daughter to be inſtructed in Needlework; the Defendant promiſed to pay for *a Year's Board*, and the Plaintiff averred, that he did put his Daughter, *&c.* for *three Quarters of a Year*; he had a Verdict, and it was inſiſted in Arreſt of Judgment, that here is a *Variance* between the Promiſe and the Agreement on which 'tis founded, for that was to place the Daughter *abroad for a Year*, which he had not done, but only for *three Quarters of a Year*, which could be no Inducement to the Defendant to make this Promiſe, becauſe he might imagine the Daughter could not be taught in leſs Time than a Year; ſo where an Agreement is laid to pay 2 *l.* for *every Tun* of Iron which ſhall be delivered, and the Plaintiff declares that he delivered one Tun and *an half*; ſo where a Man promiſes to pay his Clerk ſo much for every *Quire of Paper* he ſhall write, and he declares for a Quire *and an half*, 'tis wrong, even after a Verdict, which is very true, but not in the principal Caſe; for if there is any Variance in that Agreement, 'tis for the Advantage of the Defendant, (*viz.*) to pay leſs than he ought; for the Meaning of it is, that he would pay for the Board not *exceeding a Year*. *Sid.* 225. *Carne* verſus *Gunſton*. 1 Lev. 140.

90. Caſe, *&c.* in which the Plaintiff declared, that he and the Defendant diſcourſing of a Man who died Inteſtate, and in Debt to the Plaintiff, he the Defendant ſaid, *Forbear to ſue me till I come to* * London, *and forbear his Debt, and I will pay it*; and averred, that he did forbear; upon a Demurrer to the Declaration it was objected that it was ill, becauſe it did not appear that the Defendant was chargeable for the Debt; it was held, that the Preventing the Fear of an Arreſt in his Journey is a good Conſideration, but they all agreed, that if it had been, *forbear to ſue me as Adminiſtrator*, the Plaintiff ought to have averred, that Adminiſtration was granted to the Defendant. *Sid.* 242. *Quick* verſus *Copleſton*. 1 Lev. 161. * Antea 26.

91. Caſe, *&c.* in Conſideration the Plaintiff would permit the Defendant *to enjoy the Profits of ſuch Lands* till he could ſhew him (the Plaintiff) a good Title, he (the Defendant) promiſed to give him (the Plaintiff) ſo much, *&c.* after a Verdict for the Plaintiff, it was inſiſted in Arreſt 1 Lev. 179.

* Poſtea pl. 92. of Judgment, that an Action on the Caſe would not lie, but an Action of Debt for the * Rent, becauſe it was for the Profits of Lands, which is very true, if there had been no actual Promiſe made to pay the Money; but a Promiſe being made, this Action is founded thereon. *Sid.* 279. *Grubham How* verſus *Norton.*

1 Lev. 204. 92. *Caſe, &c.* in which the Plaintiff declared, that there was a Diſcourſe between him and the Defendant concerning an *Houſe, &c.* of which one *Lodge* had a Leaſe, rendring Rent to the Plaintiff, and the Defendant affirming that he had an Intereſt under *Lodge* promiſed, that if the Plaintiff would deliver to him (the Defendant) the Keys and quiet Poſſeſſion of the Houſe, that he would pay the Plaintiff all that *Lodge* ought to pay, and that he would become his Tenant according to the Leaſe, *&c.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that it did not appear the Plaintiff had any Eſtate in this Houſe, but that it was in *Lodge*; beſides, if there was any Reverſion in the Plaintiff, and if any Thing was due to him, it was * *Rent*, and for that an *Action on the Caſe would not lie*; but adjudged, that tho' the Defendant pretended an Intereſt, yet the Plaintiff had the Poſſeſſion, which being delivered to the Defendant by him (the Plaintiff) that is a ſufficient Conſideration, whether he had any Title or not, and tho' this is a *Rent*, yet an Action on the Caſe will lie on an expreſs *Promiſe* to pay it. *Sid.* 323. *Chapman* verſus *Southwick.*

* Antea pl. 91.

1 Lev. 188. 93. *Aſſumpſit* made to the Plaintiff's Attorney, in Conſideration he would *forbear* to proſecute a Recognizance, upon which he was employed to take out Execution againſt the Defendant, he promiſed to pay; the Defendant demurred to the Declaration, for that the Conſideration is void, as ariſing *ex turpi cauſa*, for 'tis contrary to the Truſt, and in Breach of an Attorney's Oath to *forbear* when he is employed to *ſue*; but adjudged, that it ſhall be intended the Attorney had Authority from his Client to *forbear*, or to Uſe ſuch Means as he might think requiſite to get the Debt, and to *forbear generally*, without ſaying how long, is good, for it ſhall be taken to be perpetual Forbearance. *Sid.* 294. *Ruſſel* verſus *Haddock.*

1 Lev. 222. 94. Caſe, *&c.* in which the Plaintiff declared, that *W. R.* was indebted to him, and died Inteſtate, and that he (the Plaintiff) intending to ſue the Defendant *ut Adminiſtratorem*, and having given *him Notice* of ſuch his Intention, he (the Defendant) promiſed, that if the Plaintiff would *forbear to ſue*, till he (the Defendant) married ſuch a Woman, he would pay the Money; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that it did not appear by the Declaration, that the Defendant was liable to be ſued, and ſo 'tis no Conſideration to forbear; for 'tis ſaid, that he was intended to be ſued *ut Adminiſtrator*, which is not an Averment that he was *Adminiſtrator*, but the Plaintiff had Judgment; for to be ſued *ut Adminiſtrator, of which he had Notice*, is ſufficient. *Sid.* 337. *Downes* verſus *Beck.* See *Style* 401. *Ducket's* Caſe.

95. *Aſſumpſit, &c.* in which the Plaintiff declared, that *W. R.* died Inteſtate, and indebted to him, and that the Defendant intending to *adminiſter*, promiſed the Plaintiff, that if he would *ſhew the Specialties* by which the Debt accrued, and how much was paid, and what remained due, the Defendant would pay it; and then declares, that the Defendant did adminiſter, *&c.* after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that this Declaration was ill, and the Defendant *not chargeable*, becauſe it doth not appear he had *Aſſets*; but adjudged, that 'tis not material, becauſe in this Caſe the Conſideration ariſes from the Plaintiff, (*viz.*) his *Shewing the Specialties* to the Defendant, which was the Thing he himſelf deſired. *Sid.* 369. *Loo* verſus *Burdeux.*

1 Lev. 257. 96. *Aſſumpſit, &c.* in which the Plaintiff declared, that he was *poſſeſſed of ſeveral Tickets* for the Payment of Seamen's Wages, and had an Order from *Sir George Carteret*, the Treaſurer of the Navy, for the Payment thereof; and that the Defendant being an Officer under the *Treaſurer*, promiſed, that if the Plaintiff would not trouble the Treaſurer in procuring another Order, he would pay the Money; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Plaintiff had not ſhewed any * Title to theſe Tickets, as that he was Executor or Adminiſtrator, or by an Aſſignment, or otherwiſe; but adjudged good after a Verdict, eſpecially ſince the Plaintiff declared, that he had an Order from the Treaſurer to receive the Money, which he could not have, unleſs he had a *Title* to it. *Sid.* 392. *Boltin* verſus *Fenn.*

* Poſtea 121. S. P.

Poſtea 116. 1 Vent. 44. 1 Mod. 8. Poſtea 123. 97. *Aſſumpſit*, in which the Plaintiff declared, that the Defendant promiſed to give him (the Plaintiff) ſo much *pro opere ſuo facto*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that here is nothing on the Plaintiff's Part to found an *Aſſumpſit*, for *opus factum* may be any neighbourly Kindneſs, therefore the Declaration is too general; but adjudged, that 'tis the ſame as *pro labore ſuo*, which hath been held good, and it being after a Verdict, it ſhall be intended ſuch Labour was given in Evidence as might be a Conſideration for this Promiſe. *Sid.* 424. *Ruſſel* verſus *Collins.* See *Antea* (L) 24. *contra.*

Sid. 446. 98. *Aſſumpſit, &c.* in which the Plaintiff declared, that whereas the Defendant's Brother was indebted to the Plaintiff for a Quarter's *Rent*, in Conſideration, that he (the Plaintiff) *mitteret proſequi* the Brother, he (the Defendant) promiſed to pay, *&c.* after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that here was no Conſideration, for it was no Loſs to the Plaintiff * *to ſend* to proſecute; but ruled, that tho' *omitteret* had been better *Latin*, yet in the *Dictionary*, *mitto* ſignifies to *forbear* as well as to *ſend*, and where a Word will bear ſeveral Significations, the beſt ought to be taken after a Verdict. 1 *Mod.* 43. *Buckley* verſus *Turner.* See *Poſtea, pl.* 101. *S. P.*

* Mitteret.

99. *Aſſumpſit, &c.* in which the Plaintiff declared, that the Defendant's Teſtator was indebted at the Time of his Death to the Plaintiff in 12 *l.* 10 *s.* and that the Defendant, in Conſideration

of *Forbearance, &c.* promiſed to pay 5 *l.* at ſuch a Time, and * 5 *l.* more ſome ſhort Time after, and the other 50 *s. when he ſhould have received Money*, and avers, that he did forbear, and that the Defendant had paid the two five Pounds, *and that he had received Money*, but had not paid the 50 *s.* Reſidue: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Plaintiff ought to have ſet forth, how much Money the Defendant had received; for tho' the Promiſe was general, yet the Breach ought to be adequate to the Conſideration; beſides, he ſhould have ſet forth, *of whom, and when, and where he received Money*, becauſe the *Receiving* is traverſable; but adjudged, that tho' theſe might have been Faults upon a Demurrer to the Declaration, yet they were cured by a Verdict; for as to the *quantum* the Defendant had received, the Court will intend, that it was 50 *s.* otherwiſe the Jury would not have given ſo much Damages; and as to the * *Time when, and Place where* received, the Defendant had waived the Benefit by pleading the General Iſſue. 1 *Mod.* 169.

* 1 Roll. Rep. 404. Pete *v.* Tongue.

* *See* Audita querela. (E) 8.

100. *Caſe, &c.* in which the Plaintiff declared upon a *Quantum meruit* for 40 *s.* and upon an *Indebitatus Aſſumpſit* for 40 *s.* The Defendant confeſſed the Promiſſes, but pleaded, that they accounted for ſeveral Sums, and that upon the Balance of the ſaid Accompt, he, the Defendant, was found to be indebted to the Plaintiff in 3 *s.* and no more, and that the Plaintiff, in Conſideration, that the Defendant promiſed to pay the ſaid 3 *s.* diſcharged him of all *Demands*, and upon Demurrer to this Plea, the Defendant had Judgment; for upon this mutual Accompt there being an expreſs Agreement to pay what was the Balance, and each of them to be diſcharged from each other, this is a good Diſcharge in Law, and the Parties ſhall not reſort to their Original Contract, and that a Promiſe might be diſcharged by Parol, but not after 'tis broken. 1 *Mod* 205. *Millward* verſus *Ingram.*

2 Mod. 43.

101. *Aſſumpſit, &c.* in which the Plaintiff declared, that he and the Defendant were *Coexecutors*, and that the Defendant had received 200 *l.* of the Teſtator's Money, a Moiety whereof belonged to the Plaintiff, and that he for the Recovery thereof *ſectaſſet* the Defendant, who in Conſideration, that the Plaintiff would *forbear* to proſecute the ſaid Suit, and *monſtraret quoddam computum*, promiſed to pay him (the Plaintiff) 100 *l.* and avers, that he did forbear, and that *oſtentavit quoddam computum prædict'*; after a Verdict for the Plaintiff, it was objected, that here was no good Conſideration, for *ſectaſſet* generally is not good, without alledging, that it was *legali modo*, and in what Court, that it may appear, whether it had a Juriſdiction or not; but adjudged, that after a Verdict it ſhall be intended, that there was Proof of a *Suit, &c.* and 'tis a ſufficient Conſideration to ſhew *quoddam computum prædict'*; 'tis true, it had been better to have alledged, that *monſtravit computum*, inſtead of *oſtentavit computum*, becauſe it ſuits better with the Allegation of the Conſideration; but *oſtento* ſignifies to *ſhew* as well as to *brag*. 1 *Mod.* 284. *Smith* verſus *Smith.*

Raym. 203.

102. *Aſſumpſit, &c.* in which the Plaintiff declared, that one *Stanton* was indebted to *Alſop* in 100 *l.* that *Stanton* died, and his Widow, the now Defendant, adminiſtred, and poſſeſſed her ſelf of his Goods to the Value of 100 *l.* that ſhe paid 60 *l.* Part thereof to *Alſop*, who appointed the Plaintiff to receive the 40 *l.* Reſidue of the Defendant, of which ſhe had Notice, and that, in Conſideration the Plaintiff, at her Requeſt, would *accept her to be his Debtor for the ſaid* 40 *l.* ſhe promiſed to pay, *&c.* The Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; but it was adjudged againſt him, that this Action would not lie for want of a good Conſideration to found the Promiſe; becauſe, before any ſuch Promiſe made, ſhe (the Defendant) did not owe any Thing to the Plaitiff, but to *Alſop*, and he by appointing the Plaintiff to receive the 40 *l.* of the Defendant, had transferred no Property or Intereſt in the Debt to him, it being no more than a *Choſe in Action*, he had an Authority to receive it, if ſhe, the Defendant would pay it; but if ſhe would not, the Plaintiff had no Remedy againſt her, but againſt *Alſop*, and he ought to ſue her for it: So, that a Promiſe to pay, if another would receive, is a meer voluntary Promiſe, and not binding, becauſe 'tis no good Conſideration to raiſe a Promiſe. 1 *Saund.* 210. *Forth* verſus *Stanton.*

1 Lev. 262.

103. *Aſſumpſit, &c.* in which the Plaintiff declared, that the Defendant, in Conſideration that her (the Plaintiff's Inteſtate) *at the Requeſt of the Defendant*, had provided for him (the Defendant) *diverſa Veſtimenta & omnia material' ad inde ſpectan'*, he promiſed to pay to the Inteſtate what he ſhould reaſonably deſerve, and avers, that he did deſerve 36 *l. pro veſtimentis & neceſſariis prædict'*; then ſhe lays an *Indebitatus Aſſumpſit for* 36 *l.* Money laid out, *&c.* and that the Defendant had not paid it to the Inteſtate, or to the Plaintiff as Adminiſtratrix; there was Judgment by Default, and a Writ of Enquiry, and Damages entirely aſſeſſed, and now moved in Arreſt of Judgment, that the Declaration was ill as to the firſt Promiſe, for in a *Quantum meruit* there ought to be ſome Certainty of the Things for which a Recompence is demanded by the Plaintiff, but here the Averment was very incertain, for it was for 36 *l. pro veſtimentis & neceſſariis prædict'*, when there was no Mention of *any Neceſſaries before*; but adjudged, that the *Materials* mentioned before, ſhall be intended by the Word *Neceſſaries*; and tho' in *Trover* it might be requiſite to ſhew how many Garments he had made, becauſe the Value in Damages is to be recovered in that Action, and for that Reaſon more Certainty is required; yet in this Caſe, 'tis not the Value, but how much the Inteſtate did really deſerve, that is to be recovered, and of that Matter the Defendant might be ſufficiently appriſed, eſpecially, ſince the Plaintiff had alledged, that the Cloaths were made for him, and at his Requeſt. 2 *Saund.* 373. *Tate* verſus *Lewin.*

104. *Aſſumpſit, &c.* in Conſideration the Plaintiff, at the Requeſt of the Defendant, would find and provide for him and his Retinue, *Meat, Drink*, Lodging and Horſe-meat for his Horſes, *&c.* he promiſed to pay as much as he ſhould deſerve, and avers, that he (the Plaintiff) did, at ſeveral Times and Days, find and provide *Meat, Drink, Lodging, &c.* for the Defendant, and *Horſe-meat* for his Horſes, on the 8*th Day of June*, and divers other Times, for which he deſerved 33 *l.* Upon a Special Demurrer to this Declaration, it was objected, that it was *incertain*, becauſe the Plaintiff did not ſet forth, *on what Days* he provided Meat and Drink, *&c.* for he ought to have alledged, that *between the* 8*th Day of June, and before the Action brought*, he did find *Meat, Drink, &c.* for otherwiſe 'tis ſo incertain, that a Judgment in this Action could not be pleaded in Bar to another to be brought for the ſame Thing; but adjudged, that the Declaration was very *certain*, for it ſhews, that all was done after the Promiſe made, and before the Bill exhibited, and if it had ſhewed all the Days and particular Times in which every Thing was done, this would have made the Declaration too long, which is always allowed to be ill Pleading, tho' it might be otherwiſe in an Action of Debt upon a Contract; and ſo is *Hob.* 5. *Gardner* verſus *Bellingham. Raym.* 8. *Jermy* verſus *Jenny.* See *Mintz* verſus *Bethell*, and *Cripps* verſus *Bainton. S. P. Sid.* 18. *S. P.*

105. *Aſſumpſit, &c.* for *Phiſick Wares, &c.* provided and delivered for *the Daughter* of the Defendant, and at his Requeſt. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was moved in Arreſt of Judgment, that an *Indebitatus Aſſumpſit* would not lie upon a *Collateral Promiſe*, as this was, where the Defendant promiſed not for himſelf, but for his Daughter, for 'tis no Debt from him but from his Daughter, and therefore the Plaintiff ought to have declared Specially; but adjudged, that the Action is well brought, the Phiſick being provided and delivered *for, and not to the Daughter*, which after Verdict, ſhall be intended to be delivered to the Father for his Daughter. *Raym.* 67. *Stonehouſe* verſus *Bodvill.*

Sid 283. 106. *Aſſumpſit, &c.* the Plaintiff declares, that in Conſideration he would *make Oath*, that the Money in Queſtion was due to him, the Defendant promiſed to pay it, and he averred, that he did make Oath before a Maſter in Chancery, *&c.* And upon Demurrer to this Plea, the Plaintiff had Judgment. *Raym.* 153. *Bretton* verſus *Prettiman.* 2 *Sid.* 123. *Perkins* verſus *Bink.* *Antea 5. *S. P.* See **Knight* verſus *Ruſhworth. S. P.* 1 *Mod.* 166. *Amy* verſus *Andrews. S. P.*

1 Mod. 284. Poſtea 129. 107. *Aſſumpſit, &c.* for that the Plaintiff and Defendant were joint Executors to *T. P.* and the Defendant received all the Teſtator's Eſtate, when a Moiety thereof did belong to the Plaintiff, and he threatning to *ſue the Defendant to bring him to an Account*, he (the Defendant) in Conſideration the Plaintiff would *forbear* the Suit, and produce an Accompt of the Teſtator's Eſtate, did promiſe to pay the Plaintiff 100 *l.* and avers, that he did forbear, *&c.* and that he ſhewed the Accompt, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Plaintiff did not ſet forth, *where he intended to ſue the Defendant*, and it might be in a Court which had not Juriſdiction of the Cauſe; then he avers, that he ſhewed *quoddam computum* where it ſhould be *computum præd'*; but the Plaintiff had Judgment. *Raym.* 203. *Smith* verſus *Smith.*

108. *Aſſumpſit, &c.* in which the Plaintiff declared, that there was a Diſcourſe between him and the Defendant, concerning a *Marriage* to be had between *C. R.* his Siſter's Son, and *J. R.* the Defendant's Neece; and that the Defendant, in Conſideration the Plaintiff, at the Inſtance and Requeſt of the Defendant, would endeavour and labour to perſwade *C. R.* the Nephew of the Plaintiff, to *marry* the ſaid *J. R.* he (the Defendant) promiſed to pay the Plaintiff 40 *l.* if the *Marriage* did take Effect, and the Plaintiff avers, that he on the 31 *Day of December*, 29 *Car.* 2. and at ſeveral other Times, at the Inſtance of the Defendant, *omnibus modis quibus poterat conatus fuit & laboravit* to perſwade the ſaid *C. R.* to marry the ſaid *J. R.* and that afterwards, *(viz.)* 1 *Julii* 30 *Car.* 2. the Marriage did take Effect, *&c.* Upon *Non Aſſumſit* pleaded, the Plaintiff had a Verdict and Judgment, and upon a *Writ of Error* brought, the Error aſſigned was, that the Declaration was ill, becauſe the Plaintiff did not ſhew, how he did endeavour to perſwade him to marry, *&c.* but adjudged, that the Declaration was good, for it ſhall not be preſumed, that he uſed any unlawful Means to perſwade him, *&c.* beſides, if he ſhould ſet forth the Diſcourſe he had either in commending the young Woman, or a married Life, it would make the Record to long. *Raym.* 400. *Aglionby* verſus *Tourſon.* See *Baker* verſus *Smith. S. P.*

T. Jones 158. 109. *Indebitatus Aſſumpſit* for 100 *l.* received to the Uſe of the Plaintiff; and alſo, upon an *inſimul computaſſet* for another 100 *l.* on the ſame Day: The Defendant pleaded, that the ſaid ſeveral Sums in the Declaration mentioned, are for one and the ſame Cauſe of Action for 100 *l.* only, *&c.* and that after the Time of the ſeveral Promiſſes, *&c.* *(viz.)* on ſuch a Day the Defendant paid, by the Plaintiff's Order, to one *J. B.* 30 *l.* in Part of Satisfaction of the Money in the Declaration ſpecified; and that he gave a Bond of 120 *l.* conditioned for the Payment of 65 *l.* to the Plaintiff on a certain Day to come, in full Satisfaction of the Money demanded in the Declaration, and that the Day is not yet come, and that the Plaintiff accepted the 30 *l.* and the ſaid Bond, and *hoc parat' eſt, &c.* and upon Demurrer to this Plea it was adjudged good; for tho' 'tis common to declare for a Debt ſeveral Ways, and 'tis no good Plea to ſay, that the ſeveral Sums are only the Sums firſt mentioned; yet when the Defendant pleads over, that the very Sum demanded is ſatisfied, that Plea muſt be good; that if the Sums had been diſtinct, the Plaintiff might have replied and alledged, that they were ſeveral, and tendred an Iſſue upon it; but when by the Demurrer he admits, that there was but one Sum, and by the Plea it appears it was ſatisfied, the Plea is good. *Raym.* 449. *Shelwood* verſus *Clipſham.*

110. *Indebitatus Aſſumpſit* by *Eliza Caſe* againſt *James Barber* the Defendant, for Meat, Drink, *&c.* provided, *at his Requeſt*, for his Wife, and a *quantum meruit & inſimul computaſſet, &c.* The Defendant pleaded an Agreement between him and the Plaintiff, and one *Jacob Barber*, that the Plaintiff ſhould deliver ſome Cloths to the Defendant, and ſhould accept the ſaid *Jacob Barber* for her Debtor for 9 *l.* in full Satisfaction of the Premiſſes mentioned in the Declaration, and avers, that the Plaintiff did deliver the Cloths, and that ſhe accepted the ſaid *Jacob* for her Debtor for 9 *l.* and that the ſaid *Jacob* agreed to pay it to the Plaintiff accordingly; and that afterward (*viz.*) 27 *Aprilis* 32 *Car.* 2. the ſaid *Jacob* was ready, and offered to pay the ſaid 9 *l.* and the Plaintiff refuſed to receive it, and that he hath ſince always been and ſtill is ready to pay the ſame, if the Plaintiff will receive, *& hoc paratus eſt, &c.* and upon Demurrer to this Plea it was inſiſted for the Defendant, that it was a good Plea, becauſe now, (tho' not formerly, as in *Peto*'s Caſe) an Action lies upon * *mutual Promiſes*, and therefore where an *Indebitatus Aſſumpſit* was brought againſt an Executor, upon a Promiſe of his Teſtator, the Defendant pleaded, that a Judgment in Debt was had againſt him upon a ſimple Contract for the Debt of the Teſtator; this was adjudged a good Plea a Demurrer to it, becauſe, tho' in *Debt againſt an Executor*, upon a ſimple Contract of the Teſtator, he may upon demur to the Declaration, yet when he pleads the Judgment had againſt him upon a ſimple Contract of the Teſtator, and the Plaintiff by his Demurrer admits the Demand, the Plea is good, becauſe *Executors* are now liable to pay ſuch Debts, and this was the Caſe of * *Palmer* verſus *Lawſon*; but in the Principal Caſe, the Plaintiff had Judgment, becauſe the Agreement, that *Jacob* ſhould pay the 9 *l.* was made without any *Conſideration*; beſides, if it ſhould be a good Agreement, it ought now to be *in Writing*; 'tis true, the Plaintiff need not ſet it forth to be in Writing, but where the Defendant pleads it in Bar to the Plaintiff's Action, he muſt ſo plead it, that it may appear to the Court that an Action will lie upon it; for upon ſuch Agreement pleaded, he ſhall not take away the preſent Action from the Plaintiff, and not give him another upon that very Agreement. *Raym.* 450. *Caſe* verſus *Barber*.

T. Jones 158.

* Poſtea 146.

* Executor (I) 4.

111. *In Aſſumpſit*, the Plaintiff declared, that the *Lord Oxford* was indebted to him 250 *l.* and that the Defendant had Money of the ſaid *Lord*'s ſufficient in his Hands to pay the ſaid Debt; and that it was mutually agreed between them, that the Plaintiff ſhould accept * 200 *l.* in full Satisfaction of his Debt, and that the Defendant would pay the Money on ſuch a Day, and ſo lays mutual Promiſſes. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe this was *no Conſideration*. *T. Jones* 87. *Woodward* verſus *Rigby*.

* *See* Prideaux v. Rawlins.

112. *W. R.* owed 40 *l.* to the Plaintiff, and one *Dittlesfeild owed the like Sum to W. R.* who appointed the Plaintiff to receive it of the ſaid *Dittlesfeild*, and he, in Conſideration of the Promiſſes, and that the Plaintiff would *forbear* him for a Quarter of a Year, promiſed to pay the Money; an Action was brought againſt him upon this Promiſe, and upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and upon a Motion in Arreſt of Judgment, it was objected, that the Defendant *Dittlesfeild* was no *Party* to the Agreement between *W. R.* and the Plaintiff, and if ſo, there could be no Conſideration to raiſe a Promiſe; *Forbearance* cannot be a good Conſideration, becauſe he may ſtill be * ſued by *W. R.* for the 40 *l.* but the Plaintiff had Judgment, becauſe the Defendant *Dittlesfeild*, had agreed, that the Debt ſhould be transferred from *W. R.* to himſelf, and that *W. R.* by his appointing the Plaintiff to receive it of the Defendant, had agreed, that the Defendant ſhould be diſcharged as againſt him; and this differs from *Clipſam and Morice*'s Caſe, becauſe the Defendant in that Caſe was not indebted to the Perſon, who wrote a Letter to him to pay the Plaintiff, but the Defendant in this Caſe was indebted to the Perſon who appointed the Plaintiff to receive it of him. 1 *Vent.* 153. *Oble* verſus *Dittlesfeild*. See *Clipſam* verſus *Morris*, *antea* (K) 27, 84.

* Antea 75, 83. S. P.

113. *Aſſumpſit*, *&c.* in which the Plaintiff declared upon two Promiſſes; one was, that in Conſideration that he had done to the Defendant *multum & gratiſſimum ſervitium*, *&c.* he promiſed to pay him 10 *l. per Annum*, *&c.* the other was, in Conſideration he had done to him *multa Beneficia*, *&c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that ſome particular Service or Benefit ought to be expreſſed, which is very true; but this being *after a Verdict*, it ſhall be intended, that the Plaintiff gave ſomething in Evidence, which was a Conſideration ſufficient, otherwiſe the Jury would not have given Damages; but adjudged, that nothing being particularly mentioned as a Conſideration for this laſt Promiſe, and entire Damages being given for the Whole, the Plaintiff could not have Judgment, becauſe the laſt Promiſe was void. 1 *Vent.* 27. *Moor* verſus *Lewis*. *Hutt.* 85.

Sid. 413. S. C.

114. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that in Conſideration he would *uſe his Skill and Pains, and provide Medicines* for a certain Perſon and cure him of the *Ptiſick*, then the Defendant promiſed to pay what he deſerved, and laid another Promiſe at the ſame Time, and upon the ſame Conſideration, but ſomewhat varying from the firſt, and averred, that he had uſed his *Skill and Pains*, *&c.* and had cured the Perſon, *&c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the firſt Promiſe was void, becauſe the Plaintiff, as to that, had made no * *Averment* of uſing his Skill and Pains, and entire Damages being given for the Whole, therefore he cannot have Judgment; but adjudged, that ſince the *Averment* was made on the ſecond Promiſe, ſo that it appeared on the Record, that the Cure was done, that is ſufficient, eſpecially after a Verdict. 1 *Vent.* 27, 44. *Lee* verſus *Edwards*.

1 Lev. 280. 1 Mod. 14. Sid. 428. * Antea 68.

115. The

115. The Husband was Partner with the Defendant in Making Bricks, he died, and his Widow adminiſtred, the Defendant promiſed her, that in Conſideration ſhe had promiſed to relinquiſh her Intereſt in the Partnerſhip, that he would pay her ſo much Money as her Husband had expended about Making the Bricks: In an *Aſſumpſit* brought upon this Promiſe, and *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that here was no Conſideration, becauſe the Plaintiff had no Intereſt in the Partnerſhip; for it being *Joint*, and one of them being dead it muſt *ſurvive* to the Defendant; but adjudged a good Conſideration, for there may be Covenants between the Husband and the Defendant, that there ſhall be no *Survivorſhip*, and this ſhall be *intended* after a Verdict. 1 *Vent.* 40. *Wells* verſus *Wells.* 1 *Lev.* 273. *S. C.*

Antea 97. 1 Mod. 8. Sid. 424.

116. *Aſſumpſit, &c.* wherein the Plaintiff declared, and ſet forth the Conſideration to be *pro opere preantea fact':* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Word *opere* was too general, for it may be intended to be ſo ſmall and inconſiderable as will not amount to a Conſideration for a Promiſe; but adjudged, that *pro labore* and *pro ſervitio*, hath been held good, and that *pro opere* is therefore ſufficient. 1 *Vent.* 44. *Ruſhden* verſus *Collins* *Sid.* 425. *S. C.* See *pl.* 69.

Raym. 211.

117. *Aſſumpſit, &c.* for that his Father gave him 3 *l. per Annum* during Life, and that he being about to ſue the Executor, he promiſed, that in Conſideration he *would forbear, &c.* that he the Defendant would pay the Money; the Defendant pleaded, that his Teſtator was indebted in ſeveral Sums, *ultra quod* he had not *Aſſets*; and upon Demurrer it was adjudged, that 'tis not material whether he had *Aſſets* or not, for by the Promiſe he had cauſed the Plaintiff to *forbear*, who at that Time might be prepared to prove Aſſets, and ſo had made it his own Debt. 1 *Vent.* 120. *Davis* verſus *Wright.* 2 *Lev.* 3. *S. C.* by the Name of *Davis* verſus *Reyner.* See *antea* (K) 3.

2 Lev. 20. Raym. 211.

118. *Aſſumpſit, &c.* in which the Plaintiff declared, that *T. S.* owed him 20 *l.* for the Arrears of an Annuity, *&c.* and that the Defendant was Receiver of his Rents, and had appointed him to pay the 20 *l.* to the Plaintiff, thereupon the Defendant, in Conſideration the Plaintiff would *forbear* him *adtunc Receptorem & ſervien' T. S.* to ſuch a Time, he promiſed to pay, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was inſiſted in Arreſt of Judgment, that *Forbearing* in this Caſe was no Conſideration, becauſe it did not appear, that the Defendant at the Time of the Promiſe made, had any Rents of *T. S.* in his Hands, and by Conſequence not liable to any Suit; but adjudged, that it being ſet forth, that he was *then Receiver, &c.* it ſhall be intended that he had Effects in his Hands, eſpecially after a Verdict. 1 *Vent.* 153. *Daviſon* verſus *Iſlip.* 1 *Vent.* 153. *Oble* verſus *Dittlesfeild. S. P.*

1 Saund. 136.

119. *Aſſumpſit, &c.* the Plaintiff declared, that the Defendant's Anceſtor being bound to him (the Plaintiff) in a certain Sum, (but did not ſay his Heirs were bound) afterwards died, and the Plaintiff demanded the Money of the Defendant, who was his Heir, who promiſed, that in Conſideration that he would *forbear* to ſue him for ſuch a Time, that he would pay the Money. Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that it doth not appear, that there was any Cauſe of Suit againſt the Defendant at the Time of the Promiſe made, for 'tis not ſhewed, that the Anceſtor did bind his Heirs, ſo that the Conſideration is void, it being only to ſtay a Suit againſt the Defendant whom he could not ſue; adjudged, that the Promiſe to pay may intend that there was Cauſe of Action, if the contrary doth not appear; but here the contrary doth appear, becauſe the Bond of the Anceſtor ſhall be taken as the Plaintiff hath ſet forth in his Declaration, by which it appears, that the Anceſtor was only bound. 1 *Vent.* 159. *Barber* verſus *Fox.*

120. *Caſe* againſt the *Sheriff* for a *Falſe Return of nulla Bona on an Outlary*, after a Plea pleaded, and a Demurrer to the Plea, it was adjudged, that this Action would not lie by the Plaintiff, who had obtained this *Outlary*; for, if upon a *Capias Utlagatum* the Sheriff neglect to ſeiſe the Goods, or extend the Lands, 'tis the King's Loſs, and tho' 'tis pretended, that if the *Sheriff* had ſeiſed, *&c.* it would be a Means to enforce the Perſon outlawed to appear to the Plaintiff's Action, yet that is a *Conſideration* ſo remote, that it will not ſupport this Action; but if he had ſet forth, that the Sheriff might have taken the Body upon the *Capias*, and had neglected, that might have been ſome Ground for the Action. 2 *Vent.* 89. *Dawſon* verſus *Sheriffs of London.*

121. *Caſe, &c.* for that the Plaintiff *pretended a Title to certain Goods* in the Poſſeſſion of *S. P* and claimed them to be his own, and intending to remove them, he the Defendant, in Conſideration that the Plaintiff would ſuffer them to continue in the Poſſeſſion of *S P.* promiſed to ſee them forth coming, and not imbezilled, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but it was inſiſted in Arreſt of Judgment, that here was *no good Conſideration* to raiſe this Promiſe, becauſe the Plaintiff did not ſet forth any * Property in the Goods, but only that he *pretended* to them, and claimed them; but adjudged, that after a Verdict it ſhall be intended that he proved a *Property* in them. 1 *Vent.* 211. *Evans, &c.*

* Antea 96. S. P.

122. *Aſſumpſit, &c.* againſt an *Executor*, for that his *Teſtator* being indebted to the Plaintiff, he, *at the Requeſt* of the Executor the now Defendant, came to an *Accompt* with him, upon which ſo much Money appeared to be due to the Plaintiff, which the Defendant promiſed to pay; after a Verdict, and Judgment *de bonis propriis*, it was moved in Arreſt of Judgment, that the *Accompting* did not alter the Nature of the Debt, for it was no more than the Aſcertaining

what was due to the Plaintiff, and therefore the Judgment ſhould not be *de Bonis propriis*, but *De Bonis teſtatoris*; but adjudged, that the *Accompting* upon the Defendant's Requeſt, being more than the Plaintiff was obliged to do, was a good *Conſideration* to induce a Promiſe of the *Executor* to pay what ſhould appear to be due; and after a Verdict it ſhall be intended, that there was an expreſs Promiſe to pay, and that Evidence was given of an Intention to alter the Debt and make it his Own. 1 *Vent.* 268. 2 *Lev.* 122. *S. C.*

123. *Aſſumpſit, &c.* for that the Mother of the Defendant being *excommunicated* at the Proſe- 2 Lev.
cution of the Plaintiffs, who were *Church-wardens*, for not paying a *Tax towards the Repair of the* 119.
Church, in Conſideration that the Biſhop would abſolve her at the Inſtance of the ſaid Defendant; and at his Requeſt he (the Defendant) promiſed to pay the Money to the Plaintiffs, *&c.* after a Verdict for the Plaintiffs, it was inſiſted in Arreſt of Judgment, that here was *no Conſideration* to raiſe this Promiſe to the Plaintiffs, for nothing is done or ſuffered by them, or at their Requeſt, but yet they had Judgment, becauſe it ſhall be intended that the Biſhop abſolved the Mother at their Requeſt, and would not have done it, unleſs he had promiſed to pay the Money to them. 1 *Vent.* 297. *Curtis & al'* verſus *Collingwood.*

124. *Aſſumpſit* for the Duty of *Scavage*, in which the Plaintiff declared upon the *Cuſtom of London*, that all Perſons expoſing foreign Goods to Sale which had been entered at the Cuſtomhouſe, ſhall pay ſo much for *ſhewing them*; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that there ought to be a Contract either expreſs or implied, to maintain an *Aſſumpſit*, and therefore it would not lie for this Duty; but adjudged, that an *Aſſumpſit* will lie for a *Bill of Exchange* againſt the *Acceptor*, and it will by an *Aſſignee of Commiſſioners of Bankrupt*, and yet the Debt is aſſigned by Vertue of an Act of Parliament, and ſo it will lie in this Caſe. 1 *Vent.* 298. *City of London* verſus *Goree.* 2 *Lev.* 174. *S. C.*

125. *Indebitatus Aſſumpſit*, for that the Defendant being indebted to him (the Plaintiff) in a certain Sum for Wares ſold and delivered to *T. P.* at his the (Defendant's Requeſt) he (the Defendant) did promiſe to pay, *&c.* after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that an *Indebitatus Aſſumpſit* would not lie, becauſe *T. P.* was the Debtor, and the Promiſe of the Defendant was *collateral*; but adjudged, that the Action would lie. 1 *Vent.* 311. *Kent* verſus *Derby.* 2 *Vent.* 36. *Rozer* verſus *Rozer. S. P.* but there the Judgment was ſtayed, becauſe a *collateral Promiſe* doth not create a Debt, and therefore the Plaintiff ſhould have brought an Action *on the Caſe* and not an *Indebitatus Aſſumpſit.*

126. *Aſſumpſit, &c.* wherein the Plaintiff declared, that the Father of his Wife being ſeiſed of 2 Lev.
Lands which were now deſcended on the Defendant as Heir, and the Father being about to fell 210.
Timber, to the Value of 1000 *l.* to raiſe a Portion for his Daughter (now the Plaintiff's Wife) Raym.
the ſaid Defendant *promiſed the Father*, that in Conſideration he would forbear to fell the Tim- 302.
ber, he (the Defendant) would pay the Daughter 1000 *l. &c.* upon *Non Aſſumpſit* pleaded, the Jones
Plaintiff had a Verdict; and it was inſiſted in Arreſt of Judgment, that the *Father, and not the* 102.
Son in Law, and his Wife ought to have brought the Action; 'tis true, the Promiſe is to be performed to him, but yet he is not concerned in the meritorious Act, and therefore the Action is well brought by the Son in Law and his Wife, for there is ſuch a Nearneſs of Relation between the Father and his Daughter whom the Plaintiff had married, that he (the Plaintiff) is now concerned in the Promiſe. 1 *Vent.* 318. *Dutton* verſus *Pool*, 332. *S. C.* 3 *Lev.* 139. *S. P.* affirmed in Error. *Cro. Eliz.* 163. *Rookwood's* Caſe, *S. P.* 1 *Roll.* 32. *Starkey* verſus *Mills. S. P. Style* 269. *S. C.* See *Cro. Eliz.* 369. *Jordan* verſus *Jordan*, and 609, 652. *Levet* verſus *Haws*, and 849, 881. *Rippon* verſus *Norton. Yel.* 1. *S. C.*

127. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration of ſo much Money paid, *&c.* he (the Defendant promiſed to purchaſe *ſuch Lands at the beſt Rate he could*, and aſſigned the Breach, that he had not purchaſed the Lands; upon a Demurrer to this Declaration, it was held an abſolute Promiſe, and the Plaintiff had Judgment. 1 *Lev.* 3. *Day* verſus *Webb.*

128. *Aſſumpſit, &c.* in Conſideration of 20 *s.* paid by the Plaintiff to the Defendant, he promiſed to pay the Plaintiff 20 *l. If* Cha. Stuart *ſhould be King of* England *within a Year next following*, he being then in Exile; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that here was no Conſideration, becauſe at the Time of the Promiſe, *Charles Stuart was King of England*; but adjudged, that the Words are to be taken according to the Subject Matter, the King being at that Time out of Poſſeſſion, and the Promiſe muſt be intended to pay, *&c.* if he be in Poſſeſſion within a Year. 1 *Lev.* 33. *Andrews* verſus *Herne.*

129. Error of a Judgment in the *Palace Court*, wherein the Plaintiff declared, that he and *W. R.* were bargaining for an Horſe, and the Defendant promiſed, that if they agreed on the Price he would pay the Money; after a Verdict for the Plaintiff it was inſiſted in Error, that here was no Conſideration to raiſe this Promiſe, for 'tis not to ſell or *deliver* the Horſe, ſo the Plaintiff hath no Loſs, nor the Defendant any Benefit; but adjudg'd, it ſhall be intended after a Verdict, that upon this Promiſe the Horſe was delivered. 1 *Lev.* 103. *Foſter* verſus *Holyman.*

130. In a Special Verdict in *Aſſumpſit*, the Caſe was, the Defendant *Aſtell* being a *Cuſtomhouſe Officer at Newcaſtle*, and *Johnſon*, the Plaintiff, and one *Fell*, being Merchants; and the Duty for *Rye* being 4 *s. per Quarter*, when the Price doth not exceed 32 *s. per Quarter*, and that the Plaintiff and *Fell* had imported ſeveral Quantities of *Rye*; and a Queſtion ariſing between the Plaintiff and the Defendant, what the Cuſtom did amount to, and what Sum *Fell* had paid, the Defendant in Conſideration the Plaintiff would pay him 100 *l. (which in Truth was leſs* than the *Cuſtom did amount unto)* promiſed, that if *Fell* had paid no more, he (the Plaintiff) ſhould pay no more,

more, and averred, that *Fell* had paid no more, yet the Defendant had complained to the Commiſſioners, and the Plaintiff was compelled to pay more; after a Verdict for the Plaintiff it was objected, that here was no Conſideration to raiſe this, for he was compellable *to pay what is due*, and a Promiſe to pay *what is due is no Conſideration* for an *Aſſumpſit*; beſides, the Conſideration to pay leſs than is due is a void Contract, for it amounted to no more in the principal Caſe than an Agreement to cheat the King as *Fell* had done; but adjudged, that a Promiſe to pay *what is due* without any Suit or Trouble, is a good Conſideration; and the Acceptance of a leſs Sum by the Officer from the Merchant is a good Agreement between them, for the Officer ſhall anſwer for the Reſidue out of his own Eſtate. 1 *Lev.* 198. *Johnſon* verſus *Aſtell.*

131. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration, he and his Wife, at the Defendant's Requeſt, would convey *their Eſtate* in certain Lands to *C. L.* Couſin and Heir of *Matthew Lucy*, in ſuch Manner as the ſaid *C. L.* ſhould appoint, the Defendant promiſed to pay unto them 50 *l. &c.* The Defendant pleads, that at that Time the Plaintiff and his Wife, nor either of them, *had any Eſtate* in the Lands; and upon a Demurrer to this Plea it was objected, that here was no Conſideration, the Plaintiffs having no Eſtate, which was confeſſed by the Demurrer, but it was adjudged good, becauſe the Agreement was for ſuch *an Eſtate* as they had, which might be a Right extinguiſhable by a Releaſe altho' they had no other Eſtate. 2 *Lev.* 34. *Woolnough & Ux'* verſus *Verdon.* *See* Nolle proſequi. (A) 2. *S. C.*

132. *Aſſumpſit, &c.* for that *quidam Alliſon* (without mentioning his *Chriſtian Name*) was indebted to the Plaintiff, who intended to ſue him; and that the Defendant, in Conſideration the Plaintiff would *forbear* to ſue the ſaid *Alliſon*, promiſed to pay, *&c.* after a Verdict and Judgment for the Plaintiff, and a Writ of Error brought, the Error aſſigned was, that it doth not appear what *Alliſon* this was; adjudged, 'tis not material, for be it what *Alliſon* it will, the Defendant hath promiſed, and the Jury hath found that he did promiſe, and this Judgment may be pleaded in Bar againſt any *Alliſon*, with an Averment, that he is the ſame Perſon, and rather than to reverſe the Judgment, it ſhall be intended, that his Name was *Quidam.* 2 *Lev.* 197. *Gumly* verſus *Bechinor.*

133. *Aſſumpſit, &c.* in Conſideration the Plaintiff would conſent and not hinder the Defendant to marry ſuch a Woman, he promiſed to pay the Plaintiff 20 *l.* Upon a Demurrer to the Declaration the Defendant had Judgment, becauſe the Plaintiff did not ſhew *where, or in what Place he did conſent*, for 'tis an Affirmative as well as a Negative. 2 *Lev.* 227. *Chapman* verſus *Fothergill.*

134. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would *ſolicit a Buſineſs* which the Defendant had of one *Gillingham*, and put an End to it, he (the Defendant) promiſed to pay the Plaintiff 100 *l.* and avers, that he did ſolicit it, and had been at much Care and Pains therein, but before he put an End to it, the Defendant *countermanded him*, there was Judgment by Default and a Writ of Inquiry, and the Jury gave 100 *l.* Damages; and now, upon a *Writ of Error* in the *Exchequer-Chamber*, it was objected, that this Action would not lie for the whole 100 *l.* becauſe an Employment of this Nature is always *countermandable*, therefore the Plaintiff ought to have brought a *Quantum meruit* for the Pains and Labour, *&c.* before the *Countermand* but not an *Aſſumpſit* for the Whole: But adjudged, that this Action lies for the Whole, and that the Jury may give ſo much in Damages as they ſhall find the Buſineſs done deſerved. 3 *Lev.* 244. *Howe* verſus *Beech.*

1 Salk. 172. 135. *Caſe, &c.* upon a ſpecial Agreement, wherein the Plaintiff ſets forth, that he had *mortgaged* two Cloſes to the Defendant, and that there being a *Colloquium* between them concerning the ſaid Mortgage, and of a *Releaſe* of the Equity of Redemption, the Plaintiff did agree to *releaſe* it, and in Conſideration thereof the Defendant did agree to pay 7 *l.* to the Plaintiff, then there were *mutual Promiſes* laid, and the Plaintiff averred Performance of his Part, and that the Defendant had not paid, *&c.* He pleads in Bar, that after the firſt Promiſe which was made 29 *July* 1694, the Plaintiff by Deed had *releaſed* all Actions, and that the ſecond Promiſe was made before the 29*th Day of July*, which was likewiſe releaſed: The Plaintiff replied, and craved *Oyer* of the Deed of *Releaſe*, which was of the Equity of Redemption, and at the End there were theſe Words *All Actions, Suits, Debts, Duties, Sums of Money, and Demands whatſoever*; and upon a Demurrer it was inſiſted for the Defendant, that if the Plaintiff might bring an Action for the Money before the Releaſe was executed, then the *Releaſe* is a good Bar to the Action, and he might do it upon the mutual Promiſes which he had laid in his Declaration, which is very true in ſome Caſes, but not in this, becauſe 'tis * Part of the Agreement, that the Plaintiff ſhould execute a *Releaſe*, and it was upon that Conſideration, that the Defendant was to pay the Money, therefore the *Releaſe* was to precede, and was the very Reaſon of the Action, and till that was executed, the Plaintiff had no Cauſe of Action for the Money; and if ſo, 'tis abſurd to ſay, that the *Releaſe* ſhall diſcharge that very Duty which it created, ſo the Plaintiff had Judgment, which was affirmed in *B. R* upon Error. 1 *Lutw.* 245. *Thorpe* verſus *Thorpe.* See 1 *Vent.* 177, 214, and 147. 1 *Saund.* 319.

* Poſtea (N) 10.

136. *Caſe, &c.* in which the Plaintiff declared, that the Defendant in Conſideration, that the Plaintiff would *forbear* to ſue him (the Defendant) he promiſed to pay, *&c.* then he avers, that he did *extunc totally forbear*; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that the *Conſideration* intended a total Forbearance; but that the Plaintiff avers, that from the making the Promiſe he did totally forbear, but doth not ſay *hucuſque: Sed per Curiam*, it ſhall be intended a total Forbearance. 2 *Mod.* 24. *Edwards* verſus *Roberts.*

137. *Caſe, &c.* in which the Plaintiff declared, that one *Strode* owed him 10 *l.* and that the Defendant owed *Strode* 10 *l.* and that the Defendant, in Conſideration the Plaintiff, at his (the Defendant's) Requeſt, would * accept the Defendant for his Pay-maſter, *and diſcharge Strode* of the Debt, he (the Defendant) promiſed to pay the Plaintiff 10 *l.* and avers, that he did accept the Defendant for Pay-maſter and diſcharge *Strode*; after a Verdict for the Plaintiff in an *inferior Court*, a *Writ of Error* was brought in *B. R.* and it was objected againſt the Declaration, that the Plaintiff did not ſhew *how he diſcharged Strode: Sed per Curiam*, after a Verdict it ſhall be intended that he gave him a ſufficient Diſcharge, but the Objection had been good upon a Demurrer. *T. Jones* 125. *Prideaux* verſus *Rawlins*.

* *See* Woodward *v.* Rigby's *Caſe*.

138. By the Statute of *Frauds, &c.* amongſt other Things 'tis enacted, that *no Action ſhall be brought to charge the Defendant upon any Special Promiſe to anſwer for the Debt, Default, or Miſcarriage of another, unleſs it be put in Writing*; an Action was brought againſt an Attorney and another, for appearing for the Plaintiff without a Warrant; the Cauſe was to be tried at the Aſſiſes, and the Defendant promiſed, that in Conſideration the Plaintiff would not proſecute that Suit, he would pay him 10 *l.* and the Coſts, for which the Action was now brought, it was inſiſted, that this was a void Promiſe, becauſe it was made in Behalf of the Attorney, who was a third Perſon, and it was not *in Writing*; but adjudged, that it ſhall be rather a Promiſe to pay his own Debt, and ſo not within the Statute. 5 *Mod.* 205. *Stephens* verſus *Squire*.

139. *Indebitatus Aſſumpſit* for Money had and received by the Defendant for the Plaintiff, *to the Uſe of the Defendant*; upon *Non Aſſumpſit* pleaded, the Plaintiff had a *Verdict*; and upon a Motion in Arreſt of Judgment it was adjudged, that thoſe Words, *To the Uſe of the Defendant*, ſhall be rejected, becauſe they are inſenſible, and then the Promiſe is to pay Money received by him to the Plaintiff's Uſe. 1 *Salk.* 24. *Palmer* verſus *Stavely*. See 1 *Mod.* 42. and 1 *Sid.* 306. *S. P.*

140. *Aſſumpſit, &c.* for that the Defendant being indebted to him in 20 *l.* for Goods ſold, in Conſideration thereof * *ſuper ſe Aſſumpſit*, and did not ſay, that the Defendant promiſed; after a Judgment by Default, a Writ of Error was brought, and this was aſſigned for Error; but adjudged for the Plaintiff, becauſe there is no Body elſe upon the Record to Promiſe but the Defendant; 'tis true, if there had been *two Defendants* it might have been incertain to whom to apply the Promiſe. 1 *Salk.* 26. *Shore* verſus *Brown*. See *Cro. Eliz.* 913. *Noy* 50. 1 *Lev.* 164.

* *See* Verdict. (E) 12. Gatehouſe *v.* Roe.

141. The Caſe was, an *Adminiſtrator* gave a Letter of Attorney to *T. S.* to receive ſome Money due to the Inteſtate, which he did receive, and paid it to the Adminiſtrator, afterwards a Will appearing, the Adminiſtration was repealed, and then the Executor brought an *Indebitatus Aſſumpſit* againſt *T. S.* for ſo much Money by him received, to the Uſe of the Plaintiff; it was objected, that this was the Receipt of the Adminiſtrator and not of the Defendant, becauſe he acted only under the Authority of the other, and expreſly to his Uſe, which expreſs Authority will hinder the Operation of Law, and the Raiſing an implied Contract to a third Perſon; but adjudged, that ſince the Adminiſtration was void, the Adminiſtrator could give no Authority, therefore there is nothing to hinder an implied Contract. 1 *Salk.* 27. *Jacob* verſus *Allen*.

142. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would let to hire and deliver his Gelding to *T. S.* he the Defendant promiſed, that *T. S.* ſhould redeliver the Gelding ſafe to the Plaintiff; adjudged, that the Plaintiff may bring an Action of *Detinue* againſt *T. S.* upon the original Delivery, or an *Indebitatus Aſſumpſit* againſt the Defendant, upon the Promiſe, that if *Detinue* will lie againſt *T. S.* then the Promiſe made by the Defendant is *collateral*, for it came in Aid to procure Credit for *T. S.* and if ſo, then it ought to have been in *Writing*, becauſe it being a collateral Undertaking for the Act, and to make good the Default of another, 'tis void by the Statute of *Frauds*, if 'tis not put in Writing; ſo where two come into a Shop, and one of them buys Goods; and the other, to gain Credit for the Buyer, tells the Seller, Let him have the Goods, *I will undertake he ſhall pay you, and if he doth not, I will*, this is a *collateral Undertaking*, and void; but if he had ſaid, *Let him have the Goods, I will ſee you paid, or, I will be your Pay-maſter*, this is an *Undertaking for himſelf*, and he ſhall be intended the true Buyer, and the other but his Servant. 1 *Salk.* 27. *Bourkmire* verſus *Darnell*.

143. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he, at the Requeſt of the Defendant, had *delivered* to him a Note under the Hand of *T. S.* for 50 *l.* which the Plaintiff had in his Poſſeſſion, the Defendant promiſed to pay him 50 *l.* upon the general Iſſue pleaded, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Note was uſeleſs, becauſe it came to the Defendant by Way of Delivery and not by Gift; but adjudged, that the Delivery ſhall be intended abſolute, and that the Note is Evidence of a Debt, and the Parting with it is indefinite and a good Conſideration, and ſuch a Conſideration, which need not be proved at the Trial. 1 *Salk.* 25. *Meredith* verſus *Short*. 3 *Cro.* 155. 170. *contra*.

144. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration, he, at the Defendant's Requeſt, had *delivered* to him twenty Pieces of hammered Money, being 20 *s.* he promiſed to pay him 20 *s.* new Money; it was objected in Arreſt of Judgment, that the Property of the Money was not altered, but adjudged, that a *Delivery*, in Conſideration of being paid the Value, is a Sale. 1 *Salk.* 25. *Herbert* verſus *Burſtow*.

145. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration the Defendant would receive *T. S.* and *D. G.* into his Houſe, *ut Hoſpites*, and find Meat, Drink, and Neceſſaries for them, he promiſed to pay the Plaintiff as much as he deſerved, and averred, that he did receive them into his Houſe, and did find them Meat, *&c.* The Defendant demurred to the Declaration, for that the Plaintiff did not alledge that he received them *ut Hoſpites*, which is a Special Receiving,

and therefore the *Performance ought to be preciſely alledged*, for by this Declaration it doth not appear but that they might be received into the Plaintiff's Houſe as *Servants* ; but adjudged, that if ſo, it ought to be ſhewed by the Defendant, and that the *Receiving* in the Declaration ſet forth, is a *Receiving them ut Hoſpites*, for the finding them Meat and Drink ſhall be intended a Gueſting them, till the contrary appears. 1 *Salk.* 25. *Gold* verſus *Johnſon*. See 2 *Cro.* 245, and 45. *Yelv.* 175, and *Jones* 441.

146. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would accept *T. S.* to be his Debtor for 20 *l.* due to the Plaintiff from *D. G.* and inſtead of *D. G.* he the Defendant promiſed to pay the Money; and the Plaintiff averred, that he did accept *T. S.* to be his Debtor, but did not ſay that *D. G.* was *diſcharged*, after a Verdict for the Plaintiff in *B. R.* and Judgment, and a *Writ of Error* in the *Exchequer-Chamber*, the Judgment was affirmed, for they did not take this to be a Promiſe only on the Part of the Defendant, becauſe as ſuch it could not bind him, unleſs it appeared that *D. G.* was diſcharged, but they conſtrued it as a * *mutual Promiſe*, (*viz.*) that the Defendant promiſed the Plaintiff to pay the Debt, and in Conſideration thereof, the Plaintiff promiſed the Defendant to diſcharge *D. G.* ſo that if afterwards he ſhould ſue *D. G.* he ſubjects himſelf to an Action for the Breach of his Promiſe. 1 *Salk.* 29. *Roe* verſus *Haugh*.

* Antea 110.

147. In *Aſſumpſit*, the Plaintiff declared, that in Conſideration he, at the Requeſt of the Defendant had agreed, that the Defendant ſhould *quietly enjoy* a certain Meſſuage and twenty Acres of Land charged with an Annuity of 20 *l. per Annum*, and that free and clear from *all Trouble by the Plaintiff, by Reaſon of the ſaid Annuity*, that the Defendant promiſed, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe a Promiſe to pay, *&c.* in Conſideration to be free from all Trouble by the Plaintiff by Reaſon of the Annuity, was *nudum pactum*, for the Plaintiff had no Right to trouble the Defendant for this Annuity, becauſe it was not granted to him but to another. 1 *Salk.* 364. *Courtney* verſus *Strong*.

148. *Aſſumpſit*, in which the Plaintiff declared, that in Conſideration he had found the Defendant ſufficient Meat, Drink, *&c. for divers Months laſt paſt*, he promiſed to pay to him (the Plaintiff) as much as he *deſerved*, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe it was *incertain* as to the *Time and Number of Months* ; but adjudged, that the *Incertainty as to the Time* could do no more Hurt than the *Incertainty as to the Things provided for the Defendant* ; and that 'tis ſufficient to aver, that the Plaintiff deſerved ſo much. 2 *Salk.* 557. *Snow* verſus *Firebraſs*.

149. *Aſſumpſit, &c.* for that his Teſtator had tranſported for the Defendant ſo many Wares, *&c.* in Conſideration thereof the Defendant promiſed to pay, *&c. ſo much rationabiliter habere meruiſſet*, leaving out *Quantum habere meruiſſet*, and averred he deſerved ſo much ; upon *Non Aſſumpſit* pleaded, and a Verdict for the Plaintiff; a *Writ of Error* was brought in *B. R.* and it was objected, that the Word *Quantum* was omitted, and it was not ſaid, that *ipſe habere meruiſſet* ; but adjudged, that *tantas denariorum ſummas* is ſufficient, (*i. e.*) the Defendant promiſes to pay *ſo much as he deſerved*, and that *meruiſſet* is as much as *ipſe meruiſſet* eſpecially, there being but two Perſons in this Record. 2 *Salk.* 557. *Glover* verſus *Rogers*.

150. *Aſſumpſit, &c.* in which the Plaintiff declared, *quod cum* the Defendant, in Conſideration the Plaintiff would provide for him (the Defendant) *Meat, Drink, &c.* he promiſed to pay as much as the Plaintiff *Habere meruit*, inſtead of *meruerit*; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and this was moved in Arreſt of Judgment, but adjudged that it muſt be conſtrued ſo as to make the Parties mean ſomething, and not according to a *grammatical Senſe*, for that would be to make the Promiſe void, for this is not Senſe, therefore the Words in the Declaration ſhall be taken to be the very Words of the Promiſe. 2 *Salk.* 558. *Moverly* verſus *Ley*.

151. *Aſſumpſit*, wherein the Plaintiff declared, that in Conſideration of half a Crown by him given to the Defendant, he promiſed to pay to him (the Plaintiff) *two Grains of Rye* on Monday the 29*th Day of March*, four Grains more on the next Monday after, and ſo on every Monday * double by progreſſional Arithmetick for one Year ; after *Non Aſſumpſit* pleaded, a Motion was made to ſtay the Trial, it was denied, for tho' this would amount to a great Quantity, yet the Jury will conſider the Folly of the Defendant, and give reaſonable Damages. *Mod. Caſes* 305. *Thornborough* verſus *Whitacre*.

* Antea (D) 30. S. P.

(N)

Aſſumpſit, where it lies on expreſs and implied Promiſes, and for Rent, &c. See (M) 92.

1. *Aſſumpſit*, for that the Leſſor promiſed, that the Leſſee ſhould *quietly enjoy, &c.* without any Interruption, *&c.* the Father of the Leſſor entered on the Leſſee, who brought the Action; it was objected, that it did not lie, becauſe he might bring *Treſpaſs* againſt the Father for a wrongful Entry ; but reſolved, that it being an *expreſs Promiſe*, not to be interrupted, the Action was well brought. *Dyer* 328. *Mountford* verſus *Catesby*. 'Tis otherwiſe in *Covenant*. See *Covenant*. (B) (F)

2. *Aſſumpſit*, for that there being a Leaſe for Years of Land of the Plaintiff's Wife, on which a *Rent* was reſerved ; the Defendant, in Conſideration the Plaintiff would procure the Leſſee to

aſſign the Leaſe to him, he promiſed to pay to the Plaintiff all the *Rent* for the Reſidue of the Term; it was objected, that the Action did not lie, becauſe the Plaintiff might have a higher Remedy for the Rent, either by an Action of Debt, or by Diſtreſs; but adjudged, that the Action lay, becauſe by this Promiſe the *Rent* is given to the Husband alone, whereas before it was due to him only in Right of his Wife. 1 *Leon.* 43. *Carter's* Caſe, and 155. *Read* verſus *Johnſon.*

3. *Aſſumpſit, ſſ.* A *Feme* ſole had a *Rent-Charge* for Life, ſhe married, the *Rent* was arrear, and then ſhe died; the Tenant of the Land promiſed, that in Conſideration the *Rent* was in Arrear, he would pay the ſame; it was objected, that this was a *Rent* payable by Deed, and therefore the Action did not lie, no more than a Promiſe to pay a Debt on Bond; but adjudged, that the Action lay. 1 *Leon.* 293. and *Hutt.* 34. *Green* verſus *Harrington.*

4. *Aſſumpſit, &c.* the Defendant pleaded, that before the Day in which the Promiſe was made to pay the Money, he became bound to the Plaintiff in a *Bond* to pay it, and averred it to be the ſame Debt, and that the Bond was made to pay it; adjudged, that the Plea was not good, for a *Bond cannot determine a Contract*, the Defendant ſhould have pleaded the ſpecial Matter, and traverſed *quod Aſſumpſit.* 1 *Leon* 154. *Jennings* verſus *Winch.*

5. *Aſſumpſit*, for that he let a *Ware-houſe* to the Defendant, who promiſed to *pay him* 8 *s. per Week*; it was objected, that this was a *Leaſe at Will*, and the 8 *s. per* Week was in Nature of of a *Rent*, for which an *Aſſumpſit* would not lie; it was agreed, that it would not lie for * Rent reſerved upon a Leaſe, but this was not a *Leaſe*, but a Promiſe to let, and the 8 *s.* was not a *Rent*, but a Promiſe to pay it in Conſideration of occupying the Ware-houſe. 2 *Cro.* 596. *Donmill* verſus *Morgan.* and 668. *Slack* verſus *Bowſall.* * W. Jon. 328. Brett v. Read. S. P. Poſtea 12, 26, 29.

6. *Aſſumpſit*, for that the Defendant promiſed a Widow, if ſhe would *marry R. B.* he would pay her yearly *after his Death* 40 *s.* during her Life; the Husband died, the Wife ſurvived, and afterwards married the Plaintiff, who brought the Action; the Defendant pleaded, that *R. B.* had releaſed him of all Actions and *Demands*; but adjudged, againſt him, becauſe the Rent being made payable *after the Death of R. B.* could not be *demanded* in his Life-time. 2 *Cro.* 222. *Belcher* verſus *Hudſon.* Yelv. 156. Hutt. 3. Poſtea 25.

7. *Aſſumpſit*, in Conſideration the Plaintiff, at the Requeſt of the Defendant, would be bound with him in a *Recognizance* for his *Appearance* at the *next Aſſizes*, he the ſaid Defendant promiſed to indemnify him, *&c.* The Defendant pleaded, that he brought a *Certiorari*, directed to the Juſtices of Gaol-Delivery, and that 10 *March, &c. the Writ was delivered to them*, who allowed it, and ſo his Appearence excuſed; but adjudged, no good Plea, for he ought to have his Appearance recorded, otherwiſe his Promiſe is broke; beſides, he did not alledge, that *he had delivered the Writ to the Juſtices*, which is iſſuable. 2 *Cro.* 281. *Roſſe* verſus *Pye.* Yelv. 207.

8. *Aſſumpſit*, for that the Defendant being poſſeſſed of an Houſe, of which a *Shop* was Parcel, in Conſideration of 10 *l.* paid to him by the Plaintiff, promiſed, that he would not ſuffer the Trade of a Joyner to be uſed in that Shop for a certain Term of Years, and that he did permit *R. B.* to uſe the Trade of a Joyner *in Shoppa parcell' Meſſuagii præd' contra formam Aſſumptionis præd'*, but did not ſay *in Shoppa prædict'*, nor that it was Parcel of the Houſe *tempore Aſſumptionis*; but theſe Objections were not allowed. 2 *Cro.* 326. *Rogers* verſus *Parry.*

9. *Aſſumpſit* againſt an *Executor*, for that his *Teſtator* was *indebted* 33 *l.* to the Plaintiff, and in Conſideration the Plaintiff would *forbear* to ſue him till he, the Defendant, ſhould get Execution upon ſuch a Judgment, he promiſed to pay the Money upon *Requeſt*; it was objected, that it did not appear, *how the Teſtator was indebted*, or that the Defendant had *Aſſets*; but adjudged, that the Action is grounded upon the *expreſs Promiſe* of the Defendant, and it ſhall be intended, that the *Teſtator* was indebted, otherwiſe the *Executor* would not have promiſed to pay. 2 *Cro.* 590. *Davis* verſus *Warner*, and 602. *Bard* verſus *Bard*, and 604. *Evans* verſus *Warren.*

10. *Aſſumpſit*, in Conſideration the Plaintiff would lend the Defendant 7 *l.* and *releaſe* him of all *Actions and Demands*, the Defendant promiſed, *&c.* the Plaintiff alledged, that he did lend the 7 *l.* and *Releaſe* the Defendant of all Actions, *&c.* it was objected, that the Releaſe had extinguiſhed the Action upon the Plaintiff's own ſhewing; but adjudged for the Plaintiff, becauſe the * *Releaſe* is Part of the Conſideration, and tho' 'tis a *Releaſe* of all Actions and Demands, it doth not Diſcharge what is future, according to *Hoe's* Caſe. 5 *Rep.* 7. * *Hancock* verſus *Feild*, and 2 *Cro.* 623. *Porter* verſus *Phillips.* * Antea (M) 135. * Releaſe (D) 2.

11. Error in the *Exchequer-Chamber*, on a Judgment in *Aſſumpſit*, wherein the Plaintiff declared, that in Conſideration he would buy the Defendant's Goods in ſuch a *Shop*, and give ſuch a Price for them, that the Defendant would no longer keep any Shop in *L.* it was objected, that this was an unlawful Promiſe, it being to reſtrain the Defendant to uſe a *lawful Trade*; but reſolved, that a Man may reſtrain himſelf upon a voluntary Conſideration, not to uſe a Trade in a particular Place. 2 *Cro.* 596. *Broad* verſus *Jollet.* *Palm.* 172. *Bragg* verſus *Stanner. S. P.* 2 Roll. 201. Antea (M) pl. 67.

12. *Error* of a Judgment in *Aſſumpſit*, wherein the Plaintiff declared, that whereas he at the Defendant's Requeſt, would demiſe a Houſe to *R. B.* rendring *Rent*, he the Defendant promiſed, that if *R. B* did not pay the *Rent*, he would, and alledged, that ſuch a Day he made a Leaſe to *R. B. virtute cujus dimiſſionis* he entered; but the Entry was alledged to be before the Term began, ſo that it was a *Diſſeiſin*, and by Conſequence no *Rent* could be due; but reſolved, that

*Antea 5. post. 26. the *Rent* was due upon the * Contract, and that the Promiſe was the Cauſe of Action. 2 *Cro.* 684. *Brookbank* verſus *Tailor*.

13. *Aſſumpſit, &c.* for that he being an *Attorney*, the Defendant retained him to proſecute a Suit *for B. G.* and agreed to pay his Fees, and ſhewed he had laid out ſo much in the Suit; the Plaintiff had Judgment, which was affirmed in Error, tho' it was objected, that the Defendant was but a *Solicitor*, and ſo there was no Conſideration, for 'tis Maintenance to ſolicite Suits, and alſo that the Plaintiff ought not to bring this Action, but an Action on the Caſe, becauſe there was *no Contract* between them. *Cro. Car.* 76. *Sands* verſus *Trevilian*. 2 *Cro.* 520. * *Bradford* verſus *Woodhouſe*. *S. P.* See *poſtea* (W) 1.)

* 2 Roll. Rep. 76. S. C. 14. *Aſſumpſit, &c.* for that he had ſold certain Cloths to the Defendant for 370 *l.* one Moiety to be paid in fourteen Days, and the other within a Month, and that he having paid one Moiety, in Conſideration the Plaintiff would *accept* his Bill for 145 *l.* to be paid on the firſt Day of *December* following, he promiſed to pay the ſaid 145 *l.* and alledged, that he accepted his Bill, *&c.* and that he had not paid the 145 *l. nor the* 40 *l. Reſidue* of the Moiety. After a Verdict for the Plaintiff, and Error brought, it was aſſigned for Error, that here was no Promiſe alledged for the Payment of the 40 *l.* and the Breach was aſſigned as well for Non-payment of that, as for not paying the 145 *l.* but adjudged, that by the Sale of the Cloths for 370 *l.* to be paid by Moieties, *&c.* there is an implied Promiſe to pay the Sums accordingly, and the Breach aſſigned in not paying the 145 *l.* that muſt be according to the laſt Promiſe, and of the 40 *l.* that muſt be intended according to the implied Promiſe made before, and ſo 'tis well aſſigned; and tho' theſe are ſeveral Promiſes, yet *Non Aſſumpſit* extends to both. 2 *Cro.* 544. *Heath* verſus *Dauntly*.

15. *Aſſumpſit, &c.* in Conſideration the Plaintiff would deliver Cloths, which he made for the Daughter, he promiſed to pay for them, but did not *ſay to whom*; adjudged, that the precedent Communication would make the Matter certain, and it ſhall be intended Payment to the Plaintiff himſelf. *Latch.* 151 and 272. *Sharp* verſus *Roberts*.

16. Error on a Judgment in *Aſſumpſit* againſt an *Executor*, for that his Teſtator promiſed, in Conſideration the Plaintiff would dye *ſixty Devonſhire Kerſies* for him, that he, the ſaid Teſtator, would pay him ſo much, and avers, that he had dyed *all* the Kerſies, amounting to 59 *in toto*, which came to 19 *l.* it was objected, that he ſhould have dyed 60, and he ſhewed, that he had only dyed 59. ſo the Money promiſed could not be due, and the Jury had aſſeſſed Damages *occaſione debiti prædict'*, when it ſhould have been *occaſione non performationis aſſumptionis*; but adjudged for the Plaintiff; for having averred, that he dyed *All*, the other was but a *Miſnumbring*, and 'tis a Debt, and a Promiſe implied on it. *Hob.* 89. *Bayle* verſus *Good*. See *placito* 25.

17. *Aſſumpſit*, for that the Defendant having a Friend ſick in the Plaintiff's Houſe, who was an *Inn-keeper*, the Defendant ſaid to the Plaintiff, provide for him ſuch Neceſſaries as he ſhall want, and I will pay you, and avers, that he *provided Neceſſaries* for him *amounting to* 15 *l. &c.* The Objection was, that he did not ſhew *what Neceſſaries in particular*; but adjudged, that the *general Allegation* was good. 3 *Bulſt.* 31. *Cripps* verſus *Boynton*.

18. *Indebitatus Aſſumpſit*, and upon a *mutuatus* for 5 *l.* 6 *s.* 8 *d.* and the ſeveral Sums mentioned in the Declaration, upon Caſting them up did not amount to the Sum in Demand, and this was aſſigned for Error, and the Judgment reverſed. *Paſch.* 21 *Eliz. Moor* 298. *Smith* verſus *Vowe*.

19. Reſolved, that an *Aſſumpſit* will not lie upon a general Promiſe to pay *Rent*; but if the Conſideration be to forbear, or upon any other ſpecial Conſideration, the Action will lie. *Cro. Car.* 343, 250. * *Brett* verſus *Read*. *Style* 463. *Lance* verſus *Blackmore*. *S. P.*

* W. Jon. 328. 20. *Aſſumpſit, &c.* The Defendant pleaded, that before any Breach the Plaintiff at ſuch a Place, * *exoneravet eum*; it was objected, that he ought to ſhew *how*, but reſolved, that this being a verbal Promiſe, might be diſcharged by Word before any Breach. *Cro. Car.* 382. *Langden* verſus *Stokes*. 2 *Sid. Knight* verſus *Chaplin* 77. *S. P.* See *Weſtlake* verſus *Perve, & poſtea pl.* 32.

* Poſtea 32. S. P.

4 Leon. 5. S. C. 21. *Aſſumpſit* againſt an *Executor*, for that his *Teſtator*, (who was an Infant) and the Plaintiff became bound in a Bond for the Debt of the *Infant*, who promiſed at full Age to ſave the Plaintiff harmleſs againſt the Bond; reſolved, that the Action did lie. *Godb.* 138. *Barton* verſus *Edmonds*.

22. *Aſſumpſit*, in Conſideration of 20 *l.* paid to the Defendant, he 1 *March*, promiſed to deliver to the Plaintiff *twenty Quarters* of Barley *at the next Seed Time*; it was objected, that the Plaintiff did not ſhew *when the next Seed Time was*; but adjudged, that he need not, becauſe the Promiſe being made in *March*, and the Action brought at *Michaelmas*, it ſufficiently appears, *the next Seed Time* was paſt. *Godb.* 350. *Totnam* verſus *Hopkins*.

23. *Aſſumpſit*, for that the Defendant promiſed, if the Plaintiff, *at the Inſtance of the Defendant*, would *marry* his Daughter, he would pay him 20 *l.* and avers, that he married the Daughter, but did not ſay, *ad inſtantiam Defendentis*; but adjudged, that he having married her, it ſhall be intended *ad inſtantiam Defendentis*. *Cro. Car.* 141. *Poynter* verſus *Poynter*. *See* Requeſt. (B.) 13.

24. *Aſſumpſit*, for that the Plaintiff, at the Defendant's *Requeſt*, had mended ſeveral Boats for him, he the Defendant promiſed to pay *tantum quantum meruit*, and the Plaintiff averred, that he deſerved 30 *l.* it was objected, that the Declaration was *incertain*, and that the Defendant could not know how much to pay, becauſe the Plaintiff did not alledge what, or how many

Boats he mended; but reſolved, that the Defendant might take Notice himſelf how many Boats were mended. *Cro. Car.* 414. *Conway* verſus *Aldwyn.*

25. Error on a Judgment in *Aſſumpſit*, for that the Defendant promiſed to deliver to the Plaintiff ſo many Oates, which at the Rate of 10 *s.* 9 *d. per* Quarter, would amount to 52 *l.* which the Plaintiff promiſed to pay upon the Delivery of the Oats, and that the ſame, at ſo much *per* Quarter, came to 96 Quarters and ſix Buſhels, which the Defendant had not delivered; the Objection was, that 96 Qarters and 6 Buſhels, at 10 *s.* 9 *d. per Quarter*, came to 52 *l.* and *three Farthings*, and ſo no Breach; but the Judgment was affirmed, becauſe it was ſcarce poſſible to mince the Meaſure ſo as to hit the exact Sum. *Hob.* 88. *Laſtlow* verſus *Tomlinſon.* See *antea placito* 18.

26. *Caſe, &c.* in Conſideration, that he would ſuffer the Defendant to enjoy a Houſe and three Water-Mills, *&c.* he promiſed to pay yearly ſo much as they were worth, and avers, that they were worth ſo much; and upon Demurrer to the Declaration, it was objected, that this Action being upon a *Quantum meruit* would not lie, becauſe it was a *real Contract*. *Sed per Curiam*, where a *Sum in Groſs is certain* and reſerved in a Leaſe, there muſt be an Action of Debt for it; but where no Sum certain is reſerved (as in this Caſe) a *Quantum meruit* will lie for the *Rent*. 3 *Mod.* 73. *Maſon* verſus *Beldham*. Antea 5, 12. S. P. poſt. 29. *See* pl. 31. S. P.

27. If a Man makes a Leaſe for Years, rendring *Rent*, and the Leſſee *promiſeth to pay the Rent an Aſſumpſit* will lie; if the Promiſe was made at the ſame Time with the Leaſe, for that muſt be expreſly averred *per Rolle*. *Style* 400.

28. *Aſſumpſit*, for that the Defendant, in Conſideration the Plaintiff would deliver certain Goods to the Defendant's Son, *ſuch as he ſhould deſire*, he, the ſaid Defendant, promiſed to pay for them, and avers, that he delivered certain Goods to the Son, *&c.* it was objected, that it did not appear, that they were ſuch Goods *which the Son deſired*; but adjudged, that the *Acceptance* was an actual and more than a verbal Deſire. *Style* 163. *Johnſon* verſus *Abingdon.*

29. *Caſe, &c.* in which the Plaintiff declared, that he was ſeiſed in Fee of an Houſe, and that there was a Diſcourſe between him and the Defendant for a Leaſe thereof for Years, rendring *Rent*, and thereupon the Defendant, in Conſideration the Plaintiff would demiſe the ſame to him for ſo many Years, rendering *Rent*, he promiſed to pay the ſaid Rent, *&c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that *Caſe would not lie for the Rent*, becauſe it was in the *Reality*; and of that Opinion was Juſtice *Crook*, that this was a * *Real Contract for Rent*, and that making the Leaſe for Years had extinguiſhed the Promiſe; *Sed per* three other Judges the Action lies, for where there is a Promiſe in Fact (as there was in this Caſe) beſides the Contract on the Leaſe, there an Action on the Caſe will lie upon the *Aſſumpſit*. *W. Jones* 364. *Acton* verſus *Symonds.* Cro. Car. 414. * Antea 5, 12, 26. S. P.

30. The Plaintiff brought an *Indebitatus Aſſumpſit*, for that he being one of the *Coal-meeters in London*, and that by an Act of Common Council it was ordained, that there ſhould be *ten Coal-meeters*, of which eight ſhould pay 80 *l. per Annum*, each of them, to the Lord Mayor for the Time being, and two of them ſhould pay their Rent to the Chamber of *London*, of which two the Plaintiff was one; but the Defendant being *Lord Mayor*, demanded the Rent of the Plaintiff, which he paid quarterly, and took ſeveral Receipts for it, and afterwards the Rent was demanded by the *Chamberlain*, and paid to him, and thereupon he brought an *Aſſumpſit* againſt the *Lord Mayor*, and adjudged, that it would lie; as where a Man, who has no Right, demands *Rent* as a Landlord, and receives it, and afterwards he who hath a Right demands it, and 'tis paid to him, an *Indebitatus Aſſumpſit* will lie againſt the firſt; for where a Man pays Money in Satisfaction of a Duty, to him who hath no Right to receive it, in ſuch Caſe the Duty is not ſatisfied, and therefore the Perſon to whom it is paid is indebted to him who paid it. 2 *Sid.* 4. *Bonnell* verſus *Fouke.*

31. *Aſſumpſit*, in which the Plaintiff declared, that in Conſideration the Defendant had ſurrendred a *Copyhold Eſtate* to him (the Plaintiff) and that the Plaintiff would permit the Defendant to *enjoy it* from 10 *Aug. &c. to the firſt of May* following, he *promiſed* to pay to the Plaintiff 50 *l.* he alſo declared upon a *Quantum meruit*, for the Enjoyment of the ſaid Eſtate, *&c.* The Defendant, as to the *Quantum meruit*, pleads *Non Aſſumpſit*, and as to the other Part demurred; and it was inſiſted for him, that here was a Term demiſed, and a *Rent reſerved*, for which *Debt* lies, and not *an Aſſumpſit*; and ſo is *Brett and Read's* Caſe, and *Chapman and Southwick's*; but adjudged, that the * Action will lie, for this ſhall be intended an expreſs Promiſe to pay, *&c.* and not a Promiſe in Law ariſing upon the Contract; and if *Non Aſſumpſit* had been pleaded, inſtead of *demurring* to it, the Plaintiff muſt have proved an *expreſs Promiſe*, which being collateral, and *quaſi* a ſpecial Agreement to pay the Rent, is of the ſame Effect as an expreſs Covenant in a Deed. 3 *Lev.* 150. *Johnſon* verſus *May.* See *Cro. Eliz.* 118. *Hunt* verſus *Some*, and 859. *Clerke* verſus *Pallady.* and 2 *Cro.* 598. *Dartnall* verſus *Morgan.* * *See* pl. 26. *See* pl. 29. Acton *v.* Symonds.

32. *Caſe, &c.* in which the Plaintiff declared, that in Conſideration he would deliver to the Defendant a Horſe, he promiſed to deliver unto the Plaintiff another Horſe, or five Pounds, *upon Requeſt*, and avers, that he did deliver the Horſe to the Defendant, and had requeſted him, *&c.* The Defendant pleaded, that the Plaintiff had * *diſcharged him of this Promiſe before the Action brought*, but did not ſhew *how*; and upon Demurrer to this Plea it was adjudged ill, becauſe he ſhould have pleaded the *Diſcharge* before the *Requeſt* made, and then it had been good, without ſhewing *how* he was diſcharged; but after the Requeſt he muſt ſhew how. 1 *Mod.* 262. *Edwards* verſus *Weeks.* See *Langden* verſus *Stokes, antea pl.* 20. 1 Mod. 259. * Antea 20. S. P.

33. An

33. An *Executor* brought an *Indebitatus Aſſumpſit* againſt the Defendant for ſo much of the Teſtator's Money received by him (the Defendant) to the Uſe of the *Executor:* The Evidence at the Trial was, that the Defendant had ſome Writings belonging to the *Teſtator*, which he would not deliver to the *Executor*, who gave him ſo much Money to deliver the Writings, but yet he refuſed to deliver them, tho' he had promiſed ſo to do; it was objected, that an *Indebitatus Aſſumpſit* would not lie, but a ſpecial Action on the Caſe on the Agreement, for not Delivering the Writings; as where one had undertaken to get a *Pardon* for another, and for that Purpoſe got ſeveral Sums of Money, but did not *get the Pardon*; and upon an *Indebitatus Aſſumpſit* for ſo much Money received to his (the Plaintiff's) Uſe, he was Nonſuit, for that this Action would not lie, which *Holt Ch. Juſt.* denied; 'tis true, theſe Actions have been carried too far, but are allowed for earneſt Money received upon Bargains, when the Bargain hath not been performed, and upon *Præmiums* for Inſurance, when the Ship did not proceed in the Voyage; ſo he would not Nonſuit the Plaintiff for that Reaſon. *Mod. Caſes* 161. *Holmes* verſus *Hall.*

(O)

Of Promiſes to pay or do a Thing upon Requeſt. See poſtea Tit. *Requeſt.* See (N) 23.

Moor 866. 1. WHere a Duty accreweth upon the Promiſe it ſelf, there an expreſs Requeſt muſt be laid in the Declaration, and *licet ſæpius requiſit'*, is not good. *Cro. Eliz.* 91. *Osbaſton* verſus *Garton.* But 'tis otherwiſe, where there is a Duty precedent to the Promiſe, for in ſuch Caſe *licet ſæpius requiſitus*, is good. 4 *Leon.* 2. *Pulmant's* Caſe.

2. *Aſſumpſit*, in Conſideration the Plaintiff would ſurceaſe a Suit which he had begun againſt the Defendant, he promiſed to pay him 100 *l.* and averred, that he did ſurceaſe, *&c.* and that the Defendant, altho' *ad hoc* he was required on ſuch a Day, had not paid, it was adjudged, that the *Requeſt generally* laid in this Manner, was ſufficient. *Leon.* 118. *Rivet* verſus *Rivet. antea* (M) 7. *S. C.*

3. Adjudged, that a voluntary Curteſy will not ſupport an *Aſſumpſit*; but if 'tis done at the *Requeſt* of the Party who made the Promiſe, then 'tis Binding, for tho' it follows the Thing done, yet 'tis not *naked, but coupled with the Requeſt*; and therefore where the Defendant required the Plaintiff to endeavour for a Pardon for Felony, and in Conſideration thereof, promiſed to pay him 100 *l.* tho' it did not appear, that he did any Thing towards the Obtaining it, but riding to the King; yet it was held a good Conſideration. *Hob.* 105. *Lamplugh* verſus *Brathwaite.*

4. *Aſſumpſit*, for that the Plaintiff being an *Inn-keeper*, and a Commiſſion being to be executed at his Houſe, in Conſideration he promiſed to find Man's Meat and Horſe-Meat for the Defendant and his Company, during the Time of the Commiſſion, he promiſed to pay, *&c. when he ſhould be required*, and avers, that he did find Meat, *&c.* which came to 5 *l.* which the *Defendant licet requiſitus* (without ſhewing the Day, and Year, and Place) had not paid; adjudged, that where the Defendant is charged upon a collateral Promiſe (as in this Caſe) there ought to be a preciſe Requeſt alledged, and *licet ſæpius requiſitus* generally is not good. 2 *Cro.* 183. *Selman* verſus *King*, and 523. *Hill* verſus *Wade. Godb.* 274 *S. C.*

5. He who promiſes to *ſave another harmleſs*, ought to do it at his Peril without any *Requeſt*; but if he is damnified, and Satisfaction is made on Requeſt, the Promiſe is not broken. *Style* 141. *Smithſon* verſus *Wells.*

(P)

Of mutual Promiſes, and executory Contracts. See antea (M) 47. *Covenant*, (M) per Totum. *Venire facias*, (A) 37.

Moor 667. 1. EVery executory Contract imports in itſelf an *Aſſumpſit*; for when a Man agreeth to pay Money, or to do a Thing, he aſſumeth to do it; and therefore, where he ſells Goods to another, and agreeth to deliver them on a certain Day, and the other, in Conſideration thereof, agreeth to pay, *&c.* in this Caſe each Party may have an Action upon the *Aſſumpſit*, or an *Action of Debt*; and one of theſe Actions is a good Bar to another afterwards brought upon the ſame Contract. 4 *Rep.* 92. *Slade's* Caſe. *Moor* 667. *S. C.* by the Name of *Morgan* v. *Slade.*

2. *Aſſumpſit*, in Conſideration the Plaintiff promiſed to deliver a Cow to the Defendant, he promiſed to pay him 50 *s.* here the Plaintiff need not aver the Delivery of the Cow, becauſe 'tis a *Promiſe againſt a Promiſe*, and both Promiſes were made at the ſame Time, as they ought, otherwiſe they are *nuda pacta. Hob.* 88. *Nicholls* verſus *Reinbred.* See *poſtea pl.* 12, 14. See *Bennet* verſus *Aſtell, S. P.* Averment, (B) 30.

3. The *Teſtator* promiſed, that in Conſideration the Defendant would pay after the Rate of 40 *s. per* Tun, that he ſhould have all the Iron made at ſuch a Furnace, and in Conſideration thereof, the Defendant promiſed to pay *ſecundum ratam*, as aforeſaid, and for not paying, the

Executor brought *Aſſumpſit*; adjudged, that tho' the *Teſtator* is dead, and an Action would not lie againſt his *Executor*, upon the Breach of a Promiſe made by him, yet the Promiſe on the *Defendant's Part* ſtill continueth, and a *Promiſe* made on a *Promiſe* is good. *Yelv.* 133. *Betteſworth* verſus *Campion.*

4. *Aſſumpſit, &c.* for that the Defendant being indebted to the Plaintiff in 15 *l.* promiſed to pay it by 21 *s. per Quarter*, and to give Bond for Payment *being required*, and he alledged a *Requeſt* to enter into ſuch Bond, but that the Defendant refuſed, which *Requeſt* was made after the End of the *Quarter-Day*; the Plaintiff had a Verdict, but could never get Judgment, becauſe the *Requeſt was made after the Quarter-Day*, for in ſuch Caſe, if he ſhould give Bond for Payment of the Money, it would be forfeited immediately. 2 *Cro.* 116. *Gregory* verſus *Wikes.*

5. *Aſſumpſit, &c.* the Plaintiff declared, that on *ſuch a Day, &c.* he ſold ſo much Barley to the Defendant, Part whereof he delivered the *ſame Day*, and the Reſt by Agreement he delivered afterwards, and on the *ſame Day* the Defendant promiſed to pay the Money, *&c.* it was objected, that the Sale was not compleat till all the Barley was delivered; beſides, the Promiſe was after the Sale, and if ſo, then it was made upon a *Conſideration executed*, and ſo not good; but adjudged, that it *being made on the ſame Day when the Goods were ſold*, 'tis good. *Latch* 150. *Howlet's* Caſe.

6. *Aſſumpſit*, in Conſideration the Plaintiff would *marry* the Defendant, he promiſed to *marry* her, and afterwards the Defendant, in Conſideration the Plaintiff would diſcharge him of the Promiſe, did promiſe to pay her 1000 *l.* it was objected in Arreſt of Judgment for the Plaintiff, here being two Promiſes, 'tis incertain to which the Declaration doth refer; but adjudged, that here mutual Promiſes made by the Parties, for which each may have an Action. *Style* 295, and 303. *Baker* verſus *Smith.*

7. The Plaintiff promiſed to build a Houſe, and the Defendant promiſed to pay him 80 *l. for his Labour*; here the Agreement to pay the Money is executory, and the Plaintiff muſt aver, that he had built the Houſe or was hindered by the Defendant, for in this Caſe the Word *pro* makes the Condition precedent. 2 *Saund.* 350. *Opie* verſus *Peters.* 1 Vent. 177. 214. 2 Lev. 23.

8. *Aſſumpſit, &c.* wherein the Plaintiff declared, that the Defendant, in Conſideration the Plaintiff would permit him to enjoy ſuch Land *for ſeven Years*, he (the Defendant) promiſed to pay to the Plaintiff, *for every Year* 20 *s.* and an Action was brought *within the ſeven Years*, and held good, becauſe it was an *executory Contract*, for each Year of the Seven, according to the Intention of the Parties. 1 *Vent.* 147. In *Large* and *Cheſhire's* Caſe.

9. In *Trover*, the Defendant confeſſed the *Converſion*, but pleaded in Bar, That in Conſideration that he had promiſed to pay the Plaintiff 20 *s.* for the Goods, the Plaintiff promiſed to acquit and diſcharge him for taking the Goods; and upon a Demurrer it was objected, that the Defendant did not alledge, that he had paid the 20 *s.* to the Plaintiff before the Action brought, for as 'tis pleaded, 'tis giving one Action in the Room of another; but adjudged, that where the *Promiſes are mutual*, and the Parties have *mutual Remedies*, there one Promiſe may be pleaded in Bar to an Action brought on the other, but then the Defendant muſt alledge the *Performance* on his Part. 2 *Lutw.* 1537. *Allen* verſus *Harris.* *T. Jones* 158, 168. *S. P.* 4 *Leon.* 7. *Strangborough* verſus *Warner.* *S. P.*

10 *Aſſumpſit, &c.* wherein the Plaintiff declared, that he had purchaſed a Leaſe of Lands then in the Poſſeſſion of the Defendant, who, in Conſideration that the Plaintiff had promiſed to pay him (the Defendant) 60 *l.* he (the Defendant) promiſed to deliver up the Leaſe upon the Payment of the Money, and alſo to deliver Poſſeſſion of the Lands; and the Breach aſſigned was, that he had not delivered up the Poſſeſſion of the Lands; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that tho' here was a *Promiſe againſt a Promiſe*, yet the Leaſe being to be delivered *upon Payment of the Money*, the Plaintiff ought to * *aver*, that he had paid it, for otherwiſe he is not to have the Leaſe, which is very true, but the Defendant was likewiſe to deliver the Poſſeſſion of the Lands, whether the Money was paid, or not, and that he had not done, therefore the Plaintiff had Judgment. 1 *Lev.* 70. *Olliver* verſus *Evans.* *Antea 2.

11. *Indebitatus Aſſumpſit*, and an *inſimul computaſſet* for 60 *l.* 12 *s.* 2 *d.* The Defendant, as to the firſt Promiſe, pleads *Non Aſſumpſit*, and thereupon they were at Iſſue; and as to the ſecond Promiſe thus, *poſtea ſcilicet*, on ſuch a Day they *accounted*, in which *Accompt* he was found in arrear to the Plaintiff *(allocatis allocandis)* in 14 *l.* only, which he (the Defendant) tendered, and the Plaintiff refuſed, then he pleads *Semper paratus & profert hic in Curia, &c.* The Plaintiff replied, that *bene & verum eſt*, that they *accounted*, and upon that Accompt the Defendant was found in arrear 60 *l.* 12 *s.* 2 *d.* and traverſed, that upon the ſaid Accompt he was found in arrear 14 *l.* only; they were likewiſe at Iſſue upon this Traverſe, and both Iſſues were found for the Plaintiff, and entire Damages given to 60 *l.* 12 *s.* 2 *d.* it was objected in Arreſt of Judgment, that it appears by the Plaintiff's own Confeſſion in this Replication, that there was an *Accompt* between him and the Defendant for the 60 *l.* 12 *s.* 2 *d.* due on the firſt Promiſe; if ſo, then the Action and Duty on the *Aſſumpſit* is extinguiſhed by the *Accompt*, and the Action ought to be brought upon the *Accompt* only, and not upon the *Aſſumpſit* and the *Accompt* likewiſe; therefore the *Damages given by the Jury being entire* on both Promiſes, the Plaintiff cannot have Judgment: But adjudged, that where a Promiſe is executory on both Parties, it may be diſcharged by Parol, becauſe the Duty ariſes upon the Execution of the Promiſe, and nothing is due before; but in the Principal Caſe there was a Debt executed in the Plaintiff, which cannot be diſcharged without a *Releaſe*; beſides, the new Promiſe upon the *Accompt* is a Choſe in Action, and that cannot be

be discharged by another Chose in Action of the same Nature; the Plaintiff had Judgment. 3 *Lev.* 237. *Mayor of Scarborough* versus *Butler.* See 2 *Cro.* 483. *Hartford* versus *Pile. S.P.* See 2 *Leon.* 214.

12. *Assumpsit, &c.* in which the Plaintiff declared, that it was mutually agreed between him and the Defendant, that the Plaintiff should before *Lady-Day, &c.* convey to the Defendant, *&c.* all her Interest and Title to the real Estate of *T. S.* deceased, and that in Consideration thereof the Defendant should, before that Time, pay to the Plaintiff so much, *&c.* and then lays mutual Promises, *(viz.)* that in Consideration the Defendant had promised to perform the Agreement on his Part, the Plaintiff promised to perform, *&c.* on his Part; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Plaintiff ought to have averred the Performance of his Part first, because the Performance on the Defendant's Part is conditional, *(viz.)* it was to be performed, in Consideration that the Plaintiff had performed his Part, and therefore it ought to have been averred: But adjudged, that the Performance on the Defendant's Part is not conditional, but absolute and reciprocal by Reason of the Agreement, for 'tis not in Consideration that the Plaintiff *should convey, &c.* but in Consideration he did *agree to convey*, and the Consideration upon which the Action is founded is the mutual Promise to perform the *Agreement* which is reciprocal and executory, and upon which the Parties have mutual Remedies for Non-performance, and where the Defendant hath a Remedy, for the Consideration of a Promise, the Consideration in such Case needs not to be averred. *Hardres* 102. *Gibbons* versus *Prewd.*

13. *Case* on a Special Promise, wherein the Plaintiff declared, that whereas the Defendant's Son had lain with the Plaintiff's Daughter and got her with Child, of which she was delivered; and that the Plaintiff intending to prosecute the Defendant's Son, and he the Defendant desiring an Agreement, there was a *Colloquium* between them concerning the Maintenance of the Child, and thereupon it was agreed, *that if the Plaintiff would promise to keep the Child for six Years*, and would not prosecute the Son, then the Defendant would pay to the Plaintiff 10 *l.* and so lays *mutual Promises*, and averred, that he had maintained the Child, *&c.* then he alledged a *Special Request*, but that the Defendant had not paid the 10 *l.* Upon Demurrer to this Declaration it was objected, that the Plaintiff did not *aver, that he promised to maintain the Child*, which is a Condition that precedes the whole Agreement; but adjudged, that the Plaintiff having laid *mutual Promises* in his Declaration, *(viz.) That the Promise which he made to perform the Agreement on his Part*, was the very Consideration that the Defendant promised to perform it on his Part, was a sufficient *Averment that he promised to maintain the Child.* 1 *Lutw.* 222. *Stinton* versus *Yates.* See (M) *placito* 48, 54.

14. It was the Opinion of my Lord Chief Justice *Hale*, that where there are *mutual Promises* relating to any Agreement, with a *Condition precedent*, the Performance of it must be averred; 'tis true, the mutual Promise is the Foundation of the Consideration, but that Promise must relate to the Agreement, and doth not oblige any otherwise than according to the Agreement it self. 1 *Lutw.* 394. In *Brown* and *Walker's* Case.

(Q)

Concerning Marriage.

1. *Assumpsit, &c.* there being a *Colloquium* between the Plaintiff and Defendant, about the Defendant's Daughter, and of a Marriage between the Plaintiff and her, the Plaintiff did marry her, and afterwards the Defendant promised to pay him 100 *l.* adjudged good to ground an *Assumpsit*, tho' the *Consideration, (viz.* the Marriage of the Daughter) *was past. Cro. Eliz.* 59. *Marsh* versus *Karnford.*

2. *Assumpsit, &c.* In Consideration the Plaintiff would marry the Defendant's Daughter, he promised to give him 20 *l. and to procure him all the Corn growing on such Lands, and to provide the Wedding-Dinner*; the Defendant confessed the Promise of 20 *l.* to the Plaintiff, so as he would procure a Lease of certain Lands for his Daughter's Life; the Jury found the Promise of 20 *l.* but nothing else; adjudged for the Defendant, because the Plaintiff ought not to vary from his Case, for where the Consideration is grounded upon two Promises, and the Plaintiff declares upon one alone, he shall never recover; and in the principal Case the Plaintiff had declared on two Promises, and the Jury have found but one, so that cannot be the Promise on which the Plaintiff had declared. 1 *Leon.* 299. *Simms* versus *Westcot.*

1 Roll. Rep. 433. * Postea 4.

3. *Assumpsit* against an *Executor*, upon a Promise made by the *Testator* for a Marriage-Portion; it was objected, that the Action did not lie against the *Executor* upon the *Assumpsit* of the * Testator; but adjudged that it did, and that it was not requisite for the Plaintiff to *aver*, that he gave *Notice* of the Marriage, tho' Part of the Portion was to be paid on the Marriage-Day, because the Promise made it a Debt which still continues. 3 *Bulst.* 135. *Beresford* versus *Gooderish.* See 2 *Cro.* 228. *Bradley* versus *Toder.* See *Christopher* versus *Howes. Style* 158. See 6 *Rep. Booth's* Case, and 8 *Rep. Frances's* Case, and 3 *Bulst.* 326. *Alfrey* versus *Blackamore. Latch.* 97. *S. C. Cro. Eliz.* 454. *Stubbings* versus *Rotheram, contra.*

* Antea 3.

4. Error on a Judgment in *Assumpsit* against an *Executor*, wherein the Plaintiff declared, that in Consideration he would marry, *&c.* the *Testator* promised to leave her 500 *l.* it was objected, that an *Assumpsit* doth not lie against an *Executor upon a collateral Promise of the* * *Testator*, and

that the perſonal Contract was determined by the Intermarriage, but the Judgment was affirmed. 2 *Cro.* 571. *Clarke* verſus *Thompſon.* See *Antea* (N) 6.

5. The Father promiſed 100 *l.* in Marriage with his Daughter, and ſhe, in Conſideration thereof, promiſed to pay the Father 100 *l.* who afterwards brought an Action againſt the Huſband and Wife for the Money; upon *Non Aſſumpſit* pleaded, the Jury found ſhe promiſed, but the Judgment was ſtayed by Reaſon of the Fraud, and if the Fraud had been pleaded it would have deſtroyed the Action. *Moor* 468. *Collins* verſus *Wills.*

6. The Son of one Man and the Daughter of another were about to marry, and the Father of the young Woman promiſed, that if the Father of the young Man would conſent that his Son ſhould marry his Daughter, and if he would give his Son Lands of the Value of 40 *l. per Annum*, he (the Father of the young Woman) would pay to the Son 200 *l.* in Marriage with his Daughter; the Queſtion was, who ſhould bring the *Aſſumpſit* upon Non-payment of the 200 *l.* whether the Father or his Son; the better Opinion was, that the Son ſhould have the Action. *Moor* 550. *Lever* verſus *Hayes.* *Cro. Eliz.* 619. *S. P.* and *Sprat* verſus *Agar.* Notice. (B) 22. *S. P.* See (K) 34.

7. *Aſſumpſit, &c.* wherein the Plaintiff declared, that in Conſideration he, *ad inſtantiam* of the Defendant, would marry his Daughter, he promiſed to pay him 20 *l. &c.* and alledged *in facto*, that he did marry her, and that he had required the Defendant to pay the 20 *l.* but he refuſed; upon *Non Aſſumpſit* pleaded it was found for the Plaintiff, and moved in Arreſt of Judgment, that the Promiſe being conditional to marry the Daughter *ad inſtantiam* of the Defendant, he ought to ſay, that he did marry her *ad inſtantiam* of the Defendant, and not ſay generally, that he did marry her, ſo that this being a Condition precedent, he ought to aver the Performance; but adjudged, that the Marriage ſhall be intended *ad inſtantiam* of the Defendant, without averring it. *Cro. Car.* 141. *Poynts* verſus *Poynts.*

8. *Aſſumpſit* by the Husband and Wife againſt the Defendant as *Executor* of *R. B.* for that the ſaid *R. B.* in Conſideration the Woman would marry the Husband, promiſed, that if he died, living the Wife, he would leave her worth 100 *l.* and avers, that ſhe did marry him, *&c.* it was objected in Arreſt of Judgment, that *by the Intermarriage the Action was extinguiſhed*, and ſo the Promiſe releaſed; but the better Opinion was, that the *Marriage* ſhall not deſtroy that which is created by it, neither will the Law work a Releaſe contrary to the Intent of the Parties. *Hutt.* 17. *Smith* verſus *Stafford.*

9. *Aſſumpſit*, In Conſideration that the Plaintiff would leave her Father's Houſe and come to the Defendant at ſuch a Place, he promiſed to marry her, and avers, that ſhe left her Father's Houſe, *&c. & obtulit ſe in maritagium conjungi*; it was objected in Arreſt of Judgment, that ſhe did not ſhew that ſhe gave him *Notice*, but adjudged, that the *obtulit ſe* implies Notice, for ſhe could not offer her ſelf unleſs the Man was there. *Style* 267. *Peck* verſus *Ingram.*

10. *Aſſumpſit, &c.* for that the Defendant, in Conſideration the Plaintiff would marry his Siſter, promiſed *he would give his Siſter* 300 *l.* for her Marriage-Portion, and aſſigned the Breach in not paying the Money *to himſelf*; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that the Breach was not well aſſigned, for it did not anſwer the Promiſe, that being to pay the 300 *l. to the Siſter*, and the Breech was, that he had not paid the 300 *l.* to the Plaintiff who was then her Husband; but adjudged well enough, for the Money is now due to him by the Intermarriage, and he muſt give the Acquittance for it. *Style* 393. *Bedell* verſus *Fenwick*, and 472. *Coney* verſus *Lewis. S. P.*

11. *Aſſumpſit, &c.* for that the Defendant promiſed the Plaintiff (who was a Phyſician) that if he performed ſuch a Cure he would give ſo much to him, and ſo much to his Daughter; adjudged, that the Daughter might bring the Action for her Money, tho' ſhe was a Stranger to the Conſideration and Promiſe, for the Nearneſs of the Relation gives her the Benefit of the Conſideration for her Father's Performance; ſo in the Caſe of *Lever* and *Hayes* laſt mentioned, where the Father of the young Woman, in Conſideration that the Father of the young Man would ſettle ſuch a Jointure, *&c.* promiſed the Father to pay the Son 200 *l.* here, tho' the Promiſe was made to the Father, yet the Son, who was a *Stranger* to it, may bring the Action, becauſe he did the meritorious Act, *(viz.)* he married the Daughter, but in the Caſe of * *Bourn* and *Maſon*, there the Plaintiff did nothing of any Trouble to him, or of any Benefit to the Defendant. *Raym.* 302. * Antea (K) 34.

12. The Defendant promiſed the Plaintiff *to give her* 100 *l. on the Day of her Marriage, and Intereſt for it in the mean Time*; after a Verdict for the Plaintiff and entire Damages, it was objected in Arreſt of Judgment, that 'tis incertain what was meant by the Word *Intereſt*, 'tis true, ſome Statutes mention *Intereſt* but none approve it, but the Plaintiff had Judgment. 2 *Sid.* 116. *Cook* verſus *Olliver.*

13. Caſe againſt Husband and Wife, in which the Plaintiff declared, that the Wife malitiouſly intending to marry him (the Plaintiff) did often *affirm* that ſhe was a ſingle Woman, and did *importune & ſtrenue* require the Plaintiff to marry her, and he believing her *Affirmation*, did actually marry her, by Reaſon whereof he was put to Charges, *&c.* The Defendants pleaded Not guilty, upon which they were at Iſſue, and the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that this Action would not lie, becauſe it was founded on the Contract of the Wife, which could not bind the Husband; beſides, the Fact is Felony, 'tis for that Reaſon, that where a Servant is killed, the Maſter ſhall not have an Action *per quod ſervitium amiſit*, becauſe 'tis *Felony*; the Judgment was ſtayed. *Sid.* 375. *Cooper* verſus *Witham & Ux'.* 1 Lev. 247.

Sid. 79. Poſtea (m) 10. S. C.

14. *Caſe, &c.* in which the Plaintiff declared, that he was to be married to *M. R.* who intended to take her to be his Wife, and that the Defendant falſly and malitiouſly, to hinder the Marriage, wrote a Letter to the intended Husband, that the Plaintiff was contracted to him, whereby ſhe loſt her Marriage; after a Verdict for the Plaintiff, it was objected this Action would not lie, becauſe the Defendant claimed a Right to marry her himſelf; but adjudged, that the Verdict having found it to be *falſe and malitious*, the Action lies. 1 *Lev.* 53. *Sheppard* verſus *Wakeman. Poſtea* (m) 10. *S. C.*

15. *Aſſumpſit, &c.* in Conſideration the Plaintiff, at the Defendant's Requeſt, would conſent to marry him, the Defendant promiſed to marry the Plaintiff, and that ſhe *parata fuit & obtulit ſe* to marry him, but he refuſed; upon *Non Aſſumpſit* the Jury found the Promiſe, but that it was made after 24 *June* 1677, *and without Writing*; it was objected, that this Promiſe is not within the Statute of Frauds, for that muſt be a Promiſe *to pay Money upon a Marriage*; and not a Promiſe to *marry*, but adjudged this Promiſe is within the Statute, for 'tis in Conſideration the Plaintiff would marry the Defendant, ſhe promiſed to marry him, which is a Promiſe in Conſideration of Marriage. 3 *Lev.* 65. *Philpot* verſus *Wallet.*

16. The Plaintiff being a *Tobacconiſt in London*, and having married a Daughter of the Defendant's, with whom he had 400 *l.* Portion; he (the Defendant) ſpoke merrily in the Preſence of three Witneſſes, that if his Son in Law would procure himſelf to be knighted, ſo that his Daughter might be a Lady, he would give her 2000 *l.* afterwards the Son in Law, without acquainting the Defendant, procured himſelf to be *knighted*, and brought an *Aſſumpſit* for the 2000 *l.* and the Jury gave 1500 *l.* Damages: *The Chief Juſtice* thought it a hard Verdict, for that the Words were ſpoken merrily, and intended only when the Son in Law ſhould by his Trade get an Eſtate ſufficient to qualify him for a Knighthood, and ſo a new Trial was granted. 2 *Mod.* 199. *Rands* verſus *Tripp.*

5 Mod. 411.

17. *Aſſumpſit, &c.* for that in Conſideration he had promiſed to marry the Defendant, ſhe promiſed to marry the Plaintiff; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that this Action could not be brought by the Man, becauſe Marriage is no Advantage to him but to the Woman; but adjudged, that Marriage is a Conſideration on the Man's Side ſufficient to raiſe an Uſe, and this Action is grounded on the mutual Promiſes; for if the Woman's Promiſe ſhould not bind her, then 'tis but *nudum pactum* on the Man's Side. 1 *Salk.* 24. 2 *Salk.* 736. *the Pleadings. Harriſon* verſus *Caſe. Sid.* 180. *Hebden* verſus *Rutter. S. P.* 1 *Lev.* 147. *S. C.*

18. A *Feme Sole who was ſeiſed of Lands*, married the Defendant, who had a *former Wife then living*; after the Marriage the Defendant received the Rents and gave Receipts to the Tenants, then the firſt Marriage being diſcovered, the ſecond Wife brought an *Indebitatus Aſſumpſit* againſt her pretended Husband, for ſo much Money received by him to her Uſe; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that the Husband having no Right to receive the Money, the Tenants were not diſcharged, therefore they might have a Remedy againſt the Husband, but the Plaintiff could not; but adjudged, that the Defendant being viſibly the Husband, the Tenants were diſcharged, at leaſt a Recovery againſt him by the Plaintiff would diſcharge them, becauſe that would be a Satisfaction to her. 1 *Salk.* 28. *Haſſer* verſus *Wallis.*

(R)

For Wrongs done in Ways. *Preſcription.* (B). See Title *Ways.*

1. CASE, for *Stopping up the Plaintiff's Way*, ſetting forth, that the Lord of the Manor of *M.* and *of two Acres* of cuſtomary Land, had a *Way* for himſelf and his cuſtomary Tenants of the ſaid *two Acres, in, by, and thro', &c.* and that the Lord granted the ſaid *two Acres* to the Plaintiff, and that the Defendant had erected an Hedge and Ditch, *&c.* but becauſe it did not appear in the Declaration to *what Village* the *Way* did lead, it being a *private Way*, it was held ill, but if it had been a *common Way* it had been good. 1 *Brownl.* 6. *Allen* verſus *Sparks.*

2. *Caſe*, for that he was ſeiſed of an Houſe in *B.* and ſo *preſcribed* to have a *Way* over the Defendant's Land called *C. pro quibuſdam Averiis ſuis*, and this was held *incertain*, for he ought to ſet forth what Number, and therefore the Plaintiff had not well intituled himſelf to the Way, becauſe the Certainty of the Number was Part of his Title. 1 *Leon.* 236. *Nightingale* verſus *Andrews.*

3. *Caſe, &c. for diſturbing the Plaintiff in uſing a Way*, ſetting forth, that the Defendant was ſeiſed in Fee of the Land over which the Way was, and that by Indenture of Bargain and Sale, he ſold the Lands to *R. B. with a Way over other Land*, who leaſed the ſame to the Plaintiff, and that the Defendant diſturbed him; adjudged, that the Plaintiff had not ſhewed any good Title, becauſe there was not any Grant of the *Way* by Indenture, but only a Sale of the Land, and of a Way out of other Lands, and nothing but the Uſe paſſed by the Deed, and there cannot be an Uſe of a Thing which is not *in eſſe* at the Time of the Deed made. 2 *Cro.* 190. *Beaudely* verſus *Brooks.* See *Palm.* 387. *Slackman* verſus *Weſt.* 2 *Cro.* 673. *S. C.*

Latch. 110. Palm. 410.

4. *Caſe, &c.* for *Stopping a Way*, ſetting forth, that *B.* was ſeiſed of an Houſe, without ſaying, that it was *antiquum Meſſuagium*, and ſo preſcribed to have a Way, without ſhewing *where it was*, or from *whence*, or *where* it leadeth, nor in what Town it was, nor what Manner of Way; but reſolved, that there being a *Verdict* for the Plaintiff, that had cured all theſe Exceptions,

ceptions, and as to the *antiquum Meſſuagium*, the Way is not claimed as *appendant* or incident to the Houſe, if it had, then it muſt be ſhewn, that 'tis an *antient Houſe*; but here the Houſe is *Terminus a quo*, &c. 3 *Bulſt.* 344. *Harriſon* verſus *Rock.*

5. Caſe, &c. in which the Plaintiff declared, that the Plaintiff and the Subjects, Time out of Mind, had uſed to have Paſſage in ſuch a Place, which was a Highway *tam pro ſeipſo, quam pro bonis & carragiis, &c.* and that the Defendant, on ſuch a Day, &c. *ſtopped the ſaid Way by making a Ditch*, ſo that he (the Plaintiff) could not paſs, *ad damnum, &c.* And upon Demurrer to this Declaration, it was held ill, becauſe the Plaintiff had not ſet forth any * particular Injury done to his Perſon more than to the reſt of the Subjects; as, that by Reaſon of the Stopping this Way, his Horſe throwed him, or the like; for if he had no more Damage than other Subjects, he ſhall not have this Action, for if he might, then a Hundred more might bring the like Action againſt him for the ſame Offence; this may be preſentable in a Leet, but the Declaration is not good. *Moor* 180. *Poſtea 9.

6. *Caſe for Stopping a Way*, wherein the Plaintiff ſet forth a *Title* as Leſſee of the Company of *Haberdaſhers* in *London*, and claimed to have a Way *for them*; whereas they having *let* the ſame, cannot have the Way, and ſo the *Preſcription* is not rightly applied; it ſhould have been, for them to have the Way *pro tenentibus & occupatoribus ſuis.* *Style* 300. *Cantrell* verſus *Stephens.*

7. The Plaintiff exhibited his Bill in the *Exchequer*, ſetting forth, that he was Farmer of a Common Ferry at *Brentford*, which Ferry had been a Common Ferry Time out of Mind, and ſets forth, that no other Perſon ought to erect a Ferry to the Prejudice of his Ferry; but that the Defendant being a Waterman, and having Lands on both Sides the River, about three Quarters of a Mile diſtant from the Common Ferry, did uſually carry over Paſſengers, Horſes, &c. in his Boat, &c. therefore he ſought Relief by ſuppreſſing the Defendant's Ferry, and that he might be enjoyned by Decree of this Court to uſe the Plaintiff's Ferry: At the Hearing the Cauſe the Plaintiff's Counſel inſiſted, that it was uſual to ſuppreſs ſuch Nuſances by Decree, eſpecially in the King's Caſe, and in the Caſe of his Farmers, tho' a ſpecial Action on the Caſe, or a *Quo Warranto* would lie; that a Common Ferry is a Franchiſe and Flower of the Crown, which a Common Perſon cannot ſet up without a Licence: but the better Opinion was, that 'tis in Nature of a *Monopoly* and Reſtraint to *Trade*, that a Common Stream is like a Common Highway, which is free for all, for which Reaſon *Toll Thorough* cannot be claimed by *Preſcription*; ſo the Bill was diſmiſs'd, but without Coſts. *Hardr.* 162. *Churchman* verſus *Tunſtall.*

8. *Caſe, &c.* wherein the Plaintiff ſet forth, that he was *ſeiſed in Fee* of a Wood, and that the Defendant, to hinder him from the Profits thereof, did *dig a Ditch in his own Cloſe*, over the Plaintiff's Way, leading from his Wood to *D.* which Way the Plaintiff alledged *de jure habuiſſe debuit*, for the neceſſary Uſe of his Wood: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that he had ſet forth no * *Title* to this Way, or that he was ever *poſſeſſed* thereof; but adjudged, that *de jure habuiſſe debuit*, was a good Title againſt a Wrong-doer, and this Judgment was affirmed in the *Exchequer-Chamber.* *St. John* verſus *Moody.* 2 *Lev.* 148. See 1 *Vent.* 319. *Sanders* verſus *Williams, S. P. Cro. Car.* 575. *Sands* verſus *Trefuſis. S. P.*

1 Vent. 274. *See* 1 Vent. 319. S. P. 2 Vent. 138, 739, 185, 288. 290. S. P. Jones 48. S. P.

9. *Caſe. &c.* in which the Plaintiff declared, that he was ſeiſed in Fee of Lands adjoining to the Defendant's Field called *Brambleburgh*, for four Years laſt paſt, and that during that Time *habere debuit* a certain Way thro' a Gate of the Defendant's in *Brambleburgh*, to a Cloſe, &c. of the Plaintiff's; but that the Defendant contriving to hinder the Plaintiff from the Uſe of the ſaid Way, on the 17*th of July*, &c. locked up the Gate, &c. There was a Judgment againſt the Defendant by Default, and a Writ of Enquiry, &c. and now it was objected, that the Declaration was ill, becauſe the Plaintiff had not ſhewed any *Title* to the Way by Preſcription, or otherwiſe; 'tis true, the Declaration was held good in *St. John* and *Moody's* Caſe, but that was after a *Verdict*; but adjudged, that 'tis likewiſe well, upon a Judgment by Default and a general Demurrer, without any ſpecial Cauſe ſhewn; the Plaintiff had Judgment. 3 *Lev.* 206. *Winford* verſus *Woolaſton.* See *pl.* 5, 8, 12.

10. The Plaintiff declared, that he had the Tithes of ſuch a Pariſh for a Year, and was poſſeſſed of a Barn, in which he intended to lay them, and that *alta via Regia* in *B.* was the direct Way to carry Tithes to that Barn; but that the Defendant had obſtructed it with a Ditch, and with a Gate erected croſs the Way, ſo that he could not carry the Tithes that Way, but round about, and a more difficult Way: Upon Not guilty pleaded, the Plaintiff had a Verdict, it was objected, that this being a *Stoppage in the Highway, was a Common Nuſance*, and no Damages ſhould be given in ſuch a Caſe; for then every one who had Occaſion to paſs that Way, might bring the like Action. *Sed per Curiam*, the Plaintiff had *particular Damage* by the hard Labour of his Servants and Cattle, occaſioned by obſtructing the Paſſage in the Right Way. *T. Jones.* 157. *Hart* verſus *Baſſett.*

11. Caſe againſt the Defendant, for diſturbing the Plaintiff in his Way, ſetting forth, that 10 *Maii, &c. & diu antea & adhuc, &c.* he was *poſſeſſed* of an antient Meſſuage, and that *he ought to have a Way*, from thence, in, by, and thro' a Cloſe of the Defendant's, called *Great Goſty Leaſows*, to the Highway, and that the Defendant had made a *Hedge* croſs his ſaid Cloſe, ſo that the Plaintiff could not paſs: Upon a Demurrer to this Declaration it was objected, that the Plaintiff had ſet forth, he was *poſſeſſed* of the Meſſuage, but did not ſay, *for Years*, and that it was not ſufficient to declare upon his *Poſſeſſion againſt a Wrong-doer*, becauſe he claimed the Way in the

* Antea 6. Lands of another Man, and therefore he ought to ſet forth his * *Title* to the Way either by Grant or Preſcription; but the Objection was not allowed. 1 *Lutw.* 119. *Blockley* verſus *Slater.*

3 Mod. 289. 12. Caſe, *&c.* wherein the Plaintiff declared, that the *Vill of Littleport* was an antient *Vill*, and that Time out of Mind, there had been a Ferry over the River there, which was a Common Paſſage for the Subjects, paying *Toll*, and that the Inhabitants of *Littleport had Paſſage Toll Free*; that the Defendant was Owner of the Ferry and let it decay, and that the Plaintiff required him to let him (the Plaintiff) go over the Ferry, which the Defendant refuſed, *&c.* The Defendant pleaded, that he built a Bridge in the Place of the Ferry, *&c.* and upon a Demurrer to this Plea, the Defendant had Judgment, becauſe this Cuſtom was in Nature of an *Eaſement*, and it did not conſiſt in the Right to paſs over the Ferry, for that was Common to all, but in the Right to paſs *Toll Free*, therefore the Plaintiff could not maintain an Action *for not paſſing*; for if he might, then any other might do the like, which would be endleſs; the Action only lies, where the *Toll had been demanded and paid*, for then the Plaintiff would have received

* Antea 8. a * ſpecial Damage, without which this Action doth not lie, but an Indictment or Information; for the Owner cannot let down the Ferry, and build a Bridge without a Licence, and *ad quod damnum.* 1 *Salk.* 12 *Paine* verſus *Partridge.* 2 *Salk.* 718. *The Pleadings.*

13. Caſe, *&c.* the Defendant for *Stopping up a Highway* leading to the Plaintiff's Colliery, with an Intent to deprive him of the Profit thereof, *per quod* he loſt the Profit, *&c.* and that *his Coals were ſpoiled for want of Buyers.* Upon Not guilty pleaded, the Plaintiff had a Verdict, but on a Motion in Arreſt of Judgment, the Court was divided; the better Opinion was, that this Action did not lie, it being for a *Publick Nuſance*, like the Caſe laſt mentioned, for not Keeping a *Ferry-Boat*; that no Man can have an Action without a particular Injury done, or a particular Right claimed; now in this Caſe the Plaintiff had no particular Right to the *Highway*, for that was Common to all People, nor a particular Injury done to him, becauſe Stopping a *Highway, is a Publick Injury*; but if he had ſuch an Injury by any ſpecial Damage, 'tis not ſufficiently ſet forth in his Declaration, by alledging in general, that his Coals were ſpoiled for want of Buyers, for he ought to ſhew ſpecially, that Cuſtomers were coming to buy them, and were hindered. 1 *Salk.* 15. *Iveſon* verſus *Moor.* 2 *Salk.* 728. *The Pleadings.* See 2 *Lev.* 214, 233. 1 *Cro.* 140.

(S)

Concerning Water-courſes. *See poſtea* (T) 12. (r) 15.

1. CASE, *&c.* wherein the Plaintiff declared, *Quod cum molendinum ab antiquo fuit erectum*, whereof he was ſeiſed, and the Defendant erected a new Mill, *per quod curſus aquæ prædict' coarctatus fuit*; adjudged, that the Action lies. 1 *Leon.* 273. *Ruſſell* verſus *Handfords.*

2. *Caſe, &c.* in which the Plaintiff declared for Breaking down a Bank generally *includentem aquæ*, and running to the Plaintiff's Mill, this was held good. *Hob.* 193. *Biccot* verſus *Ward.*

3 *Caſe, &c.* The Husband having made a *ſmall Pipe*, with a Cock, from the great Conduit, only to ſerve his Houſe with Water, the Action was brought againſt the Widow after his Death, for the *malitious turning Part of a Courſe of Water*, which did run from a Fountain in *C.* to the Plaintiff's Houſe, and adjudged, that the Action did lie, becauſe every Turning the Cock is a new Diverſion of the Water, *Dyer* 248, 319. *More* verſus *Brown.* *Coke* 5 *Rep. Penruddock's* Caſe. *S. P.* Quod pemittat, (A) 1. *S. C.*

4. *Caſe*, for that the Plaintiff having a *Freehold* in a Mill, and the Defendant having a *Freehold* in a Meadow, *divertit multos curſus aqarum*, ſo as where the Mill did grind before *two Quarters* a Day, it would now by that Means grind but *one.* *In Dyer* 248. it was made a *Quære*, whether the Action lay, or rather an *Aſſiſe*; but ſince it hath been ruled, that the Action lies. 4 *Rep. Lutterell's* Caſe, and *Leon.* 217. *Sly* verſus *Mordant*, and 2 *Cro.* 263. *Wrey* verſus *Veſpers.*

5. *Caſe, &c.* in which the Plaintiff declared, that the Defendant *exaltavit ſtagnum*, that the Plaintiff's Meadows was overflowed with Water; the Defendant pleaded Not guilty, the Jury found, that *erexit ſtagnum*; and if *erectio* and *exaltatio* are all one, then they find the Defendant guilty, if not, then they find him Not guilty; adjudged, that it was not all one, for *erigere* is *de novo facere*, but *exaltare eſt erectum majoris altitudinis facere.* *Mich.* 29 *Eliz. Godb.* 58. *Giles's* Caſe. *See* Aſſiſe. (A) 14. *Trehern's* Caſe.

6. *Caſe, &c.* for that he was poſſeſſed of Lands adjoining to a River *from 29th of May* 29 *Eliz.* and that the Defendant on the ſaid *29th of May had ſtopt the River, &c.* and ſo *continued* till the 14th of *February*, by which Reaſon his Land was drowned, *&c.* After a Verdict for the Planitiff, it was objected, that he had no Cauſe of Action, becauſe he declared of a Poſſeſſion *from the 29th Day of May*, which excludes that Day, and the Nuſance being alledged to be done on that Day, by Conſequence it muſt be before he was poſſeſſed; but adjudged, that tho' it was before his Poſſeſſion, yet the *Continuance* of it is a new Wrong. 2 *Leon.* 103. *Waſhborn* verſus *Mordant.* Quod permittat, (A.) 2. *Penruddock's* Caſe. *S. P.*

7. *Caſe, &c. for directing a Water-courſe*; the *Preſcription* to the Water-courſe was laid in one Pariſh, to have a Water-courſe to his Houſe in another Pariſh, and the *Ve. fa.* was from both Pariſhes, as it ought, upon Not guilty pleaded, for that Iſſue goeth to all; but if it had been a ſpecial Iſſue, then the *Ve. Fa.* muſt be from the Place where the diverting is laid. 3 *Bulſt.* 79. *More* verſus *Salter.*

8. *Caſe, &c.* for that he was ſeiſed of two Acres of Meadow in *Box*, and the Defendant was ſeiſed in Fee of a Water-Mill in *Box*, whereunto the Water run out of a Rivulet there by the ſaid two Acres, and that the Defendant erected *ripas ſtagni molendini prædict'* ſo high, that Water overflowed the ſaid Meadow, *&c.* it was objected in Arreſt of Judgment, that here was no Place laid, where the *ſtagnum molendini* was; but adjudged, that the Continuance of it was a Nuſance. 2 *Cro.* 555. *Brent* verſus *Haddon.*

9. *Caſe, &c.* in which the Plaintiff declared, that he was poſſeſſed of the Rectory of *Marſham in Berks* for a certain Term of Years yet to come, in which there was a *Curtilage*, and a Watering-place to the ſame, Time out of Mind, for him, and all thoſe who had been ſeiſed of the ſaid Rectory, for them their Tenants, *&c.* to water their Cattle, and for other Uſes, and that it run from ſuch a Stream of Water *over the Defendant's Hop-yard*, to the ſaid Watering-place in the Plaintiff's Curtilage, and that the Defendant, *&c.* did fill and ſtop up the ſaid Water-courſe with Earth and Stones, and built a Wall thereon *ad damnum, &c.* The Defendant pleads, that *H.* 8. in the 30*th Year of his Reign*, was ſeiſed of the Manor of *Marcham* in Fee, and of *this Rectory and Hop-yard*, and being ſo ſeiſed, granted the Hop-yard to *Box* in Fee, and ſo derives a Title to it in Fee from *Box*, and being ſo ſeiſed, he built a Wall upon it, as he lawfully might, *&c.* and upon a Demurrer to this Plea, the Queſtion was, whether this Water-courſe was not extinguiſhed by the *Unity of Poſſeſſion in the King*, and adjudged, that is was not; for tho' it was a Charge upon another Man's Land, (*viz.*) to run thro' his Hop-yard, yet it was a Thing of *Neceſſity* and *not of Eaſe*, and therefore not deſtroyed by *Unity of Poſſeſſion.* *Palm.* 444. *Surry* verſus *Piggott.* *See* Extinguiſhment. (G) 3. *S. C.* Poph. 166. 3 Bulſt. 339. Latch. 153.

10. *Caſe, &c.* in which the Plaintiff declared, that the Defendant *injuſte & malitioſe magnam partem cujuſdem antiquæ molis*, upon the *River Darwent*, did break, divert and beat down, and thereby great Part of the ſaid River, *ab antiquo & * ſolito curſo ſuo* to the Mill of the Plaintiff, by the ſaid River, did divert, by which the Plaintiff loſt the Profits of his Mill ſo long *ad damnum, &c.* There was an ill Plea and Replication, and upon a Demurrer, the Objection was, that the Declaration was ill, for the Plaintiff did not ſet forth, that his Mill was an *antient Mill*, or that the Defendant had *Time out of Mind* maintained the Dam, or that the Water *Time out of Mind* had run that Way; but the Plaintiff had Judgment in *C. B.* which was affirmed in Error in *B. R.* 3 *Lev.* 113. *Nulms* verſus *Heblethwait.* *Palm.* 290. *Earl of Rutland* verſus *Bowler.* 3 Mod. 48. * *In* 2 Cro. 43, 123. Sands *v.* Trefuſis, 'tis *currere ſolebat.* Cro. Car. 499.

11. *Caſe, &c.* in which the Plaintiff declared, that he was ſeiſed of a *Water-Mill* to him and his Heirs, *ſecundum cons' Decanatus de Woolverhampton*, and ſo *preſcribed* for a Water-courſe, and that the Defendant intending to deprive him (the Plaintiff) of the Profit of the Mill, did divert the Water *ab antiquo curſo ſuo*, by Reaſon whereof he could not *molare* ſo faſt: After a Verdict for the Plaintiff, it was objected, that a Corporation could not preſcribe by a *Que Eſtate*; beſides, the Word *molare* is inſenſible, but the Plaintiff had Judgment; for as to the Preſcription, he might be ſeiſed of an Eſtate in *Borough Engliſh*, and that is by the Cuſtom of a Manor, and in ſuch he might preſcribe; and if the Word *Molare* is inſenſible, then Damages were given only for what is ſenſible in the Declaration, which had been good, if that Clauſe had been left out. 5 *Mod.* 206. *Richards* verſus *Hill.*

(T)

For other Wrongs done.

1. CASE, *&c.* for keeping a Maſtiff, *ſciens* that he was accuſtomed *ad mordendum porcos*; it was held, that the Biting Hogs was neceſſary, and not like the Keeping a Dog which uſually bit Sheep, therefore this Action would not lie. *Dyer* 25. *Cro. Car. Boulton* verſus *Banks. S. P.*

2. Caſe, *&c.* for erecting a new Building which *ſtopped the Plaintiff's Light*; adjudged, that if this was a *new Light*, then the Defendant might build upon his *own Ground* and darken it, but if it was an *antient Light*, he could not. 1 *Leon.* 168. *Bowry* verſus *Pope.* *See poſtea* Unity of Poſſeſſion. (A) 9. Cro. Eliz. 526. * 1 Roll. Rep. 79. S. P. 3 Bulſt. 322. * Poſtea (V) pl. 1, 6, 15. 1 Leon. 152. Cro. Eliz. 234. 1 And. 265.

3. Caſe, *&c.* in which the Plaintiff declared, that at the *Niſi prius* the Defendant gave *Evidence* to a Jury in a Point material to the Iſſue, which *Evidence was falſe*, and ſo the Defendant was *Perjured*, by Reaſon whereof the Jury found againſt the Plaintiff *ad damnum, &c.* After a Verdict for the Plaintiff, the Judgment was * ſtaid, becauſe this Action would not lie, for it muſt be *intended*, that, where a * Witneſs is ſworn, his Evidence is true, and ſo is his Oath. 1 *And.* 47. *Damport* verſus *Simpſon.*

4. Caſe againſt the Defendant, for breaking down Part of an outer Wall of the Plaintiff's Houſe, which the Defendant gave him Leave to ſet on his Lands. *Poph.* 13, 15. *Hayes* verſus *Allen.*

2 Leon. S. C. Cro. Eliz. 285. S. C.

5. Error of a Judgment in *Caſe, &c.* for that *W. R.* being poſſeſſed of an Houſe in *L.* let a *Cellar* to the Plaintiff, and a *Ware-houſe* over it to the Defendant, who laid ſo great a Burthen in the *Ware-houſe*, that by the Weight thereof the Floor broke and fell into the *Cellar*, and ſpoil'd three Buts of Wine; the Defendant pleaded, that the ſaid Floor had ſuſtained as great a Weight, and that for want of repairing by thoſe to whom the *Ware-houſe* did belong, it was ſo ruinous, that the *Poſt of the Cellar broke, &c.* adjudged, that the Action did lie, becauſe the Plaintiff had expreſly alledged, that the *Floor broke by the Weight*, and the Defendant pleading, that it bore as great a Weight, is only Argumentative; he ought to have traverſed the Maleſeaſance. *Poph.* 46. *Edwards* verſus *Halendar.*

6. Caſe, *&c.* for erecting a *Wood-pile* ſo near the Plaintiff's Hall and Parlour, that he was deprived of the *Light*, and for building a *Hog-ſty* ſo near his Hall, that by the Stink of the Hogs he could not endure his Houſe; adjudged, that the Action lay. 9 *Rep.* 57. *Aldred's* Caſe. The Action lies for Stopping a Proſpect which is only Matter of Delight. 1 *Bulſt.* 115. * *Hughes* verſus *Keymith*; but 1 *Mod.* 55. *Knowles* verſus *Richardſon contra.* 2 *Cro.* 373. * *Rippon* verſus *Bowley.* and 1 *Cro.* 237. *Symonds* verſus *Seabourn.* 1 *Bulſt.* 116. But in *Trinity* Term, 29 *Eliz. Moſley* verſus *Bland.* there is a contrary Reſolution.

* Godb. 185. S. C. * 1 Roll. Rep. 222. S. C.

7. *Caſe, &c.* for that the Plaintiff was ſeiſed in Fee of the Manor of *B.* and of a *Fair* to be held there every *Aſcenſion*-Day, and that the Defendant diſturbed him to take *Toll*; it was objected in Arreſt of Judgment, that the Plaintiff had made no *Title* to the *Fair*, either by Grant or Preſcription; but adjudged, that being an *Inducement* to the Action, and not any Claim to the Right, it was well enough. 2 *Cro.* 43. *Dent* verſus *Olliver.* 2 *Cro.* 112. See *Owen* 109. and 1 *Cro. Moyſer* verſus *Grey. S.P. See* Toll. (A) 20.

8. *Caſe, &c.* for that *R. B.* by Deed granted unto the Plaintiff, *unum annualem redditum ſive annuitatem decem librarum* for Life, and that the Defendant tore off the *Seal eidem annexat'*, and doth not ſay it was the Seal of the ſame Deed, or that he loſt his Annuity, or whether it was an Annuity or a Rent iſſuing out of the Land, yet the Plaintiff had Judgment. 2 *Cro.* 255. *Aſh* v. *Bradnell.*

9. There was a Judgment againſt the *Principal* in an Action of *Trover*, and 140 *l.* Damages, and afterwards he rendered himſelf in Execution in Diſcharge of his *Bail*; but notwithſtanding he was in Execution, and the *Bail* diſcharged, the Plaintiff took out a *Ca. Sa.* againſt the ſaid *Bail*, for which they brought an Action on the Caſe againſt the Plaintiff, and adjudged that it would lie; and afterwards, upon a Writ of Error brought, the ſaid Judgment was affirmed. 2 *Cro.* 667. *Steer* verſus *Scoble.*

10. Caſe, *&c.* wherein the Plaintiff declared, that whereas the Defendant had obtained againſt him a Judgment for 7 *l.* 10 *s.* Coſts and Damages, and that upon the ſaid Judgment the Plaintiff had paid him 7 *l.* the Defendant did thereupon *releaſe* the ſaid Judgment, and covenanted, that he would withdraw all Proceſs of Execution for the ſaid Debt, but yet had ſued forth a *Capias ad ſatisfaciend' returnable Tres Trin.* which he delivered to the Sheriff, who arreſted him on the 20*th of July following*; the Defendant pleaded an ill Plea, and there being a Demurrer to it, he excepted againſt the Declaration, for that it appeared by the Plaintiff's own Shewing, that he was not grieved by the Defendant by this Execution, becauſe he was taken on the 20*th Day of July*, which was long after the *Return of the Writ*; ſo it was done without Warrant, and is Falſe Impriſonment in the Sheriff; and for this Cauſe the Declaration was held ill. 2 *Bro.* 505. *Bennet* verſus *Guildford.*

11. *Caſe, &c.* againſt an Ordinary for admitting a Clerk contrary to a Verdict *in jure patronatus*, for the Patron muſt firſt try his Title in a proper Action againſt the Uſurper and his Incumbent. *Hob.* 315. *Sir William Elwis* verſus *York.*

12. *Caſe, &c.* for pulling down a Mill-dam, by Reaſon whereof the Water run out, *&c.* It appeared that the Plaintiff had built a *Mill-dam*, Part upon his own Land, and Part upon the Land of the Defendant adjoining, and the Defendant pulled the Dam which was on his Land, and ſo the whole fell down, and the Water run out; this was adjudged lawful. *Cro. Eliz.* 269. *Wigford* verſus *Gill.*

13. *Caſe* againſt the Defendant, for Taking and Detaining *unam pixidem*, (but did not ſay *ſuam*) with divers Writings in it concerning the Plaintiff's Land, and detaining it till he gave him a Note to pay 40 *l.* After a Verdict for the Plaintiff, it was objected, that by the Omiſſion of the Word *ſuam*, it doth not appear in the Declaration, that the Plaintiff had any *Property* in the Box; but adjudged, that the Writings being in it, the Property of the Box muſt follow them, and the Plaintiff had ſhewed, that the Writings concerned his Lands; then it was objected, that the Plaintiff had declared for Taking and Detaining the Box and Writings, *&c.* and the Jury had found the Defendant guilty *de tranſgreſſione prædict'*, by which general Finding, the *Taking and Detaining* muſt be implied, and they cannot find an Iſſue by Implication; but adjudged, that when the Matter, upon which the Parties are at Iſſue, is in Effect almoſt the ſame with the general Iſſue, there, if the Jury find the general Iſſue, 'tis well enough. *Latch.* 195. *Holmes* v. *Wingreve. Godb.* 370. *S.C.*

14. *Caſe, &c.* by the Plaintiff againſt his own *Attorney*, for delivering to the Sheriff a *Fi. fa.* againſt him in a Suit wherein he was *Attorney for him, and procuring it to be executed*; it was objected after a Verdict, that there being a *Judgment* againſt the Plaintiff, the Suit was determined, and by Conſequence the *Truſt* repoſed in the Defendant; but adjudged, that the *Truſt* ſtill continues, for the Defendant might have ſhewed Cauſe, why there ſhould not be Execution, and his *procuring* the Writ to be executed ſhews, that he combined againſt his Client. *Style* 426. *Lawrence* verſus *Harriſon.*

15. *Caſe, &c.* in which the Plaintiff declared, that he lent the Defendant a *Mare* to ride from *S.* in *Norfolk* to *R.* in *Suffolk*, in which Journey he ſo immoderately rode her, that ſhe died; after a Verdict for the Plaintiff it was inſiſted, that no *Place* was laid where this immoderate Riding was, which ought to be, becauſe in the Declaration 'tis laid in two Counties; but adjudged, that it ſhall be *intended* to be in that County where the Action was laid. 1 *Vent.* 286. *Horſely* verſus *Potten.* Sid. 457. Raym. 187.

(V)

In what Special Caſes it lies, and where it lies againſt Judge and Officer, &c. where not. See (T) 13.

1. CASE, *&c.* for that the Plaintiff was poſſeſſed of a Veſſel made of Gold, to the Value of 500 *l.* which he delivered to *B. B.* to ſell beyond Sea, but he converted it to his own Uſe, upon which the Plaintiff brought his Action againſt him, and at the Trial the now Defendant was produced as a *Witneſs*, and ſwore it was not worth above 180 *l. &c.* by Reaſon of which Oath the Jury gave him but 200 *l. Damages*, whereas they would have given more if it had not been for that Oath; after a Verdict for the Plaintiff it was adjudged in Arreſt of Judgment, that this Action did not lie, becauſe the Law intends the * Oath of every Man to be true, and there was no Puniſhment at Common Law of a Witneſs for a falſe Oath, but now there is a Form of Puniſhment by the Statute 5 *Eliz.* ſo that if this Action ſhould be allowed, the Defendant would be doubly puniſhed. *Cro. Eliz.* 520. *Damport* verſus *Simpſon.* Antea (V) 1. *S. P.* 1 And. 47. Antea (T) 3. * Antea (T) 3. (V) 1.

2. Adjudged, That an Action on the Caſe would not lie againſt the Owner of *Coney-burroughs* by his Neighbour, tho' the *Conies* encreaſe to ſuch a Number that they deſtroy his Lands, becauſe the Owner of the Coney-burroughs hath no Property in the *Conies*, but only *ratione loci*, for they are *Feræ Naturæ*, and therefore the other may kill them when they come on his Lands. 5 *Rep.* 104. *Boulton's* Caſe; but *quære*, becauſe it hath been adjudged contrary, *anno* 16 *Jac.* in *Dewell* and *Saunders's* Caſe, which ſee *Poſtea* Dovecote. (A) 1.

3. Caſe, *&c.* againſt a *Parſon*, for that he and his Predeceſſors, Time out of Mind, had uſed to *celebrate Divine Service and to adminiſter the* * *Sacraments* to the Plaintiff and his Servants every Sunday in the Year in his Chapel, within his Manor of *L.* and that he had neglected ſo to do, *&c.* adjudged, that the Action did not lie, for his proper Remedy is to libel in the Eccleſiaſtical Court, where there is any Default either in the celebrating Divine Service or adminiſtring the Sacraments. 5 *Rep.* 75. In *Williams's* Caſe. * Poſtea 19.

4. *Caſe* againſt a *Parſon for not keeping a Bull, &c.* in which the Plaintiff declared, that in the Pariſh of *L.* there is a * Cuſtom, that the Parſon there at all Times of the Year, had uſed to keep within the ſaid Pariſh a *common Bull and a common Boar*, for the common Uſe of the Kine and Sows of the Pariſhioners at any Time when it ſhould be neceſſary, and that the Defendant was *Parſon* there for three Years and had not kept any *Bull* or *Boar* there, by Reaſon whereof the Plaintiff being an Inhabitant of the ſaid Pariſh, *had loſt the Encreaſe of, &c.* The Defendant by *Proteſtation* that there was no ſuch Cuſtom, pleaded Not guilty, and upon Demurrer this was held an ill Plea to a *Nonfeaſance*, for they are both in the *Negative* and cannot make an Iſſue; and it was adjudged a good Cuſtom, and that every Inhabitant who had any Damage by the Parſon's Negligence might have an Action againſt him. *Trin.* 39 *Eliz. Cro. Eliz.* 569. *Yielding* verſus *Fagg.* Moor 355. * *In* 4 Mod. 241. Waples *v.* Baſſet. *There was neither* Cuſtom *or* Preſcription *ſet forth, nor Loſs of any Encreaſe of Cattle, and for that Reaſon held ill.*

5. *Caſe, &c.* wherein the Plaintiffs declare, that they are a *Corporation of Weavers in London*, and that the *Cuſtom* there is, that none ſhould intermeddle with their *Guild*, nor with their Art in *London* or *Southwark*, but thoſe of their own Fraternity, and that the Defendant being none of their *Guild*, had bought Silk to the Value of 40 *l.* of *W. R.* to be woven, and had weaved it; upon Not guilty pleaded, the Jury found, that the Defendant being a *Stranger* had received of *W. R.* Silk to the Value of 40 *l.* to be woven, which he carried to *Hackney, and there weaved it*, and brought it back to *London*, and there received his Wages for weaving it; adjudged, that this was no Offence, for tho' the Cuſtom might be good, yet *the Contracting for the Silk in London, and Weaving it in the Country*, is not an Intermeddling with their Art in *London. Cro. Eliz.* 803. *The Warden and Corporation of Weavers* verſus *Brown.*

6. *Caſe, &c.* that whereas the Plaintiff brought an Action againſt one *I.* and the Defendant being produced as a *Witneſs* at the Trial gave *Evidence*, that the Plaintiff was a *Common Liar*, and ſo recorded, by Reaſon whereof the Jury gave him but ſmall Damages in that Action; adjudged, that the Action doth not lie, for if it did, every * *Witneſs* might be charged upon ſuch a Suggeſtion. *Hutt.* 11. *Harding* verſus *Bodman.* * Antea (T) pl. 3.

7. *Caſe, &c.* againſt the Defendant, a *Lord of a Manor*, ſetting forth a Cuſtom, that every *Copyholder* might nominate one to his Copyhold-Eſtate, who, upon Tender of a Fine to the Lord in Court, ought to be admitted by him, *&c.* reſolved, that the Action doth not lie, becauſe the proper Remedy is in Chancery. 2 *Bulſt.* 336. *Ford* verſus *Hopkins.* 2 Cro. 368. Moor 482.

8. *Caſe, &c.* againſt *Leſſee for Years*, for not permitting him in *Reverſion* to enter into the Houſe and ſee if any *Waſte* was done; it was objected, that the Plaintiff did not ſhew what *Waſte* was done;

done; but adjudged, that he cannot ſhew what *Waſte* was done, unleſs he may enter and view it, and the Law gives him Liberty of Entry, and therefore if he is diſturbed he muſt have a Remedy. 2 *Cro.* 478. *Hunt* verſus *Downam.*

2 Roll. Rep. 162. 9. *Caſe, &c.* for that the Plaintiff being a *Maſon, &c.* and having a Leaſe of a Stone-pit in *O.* where he digged Stones to ſell and to build; the Defendant, to deprive him of that Benefit, *threatned his Workmen*, and others coming thither, to *maim them* and ſue them, *&c.* it was objected, that here were only Words but no Act done, and Fear of cauſeleſs Suits is no Cauſe of Action; but adjudged, that the *Threatning to maim* and ſue, whereby Men were afraid to work or buy Stones was a Damage to the Plaintiff, and a Loſs of his Quarry. 2 *Cro.* 567. *Garret* verſus *Taylor.*

10. The Queen granted to the *Lord North* and his Heirs, the Fines *pro licentia concordandi*, and the Defendant refuſing to pay the Fine, the *Lord North* brought an Action on the Caſe for it; it was objected againſt the Action, that he could not declare upon an *Indebitatus Aſſumpſit*, becauſe this was a real *Fine*, and was given by Law, there being no Contract between the Parties concerning it; adjudged that the Action did lie, *becauſe there was no other Remedy.* 2 *Leon.* 79. *Lord North's* Caſe.

11. The Plaintiff declared upon the *Cuſtom of Merchants*, that if any Merchant beyond Sea deliver Money to a Factor, who makes a Bill of Exchange under his Seal, which is ſubſcribed afterwards *by the Maſter or any of the Company of ſuch Merchants*, that in ſuch Caſe the Maſter, *or any or all of the Company*, may be charged to pay it; and ſets forth, that one *W. R.* was Factor to a Company of which the Defendant was a Member, and that the ſaid Factor did ſubſtitute one *R. R.* in his Room, to whom the Plaintiff delivered 100 *l.* who made a Bill of Exchange, to which Bill one *C. D.* being one of the Company, ſet his Hand in *England*, and ſo became liable to pay it, which he had not done; the Defendant pleaded *Nil debet per Patriam*; and upon Demurrer to that Plea the Queſtion was, whether the Defendant might not *Wage his Law*, and *Hobart* was of Opinion that he might, for the *Delivery* of the Money made a Contract in Law, for which the Plaintiff might have an Action on the Caſe and declare upon the Promiſe; and if ſo, then the Defendant may Wage his Law; but he was of Opinion, that this Cuſtom, as laid by the Plaintiff, was not good, *(viz.)* that where one of the Company ſubſcribes a Bill of Exchange, that all ſhould be liable to pay it. *Winch* 24. *Vanheath* verſus *Turner.* *Poſtea* Wager of Law. (A) 11. *S. C.*

W. Jones 226. 12. It lies for detaining a Man in Cuſtody upon an Arreſt after *ſufficient Bail tendered*, and not an Action of *Treſpaſs* and falſe Impriſonment, for the detaining a Man in Priſon doth not make the Arreſt tortious. *Cro. Car.* 196. *Salmon* verſus *Percivall.*

ff. *A ſpecial Action on the Caſe.* 13. *Caſe, &c.* againſt the Defendant, for taking away the Plaintiff's *Ward*, and the Writ was *contra pacem* without *Vi & Armis*; adjudged, that this Action lies, or the Plaintiff might have *Raviſhment of Ward* upon the Statute *W.* 2. at his Election, but the Plaintiff brought this Action for taking and detaining his Ward, ſo that he could not marry him, and upon this Special Matter this Action will lie without the Words *Vi & Armis.* *Trin.* 21 *Jac. Shortridge* verſus *Hills. Godbolt* 426.

14. *Caſe, &c.* for that the Father of the Defendant held certain Lands of the Plaintiff in *Knights Service* and died in his *Homage*, leaving the Defendant within Age and his Heir, and that the Plaintiff *tendered* to him a convenient Marriage, and ſhewed what, *&c.* which he refuſed, and ſo he demanded the Value of the Marriage; the Defendant pleaded and took the Tenure by *Proteſtation*, and traverſed the Tender; adjudged that it was traverſable; then it was objected againſt the Plaintiff, that *Caſe* would not lie, for he ought to have brought his Writ *de valore Maritagii* (now taken away by the Statute 12 *Car.* 2. *cap.* 24.) which was the proper Remedy; but adjudged, that an Action on the *Caſe* would lie as well as that Writ, but becauſe the Plaintiff did not ſet forth in his Declaration, that the Father of the Defendant was *ſeiſed in Fee*, it was doubted, whether it was good, or not. *Hill.* 13 *Car. Cro. Car.* 361. *Arundel* verſus *Saunders.*

2 Cro. 681. 15. *Caſe, &c.* in which the Plaintiff declared, that there was a ſpecial *Supplicavit* out of Chancery againſt *T. S.* for the Good Behaviour, and that he was arreſted by Vertue of a Warrant thereon by the Defendant, who ſuffered him afterwards to *Eſcape*, and being charged therewith, he came into Court, and *falſe & malitioſe* made Oath that the Plaintiff *Ayres* reſcued *T. S.* from him, that thereupon the Plaintiff was committed for the ſaid Contempt, *ad damnum, &c.* The Defendant pleaded, that he did not *falſly and malitiouſly make* * *Oath, &c.* upon which they were at Iſſue, and the Plaintiff had a Verdict, it was objected that this Action would not lie, becauſe, if the Oath was falſe he ſhall be puniſhed in another Manner and not by Action on the Caſe, for in ſuch Action Damages are only recovered againſt him, ſo that the Statute which inflicts a Puniſhment on Perjury would be eluded. *Palm.* 142. *Ayres* verſus *Sedgwick.* See *Cutler* verſus *Dixon. S. P.* See *Palm.* 188. *Hunter* verſus *Allen. S. P.* 2 *Roll. Rep.* 231.

* Antea (T) 3. (V) 1.

16. *Caſe, &c. Quare filium & hæredem ſuum rapuit & maritavit*, and doth not ſay, *cujus maritagium ad ipſum pertinet*, nor that it was *filium & hæredem apparentem*, or that he was *infra ætatem*, neither doth he ſay, that the Defendant took him *a Cuſtodia* of the Father, but adjudged that the Declaration was good, for the Father may have this Action tho' the Son be not within Age, and he hath a Right to marry him, tho' he cannot leave him any Land. *Style* 216. *Wood* verſus *Topham.*

* Antea, (M) 124. 17. *Caſe, &c.* againſt the Defendant, for not paying the Money after the * *Acceptance of a Bill of Exchange*, according to the Cuſtom of Merchants; it was objected in Arreſt of Judgment, that

the Plaintiff had not alledged any *Demand* of the Money; adjudged, 'tis not neceſſary after Acceptance of the Bill. *Style* 370.

18 Caſe, *&c.* in which the Plaintiff declared, that he was a *Juſtice of Peace*, and that the Defendant had *indicted* him for reſcuing a Vagabond from the Conſtable, (who brought the Vagabond before him) ſo that the Law could not be executed, *&c.* after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action would not lie, for if it ſhould, it would diſcourage all Proſecutions upon Indictments; but adjudged actionable to indict a Man for a Crime in the Execution of his Office. 1 *Vent.* 23, 25. *Sir Andrew Henley* verſus *Dr. Burſtall.* Raym. 135, 180.

19. *Caſe, &c.* againſt a *Parſon*, wherein the Plaintiff declared, that whereas *the Sacrament of the Lord's Supper* was to be adminiſtered to the Pariſhioners on ſuch a *Sunday*, the Defendant *licet ſæpius requiſit'*, refuſed to admit the Plaintiff, and declared alſo, that he refuſed to admit him on another Sunday, but laid *no Requeſt* on the ſecond Refuſal; after a Verdict for the Plaintiff and entire Damages; this was moved in Arreſt of Judgment, and it was arreſted accordingly, but no Opinion was given, whether the Action would lie, or not. *Sid.* 34. *Clovell* verſus *Cardinal.* Antea 3.

20. *Caſe, &c.* in Nature of a Trover *pro tribus duodenis Chirothecarum, Anglice Gloves*, in which the Plaintiff declared, that he being poſſeſſed of them, the Defendant entered a *Plaint in London* againſt *W. R.* and upon an Attachment took the ſaid Goods, *knowing* that they were the Goods of the Plaintiff, and at ſuch a Place, which was not the Houſe of him againſt whoſe Goods the Attachment was taken out; after a Verdict for the Plaintiff it was inſiſted in Arreſt of Judgment, that becauſe the Goods were *attached by a legal Proceſs*, the Defendant ſhall not be puniſhed for ſuing in the King's Courts, whether it be right or wrong; but adjudged, that the Action will lie, becauſe the Jury have found, that he took the Goods *ſcienter* to be the Goods of the Plaintiff, and tho' the Word *Duodenis* is bad *Latin*, yet when there are both good and bad *Latin* Words in the Declaration, the Damages ſhall be intended to be given for thoſe which are good. *Sid.* 183. *Sanders* verſus *Powell.* 1 Lev. 129.

21. *Caſe, &c.* for that in *Derby* there is a *Cuſtom*, that every *Butcher in Derby* having ſerved an Apprenticeſhip for ſeven Years *might uſe* that Trade, but that the Defendant being not a Freeman, nor having ſerved an Apprenticeſhip, *ſold Fleſh in Derby* on ſuch a Day, not being a *Market-Day, &c.* upon a Demurrer to this Declaration it was adjudged ill, becauſe the Cuſtom is not laid *poſitively*, but only *potentially*, *(viz.)* that every Butcher having ſerved an Apprenticeſhip *might uſe that Trade*; beſides, there is no *By-Law* to reſtrain Foreigners, and without a By-Law or a Cuſtom, any Foreigner may ſell in *Market-Towns*, and not on a Market-Day, and *ſelling Fleſh* is incertain, for it may be an Horſe or a Dog. 1 *Lev.* 262. *Willmot* verſus *Nixon.*

22. *Caſe, &c.* againſt Husband and *Wife*, in which the Plaintiff declared, that he retained *T. S.* to ſerve him for a Year, and that he *departed his Service* without Leave, and that the Defendants *ſatis ſcientes & machinantes* to deprive the Plaintiff of the Service of the ſaid *T. S.* did retain and keep him, *licet ſæpius requiſit'* not to keep him; there was Judgment for the Plaintiff in *C. B.* and upon a Writ of Error in *B. R.* the Error aſſigned was, for that the Plaintiff did not alledge that the Defendants *inticed* T. S. *out of Service*, but that he departed of himſelf, and then 'tis lawful for any one to receive him; but adjudged, that the Action lies without *inticing* him, becauſe they had *Notice* that he was the Plaintiff's Servant; 'tis true, this Action was brought againſt Husband and Wife, and ſhe cannot retain or contract with him, but the Receiving him is a *Treſpaſs*, of which a Feme Covert may be guilty. 2 *Lev.* 63. *Fawcet* verſus *Beaver & Ux'.*

23. *Caſe* againſt the Defendant for Keeping a *mad Bull*, which wounded the Plaintiff, he had a Verdict, but the Judgment was arreſted, becauſe the Plaintiff did not ſet forth in his Declaration, that the Defendant *did know the Bull to be mad.* 1 *Lutw.* 90. *Bayntine* verſus *Sharp.*

24. *Caſe* againſt one of the *Pronotaries* of the Common Pleas, wherein the Plaintiff ſet forth, that there are ſeveral Filazers of that Court for every *County*, to enrol original Writs, and to *enter Appearances*, and that no Plaintiff in a perſonal Action ought to be nonſuited before the Defendant had entered an Appearance with the *Filazer*, that the Plaintiff in *Trinity-Term*, 1 *Will.* 3. had proſecuted a *Capias* againſt *Edward Sabin, ac etiam for* 135 *l.* returnable *quinden' Martini*, by Vertue whereof he was arreſted and impriſoned, and ſo ought to be till he had put in Bail, or had entered his *Appearance debite* with the *Filazer*, but that the Defendant in *Hillary-Term* following, ſigned a *Superſedeas*, reciting the ſaid *Capias*, and that the Plaintiff did not proſecute his Suit, *&c.* therefore if *Sabin* was in Cuſtody for no other Cauſe, the Sheriff was commanded to diſcharge him, and that he was accordingly diſcharged without Bail or *Appearance*, and the Plaintiff averred, that he did not neglect to proſecute the ſaid *Writ of Capias*; upon Not guilty pleaded, the Plaintiff was Nonſuit at the Trial, becauſe he had not entered his *Iſſue* in Time. 1 *Lutw.* 96. *Smith* verſus *Winford.*

25. Treſpaſs for an Aſſault, Battery, and Falſe Impriſonment againſt a *Judge and an Officer of an inferior Court*, and againſt the Plaintiff in the Action there; all the Defendants plead Not guilty as to the Force, and as to the Reſt they juſtify under a *Plaint* levied againſt the Plaintiff in the inferior Court, for a Debt of 20 *l.* and Proceſs awarded againſt him, and delivered to the Defendant *Jones*, who arreſted the Plaintiff and made a Return of his Writ *quæ eſt eadem, &c.* The Plaintiff replied, that the Cauſe of Action for which the Plaint was levied did ariſe *extra juriſdictionem* of that Court; and upon Demurrer the Defendants had Judgment, that this Action did not lie; *not againſt the Judge*, for he is not bound *ex officio* to take Notice where the Cauſe

of Action did ariſe; not *againſt the Officer*, for he is bound to obey, and cannot be a Treſpaſſer for what he doth by Vertue of any Warrant iſſuing out of the Court where he is an Officer; beſides, as to the *Judge*, 'tis true, an Action lies againſt him for doing a Thing where there is a plain Defect of Juriſdiction, but not for what he doth in his judicial Capacity, tho' 'tis erroneous, eſpecially where he has an original Juriſdiction; and therefore it will not lie againſt the *Sheriff* for taking inſufficient Bail, becauſe the Law hath made him a Judge of the Sufficiency. 2 *Lutw.* 935, and 1560. *Gwinn* verſus *Pool.* 12 *Rep.* 25. *S. P. Hutt.* 120. 1 *Roll. Rep.* 264. *S. P. See* Falſe Impriſonment. (A) 27. *S. P.*

26. *Caſe* againſt the Defendant for killing a *Maſtiff*, the Defendant pleaded, that it was a *fierce Dog*, and did often bite Men and Cattle, of which the Plaintiff *had Notice*, and that the Dog came into the Defendant's Yard againſt his Will, ſo that he was afraid to go out of his Houſe, of which the Plaintiff *had Notice*, and the Defendant deſired him to keep his Dog out of the Yard, which he refuſing or neglecting to do, the Defendant ſhot the Dog in his own Yard, and traverſed, that he was guilty *extra atrium ſuum*, the Plaintiff replied *de injuria ſua propria*, upon which they were at Iſſue, and the Jury found for the Defendant, and by the Opinion of all the Court the Plea was held good. 2 *Lutw.* 1494. *Keck* verſus *Halſtead.*

(U)

By Attornies and Officers, and others for Fees, and againſt Attornies.

See Antea (N) 23. *Attorney.* (F) per totum.

1. A *Aſſumpſit* by a *Solicitor*, for that the Defendant having retained him to proſecute and defend his Law-Suits, he promiſed to pay, *&c.* upon Demurrer to the Declaration, ſuppoſing that the Action did not lie; adjudged, that it did lie. *Cro. Eliz.* 670. *Osborne* verſus *Eden.* See *Antea* (N) 13.

Moor 366. 2. *Indebitatus Aſſumpſit* againſt the *Executor* of *W. R.* for Fees due to the Plaintiff as an *Attorney* of the *Common Pleas*, and alſo for Fees due to him *for ſolliciting Cauſes in the King's Bench*; the Defendant pleaded *ne unques Executor*, which was found againſt him, and thereupon the Plaintiff had Judgment; and upon a Writ of Error brought, the Error aſſigned was, that an *Indebitatus Aſſumpſit* did not lie againſt the Defendant as *Executor*, *for Fees for ſoliciting Suits in the King's Bench*, of which Court he was not an *Attorney*, 'tis true, it will lie againſt him for Fees in his own Court, becauſe in ſuch Caſe the *Teſtator* could not have waged his Law, but not for Fees in ſoliciting in another Court; adjudged, that an *Indebitatus Aſſumpſit* would not have laid againſt the *Teſtator* himſelf for ſo much as the Plaintiff had laid out as a Solicitor in Suits in *another Court*, becauſe ſuch Fees which he claims in ſuch Caſe, are not allowable by Law. *Mich.* 37 *Eliz. Cro. Eliz.* 425. *Germine* verſus *Roll.*

3. Action of *Deceit* againſt an *Attorney*, who by *Fraud* appeared without any Warrant in an Action of Debt brought againſt the now Plaintiff, and ſuffered Judgment to go againſt him by Deſault; the Defendant pleaded, that he was retained by another Perſon, both for himſelf and the now Plaintiff, and for Want of Information how to plead, he pleaded as before, *&c.* and upon Demurrer to this Plea it was adjudged, that he ought to traverſe the *Fraud. Mich.* 20 *Eliz. Dyer* 361.

4. *Caſe* by the Plaintiff for Fees of the *Poſt-Office*; Exception was taken to the Declaration, for that he ſet forth, that the Office of Poſt-maſter *was an antient Office*, and that there were *Fees* belonging to it, and did not *preſcribe* for the Fees; then he ſet forth a Grant of the Office to him by Letters Patents, and of the Fees, without concluding with *profert hic in Curia Literas Patentes*, *&c.* but adjudged, that having declared the Office was an *antient Office*, he need not *preſcribe* for the Fees, but as to the Letters Patents, the Plaintiff claiming a Title under them, ought to conclude with a *profert hic in Curia*, *&c. Latch* 87. *Lord Stanhope* verſus *Ecqueſter.*

5. There being a Suit commenced, the Defendant promiſed the Plaintiff's Attorney, that he would pay the Money in Conſideration he would *forbear* to proſecute; afterwards the Plaintiff brought an *Aſſumpſit*, and declared upon this ſpecial Promiſe to the Attorney in his Behalf, and not as upon a Promiſe made to himſelf, and held good either Way. *Latch* 206. *Legate*'s Caſe.

6. *Aſſumpſit*, *&c.* in which the Plaintiff declared upon a Promiſe to pay him ſuch Fees as ſhould be due to him as his Attorney in the proſecuting a Suit for him in *C. B.* and *ſuch Money as he ſhould lay out* in ſoliciting a Suit for him in Chancery: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and upon Error brought, the Error aſſigned was, that the Plaintiff did not ſet forth in particular what Sums of Money he had laid out for the Defendant, nor to whom paid; but adjudged, that it was not neceſſary ſo to do, and that if he ſhould bring any other Action for his Fees or Money laid out, the Defendant might plead this Recovery in Bar. *Style* 428. *Banks* verſus *Prat.*

(W)

Where it lies for charging the Plaintiff with Capital Offences.

See (X) *placito* 43.

1. THere is a *great Neſt of Thieves at P. and John Burgis is the Maintainer of them, and he is a ſtrong Theif himſelf. Dyer* 75. *Bridges* verſus *Warneford*; and the Plaintiff had Judgment, tho' the Word * *ſtrong* was not found. * 4 Leon. 121. S. P.

2. *Caſe, &c.* for calling the Plaintiff *Murderer and Thief*, the Defendant juſtified the Word *Murderer*, for that the Plaintiff was indicted for a Murther at *C.* and the Word *Thief*, for that a Robbery was done, *&c.* and the *Common Fame* was, it was done by the Plaintiff; adjudged, that the Juſtification is not good. *Dyer* 236.

3. *ſſ. Mr. Halley (innuendo)* the Plaintiff, is *infected of the Robbery and Murder lately committed, and doth ſmell of it*; actionable, by Reaſon of the Word *infected. Dyer* 317. *Halley* verſus *Sidenham.*

4. The Plaintiff was charged in a Bill in the Star-Chamber by the Defendant, that *that he was a Maintainer of* * *Pyrates* and *Murtherers*, and a Procurer of Pyrates; actionable, for tho' thoſe Crimes were not Examinable in that Court; but becauſe it was alledged, that he ſpoke the Words in the County of *R. in auditu complurimorum*, that his Bill was true, without expreſſing the Matter in particular, the Judgment was reverſed on a Writ of Error. 4 *Rep.* 14. *Buckley* verſus *Wood. Moor* 706. *contra.* 2 And. 28. Cro. Eliz. 230. * Palm. 278.

5. *Caſe*, &c. for theſe Words, *ſſ. I will abide by it*, that *Chriſtopher Ruſſell was and is a falſe Thief, and was at my Door in the Seſſions-Day at Night, between one and two of the Clock after Midnight, and would have robbed me, and did break open my Door and put me in Jeopardy of my Life*; adjudged actionable. *Hill.* 28 *H.* 8. *Dyer* 26. *Ruſſell's* Caſe.

6. For ſaying, that the Plaintiff *hired a Man to kill the Defendant*, actionable. *Cro. Eliz.* 214.

7. *Thou haſt ſought the Blood of thy Husband, and waſt his Death, for if thou hadſt been an an honeſt Woman he had been ſtill alive, and* averred, that her Husband was not killed. *Cro. Eliz.* 239. *Gaſtrell* verſus *Townſend.*

8. *My Lord Preſident ſhewed Mr.* Stapleton's *Hand ſet to a Book, wherein he conſented to the late Rebels in the North, but by the Means of Mr. Fairfax my Lord Preſident was perſwaded, and the Matter ſuppreſſed*; actionable. *Cro. Eliz.* 25. *Stapleton* verſus *Fryer.*

9. *William Male did ſteal my Corn out of my Barn*; actionable, for the Words charge the the Plaintiff with Felony, tho' not Capital. *Male* verſus *Kett. Poph.* 129. *S. C. Hobart.* So for ſaying, that the Defendant conſpired the Plaintiff's Death, actionable. 4 *Leon* 54. *Chriſtian* verſus *Adams.*

10. *ſſ. Parlor was in Gaol for ſtealling Mr. Piggott's Beaſt*; objected, that this was only an Implication, that he did ſteal him; but adjudged actionable, for 'tis an expreſs Affirmation of Stealing. *Goldſ.* 130. *Parlor's* Caſe. Moor 41. S. C. Poſtea (x) 24.

11. *I was robbed, and you were Privy to it, and had Part of the Money*; actionable. *Goldſ.* 138. *Redfrein's* Caſe.

12. *ſſ. You*, &c. *ſtole three Pounds of Tobacco out my* Maſter's Shop, actionable; but to ſay, he ſtole Tobacco *in* his Maſter's Shop, not actionable, without averring, that there was Tobacco there. *Winch* 6. *Wetherly* verſus *Wells.*

13. *I doubt not to prove*, he (*innuendo Sir Robert Hitcham*), (who was then the King's Serjeant) *had ſpoken Treaſon*; objected in Arreſt of Judgment, that this was no direct *Affirmation*; but adjudged, that it was more than an Affirmation, for he ſaid, *he doubted not but to prove it. Hutt.* 79. *Sir Robert Hitcham* verſus *Brook.* See *poſtea* (c) 25. *Winch* 123. *Godb.* 153 *S. P.* 2 *Bulſt.* 171. *Powell* verſus *Verdoffe.*

14. *Thou haſt taken out of my Pocket* 40 l. *of my Money, and I will cauſe thee to be indicted at the Seſſions of the Peace, and to hold up thy Hand at the Bar for it*, and that *ex ulteriori malitia*, at another Day and Place, he ſaid *he hath picked out of my Pocket Silver and Gold*; actionable, tho' ſpoke at ſeveral Times. 2 *Bulſt.* 227. *Gilpin* verſus *Shines.*

15. *ſſ. Thou art a Rogue and a Raſcal, and haſt killed thy late Wife*; actionable, for the Words ſhall be intended according to the uſual Way of ſpeaking, that he killd her willfully. *Cro. Car.* 352. *Wilner* verſus *Hold.*

16. *Mr. Long was robbed of* 40 *l. and of Plate, and Long and King have it*; actionable. 1 *Bulſt.* 147. *King and Long* verſus *Larking.*

17. *ſſ. He hath harboured and received his Son into his Houſe, having Notice before that he was a Seminary Prieſt*; actionable, for 'tis Felony by the Statute 27 *Eliz. cap.* 2. 1 *Bulſt.* 181. *Smith* verſus *Flint.*

18. *ſſ. Thou art a Thief, and haſt ſtollen my Corn*; actionable, for it ſhall not be intended ſtanding Corn, but reaped. 2 *Cro.* 39. *Kellan* verſus *Manesby. poſt.* 24. Here the Words were taken in the *worſt Senſe*, Thou art a Thief, and haſt ſtollen my Corn and never made Satisfaction, actionable. 2 *Roll. Rep.* 380. *Ayres* verſus *Higgins.* 2 Roll Rep. 440. Smith v. Shorbred S. P. W. Jones Hutt. 65.

19. Thou art a *Sheep Thief*, ſpoken in *Weſtmorland*, where thoſe Words import a *Sheep-ſtealer*, actionable. 2 *Bulſt.* 145. *Steenman* verſus *Richardſon.*

20. *ſſ. Thou haſt robbed the Church, and haſt ſtollen Lead off the Church*, meaning the Church of *A.* actionable. 2 *Cro.* 153. *Benſon* verſus *Morley. Poſtea* (c) 22.

21. *ſſ. Thou haſt been in Gaol for ſtealing a Pan*, actionable. 2 *Cro.* 154. *Showell* verſus *Haman.*

22. *ſſ. Thou haſt ſtollen my Wood*, actionable, for it ſhall be intended Wood cut down. 2 *Cro.* 166. *Low* verſus *Sanders.*

1 Roll. Rep. 444. 23. *ſſ.* The Defendant ſaid, that one *R. B.* did ſay, that Mr. *Lewis* (being a Juſtice of Peace) did ſay, *that there was no Prince in England*; actionable, becauſe averred to be ſpoken *maliciouſly*, tho' on a *Hear-ſay.* 3 *Bulſt.* 225. *Lewis* verſus *Walter.* 2 *Cro.* 406, 413. *S. C.*

24. *ſſ. Thou art a Sheep-ſtealer*, or *thou art a Horſe-ſtealer*, tho' general Words, yet actionable. 3 *Bulſt.* 303. *Porret* verſus *Parret.*

25. *Mr. Berisford bath ſpoken Treaſon, and I will prove it*; actionable. 2 *Cro.* 275. *Berisford* verſus *Preſs. Yelv.* 197. *S. C.*

26. *ſſ. Tooſe his Wife killed thy Husband*; actionable, for the Words ſhall be taken in the worſt Senſe. 2 *Cro.* 306. *Tooſe's* Caſe.

27. *Thou haſt committed Treaſon beyond Sea, and run away from thy Captain*; actionable, for it ſhall be intended he committed Treaſon againſt this State. 2 *Cro.* 424. *Lewis* verſus *Cook.*

28. *Caſe, &c.* for that the Plaintiff's Husband died by the Viſitation of God, and the Defendant ſaid, *Thou haſt poiſoned thy Husband*; actionable. 2 *Cro.* 438. *Gardner* verſus *Spurdent.*

2 Roll. Rep. 104. 29. *ſſ. Thou waſt in Lancaſter Gaol for Coining, and wert burnt in the Hand for it*; actionable. 2 *Cro.* 536. *Gainsford* verſus *Tuke.*

30. *ſſ. Thou art a Thief, and haſt ſtollen my Gold*; actionable, without ſhewing *when* the Words were ſpoken. 2 *Cro.* 622. *Boſton* verſus *Tatam.* 4 *Leon* 181. *S. P.* 4 *Leon.* 121. *Ratcliffe* verſus *Shirley. S. P.*

Palm. 278. Poſtea (X) 15. S. P. 31. *ſſ. Caſe, &c.* for that *Sir William Ailoffe* was robbed by Perſons unknown, the Defendant, to ſcandalize the Plaintiff, being Servant to *Sir William*, ſaid, *Thou art a Maintainer of Thieves to ſteal my Maſter's Goods*; actionable, for the Words ſhall be taken in the worſt Senſe. 2 *Cro.* 629. *Bennet* verſus *Tabram.*

2 Roll. Rep. 414. 32. *ſſ. She, meaning the Plaintiff, is a Thief to you and to me, and hath ſtolen* 20 *l. from me and* 40 *l. from you*; the Defendant juſtified, that the Plaintiff was a Thief, and had ſtolen two Hens from the Defendant feloniouſly, on ſuch a Day and Year; and upon Demurrer the Juſtification was held ill, becauſe 'tis not a Juſtification of all, but of Part of the Words. 2 *Cro.* 676. *Hilſden* verſus *Mercer.*

* Poſtea (Y) 3, 29. 33. *ſſ. The Plaintiff did load a Ship of my Father's with Barley*, and did *ſteal* and * *coſened ſeven Quarters thereof in Meaſure*; actionable, tho' the Word *Coſened* is *joined* with the Word Steal. *Winch.* 45, 102. *Crompton* verſus *Philpot.*

34. The Defendant ſaid, *I will hang him, for he hath ſpoke Words which are Treaſon*, tho' he did not ſet forth what the Words were, 'tis actionable. *Yelv.* 107. *Blanch Flower* verſus *Atwood. Yelv.* 197. *Berisford* verſus *Pleſſis. S. P.*

Poſtea 36. 35. The Defendant ſaid, that the Plaintiff *is a Felon, and* he *(meaning the Plaintiff) knew of the Murder of B. G. and did conceal it*; adjudged, that the ſubſequent Words did enlarge the Slander; for tho' to conceal Felony doth not make a Man a Felon, yet it ſhews *Malice* in the Defendant to affirm, that the Plaintiff did conceal a Murder. *Yelv.* 154. *Newlin* verſus *Falſet.*

36. Caſe for theſe Words, *viz. The Plaintiff is a Felon*; a Stranger, who heard theſe Words, replied, take heed what you ſay, the Defendant anſwered, *why, is he not a Felon, who knew of a Murder and concealed it?* He *(innuendo* the Plaintiff) *knew of the Murder of W. C. and did not reveal it till long after 'twas openly known:* Adjudged, that the firſt Words are actionable, for tho' to conceal a Felony doth not make the Plaintiff a Felon, being an Offence only Fineable, yet the ſubſequent Words ſhew the *Malice* of the Speaker, and are a great Slander of the Plaintiff. *Paſch.* 7 *Jac. Yelv.* 154. *Newton* verſus *Falſett.*

37. Caſe, *&c. W. R. is a rebellious and traiterous Knave*; adjudged, that the Word *Rebellious* is not actionable, but being coupled with the Word *Traiterous*, the Action lies. *Hill.* 35 *Eliz. Cro. Eliz.* 171. *Ward* verſus *Thorne. Cro. Eliz.* 621. *Wells* verſus *Hemerſon. S. P. Sid.* 132. *Glanvill* verſus *Gully. S P. Poſtea* (n) 2. *S. P.*

38. *Caſe, &c.* for theſe Words, *ſſ. Thy Father is a Thief, and hath ſtolen more Goods than I am worth*; now, tho' the Plaintiff did not *aver*, that he was worth ſo much in Goods, yet adjudged actionable without ſuch an Averment; but if the Words had been, *for he hath ſtolen my Goods*, then the Plaintiff muſt aver, that he had ſuch Goods, *&c.* 2 *Bulſt.* 140. *Painter* verſus *Warnes.*

39. Caſe, *&c.* for theſe Words, *ſſ. Thou didſt ſteal a Sack and a Curry-comb, and thou didſt ſteal my Father's Wood, and didſt give it to a Whore.* The Defendant juſtified, for that on ſuch a Day the Wood was ſtolen, and the Common Fame was, that the Defendant had ſtolen it, and thereupon the Defendant complaining to a Juſtice of the Peace, and informing him of this Matter, did ſay, *thou didſt ſteal, &c.* And upon Demurrer to this Plea, it was adjudged ill, for where

* 2 Roll. Rep. 284. a Felony is committed, the Criminal may be arreſted; but upon Common * Fame of a Felony done by ſuch a Man, ſuch Words ought not to be ſpoken to defame him. *Trin.* 14 *Jac. Hob.* 192. *Scarlet* verſus *Styles.* 1 *Brownl.* 2. *S. C.*

40. Husband and Wife brought an Action on the Caſe againſt Husband and Wife, for that the Wife of the Defendant ſaid, that the Plaintiff's Wife *had procured one to Murther W. R.* actionable, tho' the Murther did not follow. *Moor* 182.

41. Caſe, *&c.* for theſe Words, *He hath laid waite to rob, and was one of them who would have robbed me*; actionable. *Moor* 409. *Weeks* verſus *Tailour.*

42. Caſe, *&c.* * *When will thou bring home my Husband's Sheep which thou haſt ſtolen*; actionable. *Moor* 418. *Thimblethorp's* Caſe. * Poſtea 52.

43. At a Trial in an Action of the Caſe for ſlanderous Words, the Defendant, *by his Counſel*, in Mitigation of Damages, and to diſcredit the Plaintiff, offered Evidence, that *one Medman had ſtolen Sheep, and that by* Agreement *between the Plaintiff and the ſaid Medman, the Plaintiff did take a Leaſe of a Cloſe*, &c. *of Medman, to conceal him from the ſaid Felony*, the Defendant then ſaid, *that he would affirm all to be true that his Counſel had ſaid*, for which Words the Action was brought, and after a Verdict for the Plaintiff, he had Judgment; for tho' the Words, if true, are not an Accuſation of the Plaintiff as Acceſſary to the Felony, but only for a Miſpriſion of Felony, which is only Fineable; yet 'tis a great Slander to ſay, a Man cloakes Felony. *Moor* 428. *Nicholas* verſus *Badger.*

44. The Defendant ſpoke *falſly and malitiouſly* of the Plaintiff, *that he was arraigned at W. for ſtealing twelve Hogs, and if he had not made good Friends, it had gone hard with him*, with an Averment, that he never was arraigned or queſtioned; the Words are actionable. *Cro. Car.* 268. *Halley* verſus *Stanton.* W. Jones 299.

45. *Error, &c.* of a Judgment in *Caſe*, for theſe Words, *(viz.) He hath ſtolen a Tree lately cut down, (which is Felony)* and I will cauſe him to be indicted for it. *Cro. Car.* 413. *Brian* verſus *Weeks.*

46. *Sſ. He had four Children by his Servant Agnes, and hath killed them all, or cauſed them to be killed*; the Plaintiff averring that he is Not guilty or Incontinent, actionable. *Poph* 187. *Rayner* verſus *Hallet.*

47. *Sſ. Thou haſt raviſhed a Woman twice, and I will make thee ſtand in a white Sheet for it*; actionable. *(Quære.) Godb.* 287. *Bridges* verſus *Mills.*

48. *Sſ. Thou art a Thief, and haſt ſtolen Mr. St. George's Tree*; actionable. *Cro. Car.* 114. *Minors* verſus *Leeford.* See *poſtea* (X) 6. *contra.*

49. *B. G. is a baſe Gentleman, and had four or five Children by R. his Maid, and hath either killed them, or procured them to be killed*; the firſt Words are not actionable, but being *joined* with the laſt, ſhall be taken in the *worſt Senſe*, and the Word *Killing* ſhall be taken unlawful killing. *Latch* 159. *Keymor* verſus *Clerke.* W. Jones 141.

50. *Caſe* for theſe Words, *Sſ. John Lewkner, &c. knowing that W. R. a Goldſmith, carried with him a great deal of Plate, did lie in waite to rob him, and ſet upon him in the Highway, but he raiſing the County, John Lewkner fled away and loſt his Horſe, &c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that there was no Felony committed, but only an *Intention* to do it, and therefore the Words amounted to no more than to charge the Plaintiff with a *Miſdemeanor*; but adjudged, that the Action lieth, tho' the Defendant did not Charge the Plaintiff with a Felony, for an *Intention* to commit Felony comes very near to the Act it ſelf. *Cro. Car.* 99, 140. *Lewkner* verſus *Crachly. Hill.* 10 *Jac. Hutt.* 58. *Meredith* verſus *Bonill. S. P.* W. Jones 195.

51. *Caſe, &c.* for theſe Words, *Sſ. Thou haſt ſtolen Hay from Mr. Bell's Ricks*; adjudged actionable, tho' 'tis only Petty Larceny; for the Diſcredit is not in the Value of the Thing taken, but the Taking with a felonious Intention. *Paſch.* 19 *Jac. Winch* 6. *Wetherly* verſus *Wells.*

52. *Caſe, &c.* for theſe Words, *(viz.) Have you brought me home the* 40 l. *which you ſtole from me*; it was objected, that theſe Words are not actionable, becauſe by Way of * Interrogation and not Affirmative; but adjudged actionable, for 'tis an Affirmation joined with an Interrogation, and he anſwered himſelf; as if he had ſaid, where is *T. S.* whom you killed; this is actionable. *Palm.* 66. *Gibbons* verſus *Meggott.* 2 Cro. 568. 2 Roll. Rep. 165. * Antea 42. S. P.

53. *Caſe, &c.* againſt Husband and Wife, in which the Plaintiff declared againſt them for ſcandalous Words ſpoken of him *by the Wife. Sſ. Thou and thy Father had been hanged for Coining of Money, if you had had your Deſerts, long ſince.* Upon Not guilty pleaded, the *Wife* was found guilty; it was objected, that this was not an *Affirmative* Charge, but only Conditional, *(viz.) if you had your Deſerts*; but adjudged actionable, for 'tis a Condition, which amounts to an Affirmation. *Palm.* 68. *Brown* verſus *Audley.*

54. Caſe, *&c.* for theſe Words, *Thy Son is a Murderer*; after a Verdict for the Plaintiff the Judgment was arreſted *quia non conſtat de perſona*, for the Father might have * more Sons, therefore it ſhould be averred, that he had but one; but 'tis otherwiſe, if the Words had been ſpoken to a *Wife*, to a *Servant*, or to a *Son*, that thy *Husband*, thy *Maſter*, or thy *Father*, is a Murderer, becauſe a Woman can have but one Husband, a Servant but one Maſter, and a Son but one Father. *Palm.* 283. *Harvey* verſus *Chamberlaine.* 2 Cro. 635. * Poſtea (X) 17.

55. *Caſe, &.* for theſe Words, *He kept Faukner the Jeſuit in his Houſe a Week together, knowing him to be a Jeſuit*: it was objected after a Verdict for the Plaintiff, that the Action doth not lie, becauſe it might be before the Statute 27 *Eliz.* and it was not Felony before; but adjudged actionable. *Palm.* 410. *Clerk* verſus *Loggin.* 2 *Cro.* 300. *Flint* verſus *Smith. S. P.* Latch. 1, 83. W. Jones 68.

56. *Caſe,*

56. *Caſe, &c.* for that the Defendant ſaid of the Plaintiff, *(viz.) She cauſed Mr. Langly's Servant to ſteal* 30 *l. and received it:* After a Verdict for the Plaintiff, the Judgment was affirmed on a *Writ of Error in the Exchequer-Chamber*, becauſe the Plaintiff was charged, with procuring a Felony to be done, and receiving the Thing ſtolen. *Allen* 5. *Hinacre* verſus *Lemon.*

57. *Caſe, &c.* for theſe Words; *ſſ. You are a Rogue, you are a branded Rogue, you have held up your Hand at the Bar, and I will have you hanged.* After a Verdict for the Plaintiff, it was objected, that *Branded Rogue* was not actionable; for it ſhall be intended to be done by Vertue of the Statute 1 *Jac. cap.* 7. and if ſo, then his Puniſhment is *paſt*, and conſequently the Words not actionable, becauſe they cannot be any Damage to him; but adjudged actionable, becauſe, if a *branded Rogue* wander again, 'tis Felony by that Statute, and ſo the Words put him in a nearer Degree of Felony. *Allen* 35. *Marke* verſus *Cubitt.*

58. *Caſe, &c. You are a Buggering Rogue, go Home and Bugger another Mare.* The Plaintiff had a Verdict, but it was moved to Arreſt the Judgment, becauſe the Plaintiff is not charged with any Act done; but adjudged actionable, becauſe the Words imply an Act done. *Allen* 61. *Chappell* verſus *Goodhouſe.*

Cro. Car. 277. 59. Action on the Caſe, for theſe Words ſpoken by the Defendant, *(viz.) That T. S.* (the Plaintiff) *ſet upon* him *with Violence in the Highway, and took his Purſe from him, and would have cut him in the Middle, had not the Plaintiff run away*; actionable tho' no Felony was committed, or the Plaintiff put in Fear. *W. Jones* 302. *Lawrence* verſus *Woodward.*

60. Caſe, *&c.* for theſe Words ſpoken to *T. S. Go tell thy Landlord, that he is a Thief, innuendo* the Plaintiff; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action will not lie, becauſe 'tis not averred, that the Plaintiff was Landlord to *T. S.* and ſo it was adjudged. *W. Jones* 376.

See Allen 32.

61. *Caſe, &c.* for theſe Words, ſpoken at an Election for Knights of the Shire; *ſſ. You and your Crew, brought the late King to his Death:* Upon Not guilty pleaded, the Plaintiff had a Verdict, and 200 *l.* Damages, and it was moved in Arreſt of Judgment, that the Words are not actionable, for they ought to be taken *in mitiori ſenſu*; not that the Plaintiff killed the late King, but, that he attended him *to his Death*; but adjudged, that the Words import Scandal, and that in common Acceptation they amount to charge the Plaintiff with the King's Death. *Hardr.* 203. *Lewis* verſus *Roberts.*

62. *Thou haſt ſacrificed thy Child to the Devil*; actionable. *Style* 65. *Long's* Caſe.

2 Roll. Rep. 141. 63. *I arreſt you for Felony*, without ſaying, that he committed Felony; actionable. *Poph.* 150. *Serle* verſus *Mand.*

2 Cro. 423. 64. *Thou haſt killed thy Maſter's Cook*, and it doth not appear that he had a Maſter, or that his Maſter had a Cook; actionable. *Poph.* 128. *Cooper* verſus *Smith.*

65. *ſſ. Your Son ſtole a Horſe, and ſold him for* 10 l. actionable. *Style* 46. *Perſon* verſus *Dawſon.*

W. Jones 302. Smith *v.* Hogſhed. 66. *ſſ.* The Defendant ſpoke to a *Conſtable, (viz.) There he is, take him, for I charge him with flat Felony*, without alledging, that the Words are ſpoken *falſly and malitiouſly*; actionable, becauſe the Words themſelves were Scandalous, and in ſuch Caſe the Plaintiff need not aver, they were ſpoken *falſly and malitiouſly. Style* 59. *Nevill* verſus *Mott.*

* W. Jon. 302. Smith *v.* Hogſhed. Antea 66. S. P. 67. The Defendant, and another, having a Diſcourſe about the Defendant's Cow, he ſaid, *He* (meaning the Plaintiff) *hath ſtolen her, and I charge him with* * *flat Felony*, by Reaſon whereof the Plaintiff was *impriſoned, &c.* The Defendant pleaded in Bar an Award, made, *&c.* adjudged, that the Award went only to Speaking the Words, and not to the *Impriſonment*; ſo that the Plea was entire, and yet did not go to all which was alledged in the Declaration, and therefore naught; and tho' the Declaration was likewiſe ill, yet, if 'tis good in any Part, Judgment ſhall be againſt the Defendant for that Part. *Style* 247. *Denton* verſus *Cahors.*

68. *Caſe, &c. The Knave the Apothecary, that married my Siſter, hath poiſoned my Uncle, and I will have him taken up again to hang* him; actionable. *Style* 245. *Dove* verſus *Oakham.*

1 Lev. 251. 69. *Caſe, &c. Thou art a Scurvey Fellow, I am no Traitor, but I have ſeen thee in Rebellion:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the firſt Part of the Sentence imports no Scandal; and to ſay, *he hath been in a Rebellion*, is not actionable, becauſe it might upon a Proceſs out of *Chancery*; but adjudged, that the Word *Rebellion* is explained by the precedent Words, *I am no Traitor*, which ſhews, that ſuch a Rebellion was intended which relates to Treaſon. *Sid.* 381. *Dalton* verſus *Sadd.*

70. *Caſe, &c.* for theſe, Words, *Thou art a Rogue, and receivedſt ſtoln Mutton of Beſſe Gamble, and ſhe ſtole it, and thou was Partner with her, and hadſt Part of it.* Upon Not guilty pleaded the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Plaintiff was not charged with any Crime, but *Beſſe Gamble*; but adjudged, that the Plaintiff's Words, *Partner with her*, relates to the whole Sentence, and muſt be conſtrued to be Partners in Theft. *Sid.* 412. *Gamble* verſus *Dan.*

71. *Caſe* for theſe Words, *Thou haſt ſtolen as much Lead out of my Maſter's Houſe, as is as big as a Houſe*; after a Verdict, it was objected, that it might be Lead fixed to the Freehold, which is true, if the Words had been, *off my Maſter's Houſe*; but it was, *out of my Maſter's Houſe*; the Plaintiff had Judgment. 1 *Lev*, 156. *Ering* verſus *Street.*

T. Jones 235. 72. Caſe, *&c.* for theſe Words, *Thou art a Clipper, and ſhalt be hanged for it*: After a Verdict for the Plaintiff, it was inſiſted in Arreſt of Judgment, that it might be intended a *Clipper of Cloth*; but adjudged actionable, for it muſt be a Clipper of ſuch Things for which he

ought to be hanged, and that is * Clipper of Money; ſo where the Words were, *Thou art a Clipper, and thy Neck ſhall pay for it*, adjudged actionable. 3 *Lev.* 166. *Walter* verſus *Beaver*. * T. Jones 235. S. P.

73. Caſe, *&c.* for theſe Words, *I have an honeſt Man in Langattock, who will prove that Williams* (the Plaintiff) *ſaid he had killed a Man in Ireland and buried him in the Sands*, and the Plaintiff averred he did not ſay ſo; after a Verdict for the Plaintiff it was inſiſted againſt him, that the Declaration was ill, becauſe *he did not aver, that he did not kill a Man in Ireland*, and that there was not a Man in *Langattock* who could prove that he (the Plaintiff) ſaid ſo; but adjudged, that if the Words had been laid as ſpoken from the *Report of another*, then it muſt be averred, that the other *did not ſo Report*; but here the Defendant undertakes to *prove it himſelf* by a Man he had in *Langattock*. 3 *Lev.* 171. *Williams* verſus *Lewis*. Poſtea (k) S. S.P.

74. *Caſe, &c.* for theſe Words: ſſ. *Nuttall, that was Solomon Smith's Clerk, is a Knave and a Rogue, and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the King's Hand and Seal*, actionable. *Raym.* 17. *Nuttal* verſus *Page*.

75. *Caſe, &c.* for theſe Words, ſſ. *Thou haſt ſtolen our Bees, (innuendo*, a Stock of Bees) *and thou art a Thief*; upon Not guilty pleaded, the Plaintiff had a Verdict, it was moved in Arreſt of Judgment, that Felony cannot be committed of *Bees*, becauſe they are *Feræ Naturæ*, but adjudged, that the ſubſequent Words, *Thou art a Thief*, do import, that the Stealing was of ſuch *Bees* of which Felony may be committed, and ſo actionable. *Raym.* 33. *Tibbs* verſus *Smith*. See *Kellan* verſus *Manesby*. *Antea* 18. and *Minors* verſus *Leeford*. *Antea* 39.

76. Caſe, *&c.* for theſe Words, *(viz.) He is a Clipper and a Coiner*; upon Not guilty pleaded, the Plaintiff had a Verdict, it was moved in Arreſt of Judgment, that the Words did not charge the Plaintiff with *clipping or coining Money*, for they may be applied to many other Things, but adjudged actionable, for it muſt ſtrongly be intended, that the Defendant meant Money, and in that Caſe they are uſually underſtood. 1 *Vent.* 172. *Dacy* verſus *Clinch*. Sid. 53.

77. *Caſe, &c.* in which the Plaintiff ſet forth, that there was a *Diſcourſe* between *T. S.* and the Defendant, concerning the Plaintiff and a Baſtard-Child, ſuppoſed to be born of her (the Plaintiff) ſince the Death of her Husband, and that *T. S.* ſaid to the Defendant, *I hope ſhe did not murder her Child*, the Defendant replied, *But ſhe did, and Blood requires Blood, (Innuendo*, ſhe had murdered her Baſtard); upon Not guilty pleaded, the Jury found the Defendant guilty of ſpeaking theſe Words, *Blood requires Blood, modo & forma*, as the Plaintiff had declared; but as to the other Words Not guilty; and upon a Writ of Error brought it was inſiſted, that the Jury having not found the Words ſpoken by *T. S.* the Words which they had found were inſenſible, without relating to the precedent Words ſpoken by him, which, *per Curiam*, is very true, and therefore the Judgment was reverſed; but if thoſe Words had been found, they are actionable. *T. Jones* 211. *Nailour* verſus *Clerke*.

78. *Caſe, &c.* for theſe Words, He is a *Clipper (Innuendo*, the Coin of the Realm) *and his Neck ſhall pay for it*, actionable, for tho' the Word *Clipper* is not actionable, yet the ſubſequent Words ſhew that it muſt be a * *Clipper of Money*, becauſe they are, that *his Neck ſhall pay for it*, which is a common Expreſſion for hanging. *T. Jones* 235. *Moyden* verſus *Mycock*. * Antea 72. S. P.

79. *Caſe* for theſe Words, *You are a Raſcal, you have forgot ſince you lived in Black Bull-yard*, there you could *procure broad Money for Gold, and clip it when you had done, and then the Sheers could go*; after a Verdict for the Plaintiff it was inſiſted for the Defendant in Arreſt of Judgment, that the Words are not actionable; for they are not an Imputation of any Act done, but only of a Power of doing it; but adjudged, that where the Matter is confined to a *particular Place*, as in this Caſe, to the *Black-Bull Yard*, it muſt be intended that ſome Act was done in that Place, becauſe a Power to do a Thing is the ſame in all Places, like the Caſe of *Horne* verſus *Powell*. *Trin.* 12 *W.* 3. *C. B.* where the Words were, *You may well ſpend Money at Law, for you can coin Money out of Farthings and Half-pence*, actionable, for the Words import an Act done, becauſe by a bare Power to coin he could not be ſupplied with Money to ſpend at Law. 2 *Salk.* 697. *Speed* verſus *Perry*.

80. *Caſe, &c.* for theſe Words, *You ſtole my Box-Wood and I will prove it*, actionable, becauſe they are an Imputation of Felony, and tend to diſgrace the Plaintiff. 2 *Salk.* 695. *Baker* verſus *Pierce*. Mod. Caſes 23.

81. Caſe, *&c.* for theſe Words, *I dealt not ſo unkindly by you when you ſtole a Sack of my Corn*, actionable. 2 *Mod.* 58. *Cooper* verſus *Hawkſwell*.

82. *Caſe, &c.* for theſe Words, *He ſtole the Colonel's Cup-board Cloth*, the Queſtion was, whether the Words were actionable, there being no *Colloquium* laid, either of the *Colonel* or his *Cup-board Cloth*: *Sed per Curiam*, the Words are actionable, for they charge him with Felony. 3 *Mod.* 280. *Anonymus*.

(X)

Where it will not lie for charging the Plaintiff with capital Crimes.

1. ſſ. FOR *my Grounds in Allerton Mr. Hext ſeeks my Life*, and if I could find out *R. B.* I do not doubt but in two Days *to arreſt Mr. Hext* for Suſpicion of Felony, not actionable, for he may ſeek his Life for a juſt Cauſe; beſides, *ſeeking* is too * general a Word. 4 *Rep.* 15. *Hext* verſus *Yeoman*. See 4 *Leon.* 121. *Peak* verſus *Pollard*. *S. P.* * Poſtea 21.

2. *Thou*

2. *Thou haſt killed my Wife and art a Traitor*, when it appeared by the Declaration that the Wife was living, and for that Cauſe not actionable. 4 *Rep.* 16. *Snagg* verſus *Gee.*

3. He is a Brabler and Quarreller, for *he gave his Champion a Deed of his Goods to kill me, and then to fly out of the Country*; adjudged, that a Purpoſe without an Act done is not actionable. 4 *Rep.* 16. *Eaton* verſus *Allen.* See *Poſtea* 15.

4 Leon. 35. S. C. 4. If a Man exhibit Articles to a Juſtice of Peace againſt another, containing great Abuſes, in order to have him bound to the Good Behaviour, 'tis not actionable, for he purſues the proper Remedy. 4 *Rep.* 14. *Cutler* verſus *Dixon.*

5. ſſ. *Mr. Barham did burn my Barn (innuendo*, a Barn with Corn) *with his own Hands, and none but he*, not actionable, for 'tis not Felony to burn a Barn if 'tis not Parcel of the Dwelling-

* Poſtea 6. S. P. houſe, and the * *Innuendo* will not help where the Words are not ſcandalous. 4 *Rep.* 20. *Barham's* Caſe.

* Poſtea, 10. S. P. Moor 396. 6. ſſ. *Thou haſt ſtolen half an Acre of Corn*, * *Innuendo*, Corn ſevered, not actionable, for the *Innuendo* cannot alter the precedent Words, and *half an Acre of Corn* can never be intended to be Corn ſevered. *Owen* 57. *Caſtleman* verſus *Hobbs.*

7. *Thou art a Rogue and a Thief*; adjudged, the laſt Word is actionable of it ſelf, but when 'tis joined with a Word which ſhews the Defendant intended no *Felony* was done, 'tis not actionable. *Cro. Eliz.* 857. *Robins* verſus *Franks.*

* Poſtea 32. 8. *Thou haſt ſtolen a Mare, or conſentedſt to the Stealing her*, not actionable, for the Words are in the * *Diſjunctive*, and a Man may conſent when he doth not contradict it. *Cro. Eliz.* 780. *Griffith's* Caſe. *Poſtea* 9. 23. *S. P.*

9. *He hath poiſoned W. R. quendam W. R. adtunc defunct' innuendo*, and did not *aver that he was dead* at the Time of the Speaking the Words; adjudged, for that Reaſon the Action doth not lie. 2 *Cro.* 343. *Jacob* verſus *Mill. Hob.* 6. *S. C.* See (Y) *placito* 36, *contra Yelv.* 21. *S. C.*

* W. Jones 11. Goddard v. Gilbert. S. P. 10. ſſ. *Thou art a Thief and haſt ſtolen a Tree*, not actionable, for the Word *Tree* ſhall be rather taken to be a ſtanding Tree than one felled. *Hob.* 77. 331. * *Clerke* verſus *Gilbert. Brownl.* 2. *S. C.* See *Antea* (W) 58, *contra*, denied to be Law by *Rolls. Poſtea, placito* 33.

* Antea (W) 76. 11. ſſ. Thou mayeſt well be richer than *I, for thou haſt coined* 30 *s. in one Day, and thou art a Coiner of Money*, not actionable, for he might * Coin by Authority in the Mint; here the Words were taken in the mildeſt Senſe. *Godb.* 167. *Ward* verſus *Pool*, and *Symms's* Caſe there 391, and *Mills's* Caſe there 375.

12. ſſ. Thou art a * Thief and haſt cozened my Couſin *Baldwin* of his Land, not actionable. *Hutt.* 113. *Herbert* verſus *Angell.* See 4 *Leon.* 241. *Bluet* verſus *Cook. S. P.*

13. ſſ. The Defendant, before a Juſtice of Peace, ſaid he would charge the Plaintiff *with flat Felony, for ſtealing Hops from my Shop*, not actionable. *Hutt.* 113. *Ram* verſus *Lumley.*

14. ſſ. *Thou art as errant a Thief as any in England, for thou haſt broken up R. B.'s Cheſt and taken* away 40 *l.* not actionable, for the firſt Words are not ſo without an *Averment*, that there is a Thief in *England*, and they do not prove that any Felony was done; and as for the Breaking open the Cheſt, it might be upon Pretence of Title. 2 *Cro.* 687. *Foſter* verſus *Browning.*

* Antea (W) 31. S. P. 15. ſſ. The Defendant was robbed by two of *Sir Herbert Crofts's* Men, and thereupon he ſaid, that *Sir Herbert Crofts* * *keepeth Men to rob me*, not actionable, for the Keeping of Men ſhall be intended lawfully, and the Words, to rob him, is only an *Intent* and no act done, which is not puniſhable. *Crofts* verſus *Brown.* 3 *Bulſt.* 161.

16. The Plaintiff declared, that whereas ſeveral Malefactors unknown had *feloniouſly* ſhorn the Sheep of *R. B.* and there being a *Colloquium* between the Defendant and another concerning the Shearing the ſaid Sheep, but did not ſay *feloniouſly*, the Defendant ſaid it was the Plaintiff and *M.* who did ſhear them, *innuendo felonice*; adjudged, that the *Colloquium* being laid only of the Shearing, and not concerning the Felony, and the Defendant having not ſaid, that the Plaintiff did ſhear the Sheep feloniouſly, but only that he did ſhear them, generally, the Scandal muſt grow out of an *Innuendo*, and ſo the Words not actionable. 3 *Bulſt.* 85. *Helly* verſus *Henders.*

* Antea (W) 54. 17. ſſ. There being a *Colloquium* betwixt the Father of the Plaintiff and the Defendant, he ſaid, that *Taylor did ſteal the Mare of R. B. and thy* * Son was conſenting to it, without avering that the Father had no more Sons than the Plaintiff, for which Reaſon the Action did not lie. 3 *Bulſt.* 249. *Lewkener* verſus *Godnam.*

18. *You might have known your own Sheep, and not have ſtolen mine*; the Court divided in Opinion, two Judges, that the Words were not actionable, being no direct Charge, but only by Implication; two other Judges, that they were actionable, for 'tis a ſtrong Implication, and neceſſary Conſequence of a Charge, that the Plaintiff had ſtolen the Sheep. *Yelv.* 144. *Thompſon* verſus *Knotts.*

* Antea (W) 10. 13. 19. *Caſe, &c.* for theſe Words, *(viz.) Bear witneſs Miſtreſs, that he hath ſtolen my Hair-Cloth*, not actionable, for 'tis not a direct * Affirmation to charge the Plaintiff with Theft, but reſts only upon Teſtimony and Proof. *Paſch.* 6 *Jac. Yelv.* 126. *Berry* verſus *Wright.*

20. The Words were as follow, *(viz.) It would be proved by many vehement Preſumptions, that W. R. the Plaintiff, was an Inventor and Plotter of the Death of M. M. becauſe he would not ſell him his Land*; adjudged not actionable, becauſe he doth not *affirm* any Thing of the Plaintiff, but refers all to *Preſumptions*, which are *incertain*, and ſlanderous Words muſt be in the *Affirmative. Paſch.* 7 *Jac. Yelv.* 153. *Weblyn* verſus *Mayer.*

21. Caſe for theſe Words, ſſ. *Mr. Crook came into Cornwal with a Blue-Coat on his Back, and hath now got a great Quantity of Wealth by Trading with Pirates, cozening in the Tale of Pilchards, and by Extortion*; not actionable, becauſe too general. *Crook* verſus *Avery*. 2 *Bulſt*. 226.

22. Caſe, *&c.* for theſe Words, *(viz.) He ſtole Tobacco in his Maſter's Shop*; not actionable, becauſe the Plaintiff did not *aver*, that there was Tobacco in his Maſter's Shop; but if the Words had been, *he ſtole three Pounds of Tobacco out of his Maſter's Shop*, it had been actionable. *Winch* 15. See *Antea Male* verſus *Ket*.

23. Caſe, *&c. There is a Villain now broke into my Mother's Houſe to rob my Mother, and is in the Houſe, Innuendo* the Plaintiff; the Court doubted, whether this *Innuendo* could reduce the Words to the Plaintiff, to entitle him to this Action. *Moor* 401. *Bale* verſus *Rhodes*.

24. *Caſe, &c.* for theſe Words, *The Plaintiff hath been in Priſon for Stealing Mr. Pigot's Mare*; the Court doubted whether the Words were actionable, becauſe the Defendant did not *affirm* that the Plaintiff ſtole the Mare. *Moor* 401. *Barler's* Caſe. Goldsb. 31. S.C. Antea (W) 10.

25. *Caſe, &c.* for theſe Words, *Carter is a progging, pilfering Merchant, and hath pilfred away my Corn from my Wife and Servants*; not actionable. *Moor* 409. *Carter's* Caſe.

26. *Caſe, &c.* for theſe Words, *He hath ſtolen my Corn out of my Barn*; actionable. *Moor* 883.

27. *Caſe, &c.* for theſe Words, *He is in Warwick Gaol for Stealing a Mare*; not actionable, becauſe no *poſitive Affirmation*, that he did ſteal the Mare. *Hob.* 177. *Steward* verſus *Biſhop*. 1 *Cro.* 195. 2 *Cro.* 154, 247, 536, *contra*, and in 1 *Lev.* 82. The Caſe of *Steward* and *Biſhop* queſtioned to be Law.

28. Caſe, *&c. Sir Tho. Holt hath taken a Cleaver and ſtricken his Cook's Head, ſo that the one Side of his Head fell upon one Shoulder, and the other upon the other Shoulder*; not actionable, becauſe he did not *aver* that the *Cook* was living. 2 *Cro.* 184. *Sir Tho. Holt's* Caſe.

29. Caſe, *&c.* for theſe Words, *Thou haſt ſtolen me (Innuendo*, the Defendant) *a Hundred of Slate*; after a Verdict for the Plaintiff it was inſiſted for him, that this is the uſual Phraſe of the Country, *Thou haſt ſtolen me* (i. e.) *thou haſt ſtolen from me: Sed per Coke* Ch. Juſt. then the Plaintiff ſhould have averred, that this was the uſual Phraſe, *&c.* which he had not done, therefore it being *inſenſible*, the Action will not lie. 1 *Roll. Rep.* 286. *White* verſus *Bourgh*.

30. *Caſe, &c.* for theſe Words, *(viz.) Thou art Luſcomb's Hackney* (Innuendo) *Thou art a thieviſh Whore and a Pocky Whore, and I will prove thee a Whore*; not actionable, ſo adjudged in Arreſt of Judgment after a Verdict for the Plaintiff, becauſe the Word *thieviſh is adjectively* ſpoken. *Culliford & Ux'* verſus *Knight*. Godb. 278. * Poſtea (r) per totum.

31. *Caſe, &c.* for theſe Words ſpoken to the Plaintiff *Wheeler, thou haſt ſtolen my Piece (Innuendo, unum tormentum) and I charge thee with flat Felony*; and the Plaintiff in his Declaration did not lay any *Colloquium* of the Loſs of a *Gun*; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was inſiſted in Arreſt of Judgment, and ſo adjudged, that the Action did not lie, becauſe the Word *Piece* is of *an incertain Signification*. 2 *Roll. Rep.* 342. *Wheeler* verſus *Appleton*. See *Poſtea* (g) 30. Godb. 339.

32. Caſe, *&c.* for ſaying of the Plaintiff, *He hath been whipp'd, or burn'd in the Hand or in the Shoulder for Sheep*; adjudged, that the Action would not lie, becauſe the Words are in the * Disjunctive; beſides, a Man cannot by Law be burn'd on the Shoulder for ſtealing Sheep. *W. Jones* 308. *Churley* verſus *Hill*. * Antea 8.

33. *Caſe* for theſe Words, *Margaret Whitacre is a Thief and ſtole my Wood, and I will put her in Bridewell*; two Judges only in Court, and they were divided, upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff, for one held the Words not actionable; 'tis true, the firſt Part of the Words are actionable, but they are qualified by the Words which follow, *(viz.) And I will have her put in Bridewell*, becauſe by the Statute 43 *Eliz. cap.* 7. Perſons who ſteal *Wood growing are to be whipp'd*, and *Bridewell* is known to be the proper Place for *Whipping*, ſo that this is an Accuſation for an Offence, which is *not Felony*, but only puniſhable by *Whipping*: But *Rolls* held the Words actionable, *(viz.) She is a Thief*, and the Words which follow being joined with the copulative *And* make them Accumulative; it might have been otherwiſe if they had been, *for ſhe ſtole my Wood*, becauſe then they would have been explanatory; and he denied * *Clerke* and *Gilbert's* Caſe to be Law. *Allen* 10. *Whitacre* verſus *Hillidell*, and 31 *Yearworth* verſus *Peirce*. *S. P.* Style 24. * Antea 10. Hob. 77. 331. 2 Brownl. S.C.

34. *Caſe*, &c. *Thou didſt and doſt buy and receive ſtolen Goods, witneſs a Feather-bed Tick thou haſt in the Houſe, and I will prove it, and thou didſt know that it was ſtolen*; after a Verdict for the Plaintiff not actionable, becauſe the Plaintiff was not charged with a *felonious Receiving*; for tho' he knew they were ſtolen, it doth not follow that he was conſenting to the Stealing, for they might be afterwards ſold in a Market Overt. *Allen* 57. *Creſwel* verſus *Ventris*.

35. *Caſe, &c.* for theſe Words, *Thy Husband was the Death of John Parrett, and had it not been for thee and thy Husband, he had been alive unto this Day*; after a Verdict for the Plaintiff adjudged not actionable, for he might be the Occaſion, but not the Cauſe of his Death. 2 *Sid.* 71. *Skelton* verſus *Earth*.

36. *Caſe, &c.* for theſe Words, *You have ſtole the Shutters of my Window*; not actionable, becauſe the *Shutters are Parcel of the Freehold*; but if he had ſaid *You are a Thief*, for you have ſtolen my Shutters, *&c.* actionable, becauſe the precedent Words ſhew that he intended ſuch *Shutters* which were not Parcel of the Freehold. *Sid.* 104. *Hall* verſus *Hammond*.

1 Lev. 250. 37. *Case, &c.* for these Words, *Thou art a sacrilegious Person, and committest Sacrilege every Day*; after a Verdict for the Plaintiff, adjudged not actionable, for a Man shall not be intended to commit a sacrilegious Felony *every Day*, but rather of detaining Tithes, which is Sacrilege according to the Canon Law. *Sid.* 376. *Gaudy* versus *Smith.*

38. *Case, &c.* for these Words, *He is a great Rogue, and deserves to be hanged as well as Gale who was condemned to be hanged at Newgate Sessions*, and of his further Malice, *He bid* T. S. *steal what Goods he could and he would receive them*; not actionable, for the first Words shew what was his Opinion, and perhaps he might not think that *Gale* deserved hanging, and the last Words were only bad Advice, but no Act done. *T. Jones* 157. *Bush* versus *Smith.*

39. *Case, &c.* for that the Plaintiff being seised in Fee of Lands, the Defendant said, *Burton* (the Plaintiff) *hath forged a Deed to cheat me of my Lands*, and he gave *T. P.* 40 *s. for engrossing it*; after a Verdict for the Plaintiff, and a Writ of Error brought, adjudged that the Words are actionable. *Raym.* 4. *Reynolds* versus *Burton.*

40. *Case* for these Words: ff. *I will indict* R. R. (the Plaintiff) *at the next Sessions, and it shall go hard with him for his Life, but his Estate he shall surely lose for Marking my Sheep*, after a Verdict for the Plaintiff the Judgment was stayed, for the Words did not amount to a *Charge of Felony*, because the last Words mitigate those which go before. *Raym.* 12. *Rawlins* versus *Hill.*

41. Case, *&c.* for that the Defendant carrying one *Woodford* to Gaol for Felony, when he came thither, said of the Plaintiff *malitiously and falsly, That he met one on the Road*, who told him: *What are you carrying Woodford to Gaol, I shall follow you shortly, and bring with me Heneage Crawford for Stealing a Mare*, for which Words *Crawford* brought this Action; and after a Verdict it was held, that the Words were actionable, tho' *no direct Affirmation* that *Crawford* did steal the Mare, and they questioned the Case *in Hob.* to be Law; but in the principal Case Judgment was given against the Plaintiff, because he did not aver in his Declaration, that the Defendant did not meet any Body on the Road who told him those Words, for that had been traversable. 1 *Lev.* 82. *Crawford* versus *Middleton.*

42. *Case* for these Words, *You are a Pick-pocket, you picked my Pocket and took away my Money, and I will justify it*; adjudged not actionable. 2 *Lev.* 51. *Watts* versus *Rymes.*

Sid. 413. 43. Case, *&c. Thou hast received stolen Goods, and knew they were stolen, A. S. stole them, and thou wert Partner with her*; adjudged, that the Words were not actionable, because they might have a justifiable Construction, for the Goods might be *waived*, but that the last Words were actionable, for the Word *Partner* must be intended Partner in the Felony. 1 *Vent.* 18.

44. Case, *&c.* for these Words, *He picked my Pocket against my Will*, and *de ulteriori malitia* he said, he (the Plaintiff) is a *Pick-pocket*; adjudged not actionable, as not necessarily implying the Plaintiff was guilty of *Felony.* 1 *Vent.* 213.

Jones 84. 2 Lev. 205. 45. *Case, &c.* for these Words, *He would have given Dean Money to have robbed Golding's House*, and *He did rob the House*; after a Verdict for the Plaintiff, it was moved, that the first Part of this Sentence imports only an *Inclination, &c.* and the subsequent Words, *(viz.) He did rob the House*, there the relative *He* must refer to the last Antecedent, which was *Dean*, so no Charge on the Plaintiff; but adjudged, that the Words taken altogether will admit of this Construction, *(viz.)* that the Plaintiff offered *Dean Money to rob the House, and he refusing it, the Plaintiff himself* robbed it. 1 *Vent.* 325. *Frowd* versus *Frowd.*

46. *Case, &c.* for these Words, *He broke my House like a Thief*; upon Not guilty pleaded, the Plaintiff had a Verdict, but adjudged that the Words were not actionable. 2 *Vent.* 172.

Mod. Cases 109. 47. Case, *&c.* for these Words, *Thou art one of those that stole my Lord Shaftsbury's Deer*; not actionable, for tho' Imprisonment is the Punishment for stealing Deer, yet that is not a scandalous Punishment, and 'tis the subjecting a Man to an infamous Punishment, which is the Support of these Actions. 2 *Salk.* 696. *Turner* versus *Ogden.*

(Y)

Where it lies for charging the Plaintiff with other Crimes.

1. THE Defendant being a *Justice of Peace*, directed his Warrant to the Constables, in which it was alledged, that the Plaintiff was accused before him, *for stealing a Horse*, whereas he was never accused, nor stole any Horse; actionable, if the Party was apprehend on the Warrant. 1 *Leon.* 187. *Windham* versus *Sir Edw. Cleer.*

2. The Defendant *Ford wrote a Letter*, in which were these Words, *'tis reported the Lord Lumley seeketh my Life*, and the Truth was, 'twas not so reported. *Lord Lumley* versus *Ford.* Actionable. 1 *Leon. Ibid.*

* Antea (W) 33. 3. ff. *Thou hast* * *cozened Mr. Windsor of his Fee, and I will sue thee for it in the Star-Chamber*; actionable. *Brownl.* 3. *Stephens* versus *Batters.*

4. ff. *Thou didst keep and sell by false Weights, and in bestowing* 24 *s. thy Weights were false two Ounces, and thy Man will be a Witness against thee*; actionable. *Brownl.* 5. *Stober* versus *Green.*

5. The Defendant ſaid, that the Plaintiff *maintained, victualled and let go Pyrates*, contrary to the Law, *&c.* actionable, for tho' *Piracy* is triable by the *Civil Law*, yet by the Statute 35 *H.* 8. our Law takes Notice of it. *Cro. Eliz. Morgan* verſus *Kitt.*

6. *If you had your Deſerts you had been* * *hanged before now*; actionable, for it ſhall be intended he committed an Offence for which Death was to be the Puniſhment. *Cro. Eliz.* 62. *Donne's* Caſe. * Poſtea 35. S. P. (Z) 15. contra.

7. The Defendant ſaid, that the Plaintiff was a *Perjured* Perſon, and that he was forſworn in the Court of Requeſts, and that he ſhall ſtand upon the Pillory; actionable. *Brook* verſus *Baught Cro. Eliz.* 135. and *Foſter* verſus *Thorne. Trin.* 23. *Eliz. S. P.*

8. Thou haſt taken a *falſe Oath in the Conſiſtory-Court of Exceſter*; now, tho' Perjury in the Spiritual Court is not within the Statute 5 *Eliz.* of Perjury, yet the Words were adjudged actionable. *Place* verſus *Havers. Cro. Eliz.* 185. Poſtea 34.

9. *He is a Suborner of Perjury*; actionable, becauſe one cannot be a *Suborner* of Perjury, but it muſt be neceſſarily intended, that he did ſuborn ſome Perſon to forſwear himſelf. *Cro. Eliz.* 308. *Cardan* verſus *Winterſlade.*

10. *One told me, he heard ſay, that Mrs. Meggs had* poiſoned her Husband, *ubi revera nullus dixit, &c.* actionable, for it may occaſion her being indicted for Petty Treaſon. *Cro. Eliz.* 400. *Meggs* verſus *Griffith. Moor* 408. *S. C. contra.*

11. *Thou art a perjured Knave, for thou didſt ſwear this Day at the Leet, that I baked Bread in my Houſe, when I did not*; actionable, for tho' *Perjury* cannot be in a *Leet*, of which the Law takes Notice, ſo as to puniſh it by the Statute or otherwiſe, yet 'tis a Diſcredit. *Cro. Eliz.* 709. *Spencer* verſus *Shorey.*

12. ſſ. *Thou art a Whore-maſter, for thou haſt lain with Brown's Wife, and hadſt to do with her againſt a Chair*, by Reaſon of which Words he loſt his Marriage; actionable. 2 *Bulſt.* 90. *Matthew* verſus *Croſs.*

13. ſſ. *Thou art a Healer of Felons*; actionable, for it ſhall be intended a Concealer of Felons. *More's* Caſe. *Hob.*

14. *The Devil appears to thee every Every Evening in the Likeneſs of a black Man riding upon a black Horſe, and thou conferreſt with him, and whatſoever thou doſt ask, he doth give it thee, and this is the Reaſon thou haſt ſo much Money*, and this I will juſtify; actionable, *Hob.* 129. *Marſham* verſus *Steward.* Moor 864.

15. *I think in my Conſcience, if Sir John Sidenham might have his Will, he will kill all the Subjects in England, and the King too, and he is a Maintainer of Papiſtry and Rebellious Perſons*; actionable, tho' they refer to the Intention and Thinking. *Hob.* 180. *Sir John Sidenham* verſus *May.* 3 *Bulſt.* 260. *S. C.* 1 Roll. Rep. 427. Yelv. 152. *I think in my Conſcience, was not in the Declaration, but that made no material Variance.*

16. ſſ. *He hath caught the French Pox, and hath carried it Home to his Wife*; actionable. *Hob.* 219. *Crittall* verſus *Horner. Cro. Eliz.* 214. *Auſtin* verſus *White.*

17. The Plaintiff being Heir to his Father, and to his younger Brother, the Defendant ſpoke theſe Words, ſſ. *Thou art a Baſtard*, by Reaſon whereof they gave away their Lands; actionable. *Godb.* 415. *Humfries* verſus *Studfeild.* W. Jones 388.

18. ſſ. *He is not worthy to bear Office in ſuch a Place, for he keeps a Bawdy-Houſe in London*; actionable. 1 *Bulſt.* 138. *Simpſon* verſus *Brooks.*

19. ſſ. *The Deed which Sir Geo. Reynell ſhewed forth before Sir John Tindall was* * *forged and made under a Hedge:* the Words *joined* were actionable. 2 *Bulſt.* 132. *Sir Geo. Reynolds* verſus *Sackfeild.* * Poſtea 24, 39.

20. ſſ. The Defendant being arreſted by a Warrant upon a *Latitat*, ſaid, that it was *a Counterfeit Warrant made by Mr. Stone*; actionable. 2 *Cro.* 648. *Stone* verſus *Smalcomb.*

21. ſſ. *Thou art a Leprous Knave*; actionable, for 'tis as much as to ſay, thou wert laid of the Pox. 2 *Cro.* 144. *Tailor* verſus *Perkins.*

22. ſſ. *Thou art a Bankrupt Rogue, and accompted a Common Knave*, and *thou art a Thief, and haſt ſtolen my* * *Corn*; the firſt Words not actionable, the laſt are. 2 *Cro.* 424. *Loyd* verſus *Pears.* * Antea (W) 18.

23. *ſſ.* There being a Communication between the Plaintiff and *Mary Syvydale* of a *Marriage*, the Defendant ſaid to *R. B. Hath that Baſtard Brian Nelſon cauſed you to be arreſted, is that all the Spight the ſaid Baſtard can do you?* by Reaſon whereof he loſt his Marriage; tho' the Words were ſpoken by Way of * Interrogation, yet actionable. 2 *Cro.* 422. *Nelſon* verſus *Scaiffe. Hob.* 127. *S. C. Moor* 269. *S. C.* * Antea (W) 42.

24. *Caſe, &c. Thou art a Thief, and haſt* * *forged a Deed*; adjudged, that to call a Man *Thief* generally is not actionable; but for the other Words the Action will lie, tho' he did not alledge what Manner of Deed was forged. *Owen* 47. *Moſſe* verſus *Read.* Poſtea 26, 34, 39.

25. *Caſe, &c.* for theſe Words, (*viz.*) *George Lucas is a falſe Knave, and worthy to ſtand in the Pillory*; the Defendant juſtified, for that the Plaintiff took a Falſe * Oath in the *Mayor's Court, &c.* and this Juſtification was held good. *Moor* 79. *Lucas* verſus *Cotton.* 1 And. 12. Antea 7, 8. (n) 27.

26. ſſ. *Thou haſt forged a Privy-Seal and Commiſſion:* It was objected, that he did not ſay *what Privy-Seal* he meant; but it being alledged, that the Words were ſpoken to Scandalize him, it ſhall be intended the King's Privy Seal. 1 *Cro.* 257, 326. *Beal* verſus *Baggarley.* W. Jones 325. Antea 24.

27. *Thou waſt forſworn in a Court of Record, and that I will prove:* Judgment was given in the Common Pleas, that the Action would not lie, becauſe he did not ſhew, in what Court of Record he was forſworn; but upon *Error* brought, that Judgment was reverſed in *B. R.* and adjudged, that the Action did lie; for it ſhall be intended the Defendant ſpoke the Words maliciouſly, accuſing him of Perjury, in Taking a falſe Oath upon Judicial Proceedings in a Court of Record. *Cro. Car.* 366. *Ceely* verſus *Hoskins.*

28. *Thou art a Whore, and a Two-penny Whore*; this was held to be a good Cauſe of Action in *London* by the *Cuſtom*, for they puniſh ſuch Perſons there, by *Carting* them. *Cro. Car.* 350. *Bowen* verſus *Cooper.* See *Oxford*'s Caſe, *contra.*

Cro. Car. 480. * Antea (W) 33. S. P. Poſtea (Z) 20. contra.

29 The Plaintiff declared, that he was retained by *T. S.* as a Servant in Husbandry, and behaved himſelf honeſtly, *&c.* and that the Defendant to Slander him, and to bring him in Diſcredit with his Maſter, ſaid, that he (the Plaintiff) *was a* * *Cozening Knave, and had cozened his Maſter:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action would not lie for theſe Words; *Sed per Curiam*, the Plaintiff had Judgment. *W. Jones* 395. *Sams* verſus *Bigg.*

30. *ſſ.* Words ſpoken of an *Inn-keeper*, ſſ. *Colonel Egerton had the French Pox*, and *hath Set it in the Houſe*, and *Smith* and *his his Wife have it*; objected, that the Word *Set* made it inſenſible; but adjudged actionable and well brought by the *Husband alone.* *Style* 112. *Smith* verſus *Hobſon*, and 129. *Stradling* verſus *Boreman. S. P.*

31. ſſ. *Thou went'ſt to the Wells, to be cured of the Pox*; actionable. *Hobſon* verſus *Hadſon. Style* 219.

32. ſſ. *Thou art a Baſtard-getting Rogue, and hadſt a Baſtard at Oxford*, and *art a Pocky Rogue, &c.* actionable. *Style* 283. *Elliot* verſus *Blague.*

33. ſſ. *He* (meaning the Plaintiff) *got Mary Nabb with Child, and the Child is his, and I have tried it with Sieve and Shears:* Objected, that the laſt Words were *inſenſible*; but adjudged the firſt Words were actionable. *Style* 379. *Shercroft* verſus *Weeks.*

34. *Caſe, &c.* for theſe Words, *Thou haſt forged a Deed to cheat W. R. of his Lands*; actionable, but 'tis not, to ſay that he forged a *Writing or a Warrant*, becauſe thoſe are Words of incertain Signification. *Sid.* 16. *Caſſibilly* verſus *Brett.* See *poſtea (Z) pl.* 8.

* Antea 6. S. P.

35. Caſe, *&c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Words were not actionable, *(viz.) You Poturit, you will lie with a Cow again, as you did; if you had your* * *Deſerts you deſerved to be hanged*; adjudged actionable. *Sid.* 220. *Poturit* verſus *Barrell.*

36. *Caſe, &c.* for theſe Words, *Thou art a Buggering Rogue, and I could hang thee:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, and adjudged, that the Words were actionable; ſo 'tis to ſay, Thou art a *Thieving Rogue*, for thoſe Words import an Act done; but *Thieviſh Rogue*, imply only an Inclination to ſteal. *Sid.* 373. *Collier* verſus *Burrell.*

Lev 248.

37. *Caſe, &c.* in which the Plaintiff declared, that he is a Parſon, and was recommended to be Chaplain to the *Duke of Ormond, &c.* and that the Defendant ſpoke theſe Words of him, *(viz.) He hath a Baſtard on the other Side of the River*, by Reaſon whereof he loſt his Preferment: After a Verdict for the Plaintiff, it was objected, that the Words are not actionable, becauſe it did not appear, that the Baſtard was chargeable to the Pariſh; and if not, then *Baſtardy* is only an Offence puniſhable in the Spiritual Court; but adjudged actionable in Reſpect of the Special Damages. *Sid.* 376. *Dumwick* verſus *Paine.*

38. *Caſe, &c. He hath broke three or four of his Father's Ribs, of which he ſhortly after died and I will complain to a Juſtice of him, he may be hanged for the Murder, tho' it was done twenty Years ſince:* After a Verdict for the Plaintiff, it was inſiſted for the Defendant, that it might be intended this Hurt was unwillingly done; beſides, 'tis not averred, that the *Father was dead*; but adjudged actionable, for the Defendant muſt intend ſuch a Killing as was Murder; and the better Opinions are, that there needs no *Averment*, that he is dead. 1 *Vent.* 117. *Phillips* verſus *Kingſton.* See (X) *pl.* 19.

* Antea 24, 26, 34.

39. *Caſe, &c.* for that there being a Diſcourſe of the laſt Will of *John Rowe*, deceaſed, the Defendant ſaid, that the Plaintiff *had* * *forged his Uncle Rowe's Will*; actionable, without *averring*, that *John Rowe was dead.* 1 *Vent.* 149. *Dorrell* verſus *Jay.* See *antea pl.* 34.

(Z)

Where it will not lie for charging the Plaintiff with Crimes not Capital.

1. *ſſ. MEN cannot have their Cattle go upon the Common, but Barber and his Children will kill them with Barber's Dogs.* Adjudged, upon *Error* brought, not actionable. *Dyer* 118.

* Antea (Y) 28.

2. *ſſ.* The Plaintiff brought an Action in *London*, for calling his Wife * *Whore*; 'tis actionable only there by Cuſtom; but Cuſtom to maintain Actions for brabling Words, is againſt Law. 4 *Rep.* 18. *Oxford* verſus *Croſſe.* *Cro. Car.* 255. *Hart's* Caſe. *S. P.* See *antea* (Y) 33. *Bower's* Caſe. *contra.*

Moor 417.

3. *Sir Chriſtopher Hilliard is a Blood Sucker, and ſucketh Blood; but if a Man will give him a Bribe, as a Sheep, or a Couple of Capons, he will take it*; not actionable, for it cannot be intended what Blood he ſucked. *Cro. Eliz.* 306. *Hilliard* verſus *Conſtable.*

4. For

4. For Words ſpoken Part in *Latin*, (*viz.*) *Inimicus meus is an Extortioner*; not actionable. *Cro. Eliz.* 496. *Johns* verſus *Davers*. *Moor* 182. *S. P.* in Welch.

5. *Caſe*, &c. *Thou waſt forſworn in the Leet*, *innuendo* a *Leet* holden in ſuch a Manor, on ſuch a Day; The Defendant juſtified, for that the Plaintiff, and ſome others, the ſame Day, were ſworn before the Steward to preſent, &c. and they preſented, that ſuch a Ditch was not ſcowerd *ad nocumentum*, which was falſe; and upon Demurrer to this Plea, it was adjudged for the Plaintiff, for that the Defendant did not alledge, that the Ditch was not in the *Leet*; and if not, then the Preſentment thereof is out of the Charge; therefore 'tis not Perjury. 3 *Eliz.* 402. *Wild* verſus *Cockman*. Moor 404, 537.

6. *Bill in Chancery*, and a Third Perſon was, by Order of the Court, to be made a Party to the Bill, and a * Commiſſion iſſued to examine Witneſſes, and the Defendant being produced as a Witneſs for this third Perſon, ſwore directly againſt the Defendant in the Bill, whereupon he brought his Action on the Statute 5 *Eliz.* as a *Party grieved*, by the Oath; adjudged, that the Action did not lie, for the Words of the Statute are, *where a Man is damnified by a Depoſition in a Suit between Party and Party*; and in this Caſe the third Perſon was no Party to the Suit, for he was neither Plaintiff or Defendant in the Suit, but came in by an interlocutory Order. *Yelv.* 22 *Brode* verſus *Owden*. *Mich.* 45 *Eliz.* 1 *Brownl.* 82. *S.C.* * Poſtea (a) 7.

7. *Caſe* againſt the Defendant, for ſpeaking theſe Words (*viz.*) The Plaintiff *hath ſaid Maſs many Times* to *W. R.* Upon a Demurrer to the Declaration, it was adjudged ill, becauſe he did not ſet forth, *where* the Maſſes were ſaid, nor the *Day when*; for it might be in *France*, or in ſome other Place out of *England*, and the Statute appoints no Penalty, unleſs the Indictment be within a Year and a Day. *Mich.* 29 *Eliz.* *Godb.* 106.

8. ſſ. *This is John Thomas his Writing*, (*Innuendo* the Plaintiff) and *he hath forged this Warrant*, *innuendo* a Warrant made by the Sheriff, &c. Upon a *Capias*, &c. not actionable, for the Words ſhall not be enlarged or made certain by the *Innuendo*. *Hob.* 2. *Thomas* verſus *Axworth*. See *Brownl.* 4, 6. *Yardley* verſus *Ellis*. See *antea* (Y) *pl.* 34.

9. Caſe, &c. *He is a Cuckold, and a Wittal, which is worſe than a Cuckold, and B. B. hath lain with his Wife*; not actionable. 2 *Cro.* 78. *Eaton* verſus *Ayloffe*.

10. ſſ. *Thou haſt forged Writings, for which thou ſhouldſt looſe thy Ears*; the Court divided, two Judges of Opinion, that tho' the firſt Words are not actionable, yet the ſubſequent Words make them ſo, and they ſhall be conſtrued by theſe Words; *two Judges contra*, the Words are *incertain* what Manner of Writings they were, and they may be frivolous Writings, and then he is in no Danger of his Ears. 3 *Bulſt.* 265. *Froſt* verſus *Ayres*. 1 Roll. Rep. A. 31.

11. *Caſe*, for calling the Plaintiff *Idonor, in the Welſh Language*, with an Averment, that it was ſpoken before thoſe who underſtood *Welſh*, and that it ſignified *Perjured*; actionable. *Hob.* 191. *Gibbs* verſus *Jenkins*. and 126. *S. P. Moor* 182. *S. P.*

12. *Caſe* for calling the Plaintiff *Adulterer*; not actionable, becauſe 'tis an Offence not puniſhable at Common Law, but only in the Spiritual Court; but to call a Man *Knave or Villain*, an Action will lie. *Moor* 29. *Moor* 261. *contra. George's* Caſe.

13. *Caſe*, &c. for theſe Words, *My Maſter was not content to take my Living from me, but ſent his Man Andrews to kill me*; not actionable, for nothing followed upon this Command; beſides, the Words, *my Maſter*, are too general, and ſo * *Non conſtat de perſona*. *Moor* 63. *Bray Mil'* verſus *Andrews*. * Poſtea (a) 17. S. P.

14. *Caſe*, &c. for calling the Plaintiff *Briber and common Extortioner*, not actionable, unleſs the Plaintiff aver that he is an Officer. *Moor* 182. *Linſey's* Caſe.

15. *Caſe*, &c. for theſe Words, *Thou ſhouldeſt have ſate in the Pillory if thou hadſt thy* * *Deſerts*, not actionable, for the Words are too *general*. *Moor* 243. * Antea (Y) 6. contra.

16. Caſe, &c. for theſe Words, *Hang him, he is full of the Pox, I marvel you will eat and drink with him, innuendo*, the Plaintiff, not actionable, for it may be intended the Small-Pox; beſides, the Words were not ſpoken with an Intent to defame the Plaintiff, but by Way of Advice to a Friend. *Moor* 573. *James* verſus *Rudlege*.

17. *Caſe*, &c. for theſe Words ſpoken of the Plaintiff, *He hath had two Baſtards thirty ſix Years ago, and ſhould pay for the Keeping them*, and ſets forth, that at the Time of Speaking theſe Words he was married, and by Reaſon of the Speaking, &c. a Divorce between him and his Wife *was like to enſue*, and that *diverſæ lites ortæ fuerunt* between him and her; adjudged, that the Action will not lie, for *Baſtardy* hath been pardoned by ſeveral Acts of Grace within thirty-ſix Years, ſo that the Plaintiff cannot be puniſhed by the Statute 18 *Eliz.* and *non conſtat* on which Side *lites ortæ fuerunt*, ſo that is very *incertain*. 2 *Roll. Rep.* 24. *Randall* verſus *Bell*.

18. ſſ. *Cozening Knave*, not actionable. *Hutt.* 13. *Gitting's* Caſe, and *Hutt.* 14. *George* verſus *Whitlock*. *Antea* (Y) 29. *contra*.

19. ſſ. *Falſe Knave*, not actionable. *Hutt.* 14. *Walcot* verſus *Hind*, and *Brook's* Caſe.

20. Caſe for theſe Words, ſſ. *You are a Rogue, a baſe Rogue, a cozening Rogue, a Coney-catching Rogue, a Cut-purſe Rogue*; adjudged not actionable. *Palm.* 10. *Trevilian* verſus *Betty*. 2 Cro. 536.

21. *Caſe* for theſe Words, *Thou haſt the French Pox*: Upon Not guilty pleaded, the Jury found, that he ſpoke theſe Words, (*viz.*) *Thou haſt had the French Pox*; adjudged a material Variance, and that the Declaration was not maintained by this Verdict. *Allen* 30. *Dutton* verſus *Eaton*.

22. *Caſe*,

22. *Caſe, &c.* for theſe Words, *Thou art a Knave, and a cheating Knave:* After a Verdict for the Plaintiff, it was held in Arreſt of Judgment, that theſe Words are not actionable, upon the general Inducement, that the Plaintiff is *verus & fidelis ſubditus*, without ſhewing, that he is of ſome *Trade*, and ſo had ſome ſpecial Damage. *Sid.* 48. *Welden* verſus *Johnſon.*

23. *Caſe, &c.* for theſe Words, *Thou art a forſworn Fellow, and we will prove thee ſo*; not actionable, becauſe in the *Future Tenſe*. *Sid.* 48. *Danell's* Caſe.

1 Lev. 112. 24. *Caſe, &c.* by the Plaintiff, who is a Carrier, for theſe Words, *Thou haſt forged falſe Letters, and haſt given me a falſe and forged Acquittance:* After a Verdict for the Plaintiff, adjudged in Arreſt of Judgment, not actionable. *Sid.* 155. *Monday* verſus *Mills*, becauſe no *colliquum* laid of his Trade of a Carrier.

1 Lev. 207. 25. *Caſe, &c.* for theſe Words, *He hath got the Pox by a Yellow-haired Wench in Moorfields*, and *it will coſt him* 10 *l. if he Eſcape his Life*; actionable, after Judgment, for to ſay *he got the Pox by a Wench*, muſt be intended the *French Pox* by a *Whore*. *Sid* 304. *Lyme* verſus *Hockley.*

26. *Caſe, &c. You are a Forger of Bonds, a Publiſher of Forgery, and ſue upon forged Bonds:* Upon Not guilty pleaded, the Jury found the Defendant Not guilty, as to the firſt Words, and adjudged, that the laſt Words were not actionable, it not being laid, that he *knew* of the Forgery. 1 *Vent* 3. *Twiſleton* verſus *Hobbs.* 4 *Leon.* 181. *Hungerford* verſus *Watts. S. P.*

(a)

Where it will lie for Words ſpoken of Magiſtrates, Officers, &c.

See (b) placito 2.

* Poſtea 27. S. P. 1. *ſſ.* THE Plaintiff being a * *Juſtice of Peace*, the Defendant ſaid, *Mr. Stukely covereth and hideth Felonies, and is not worthy to be a Juſtice of Peace*; actionable, for tho' his Office is not named, the Words neceſſarily refer to it. 4 *Rep.* 16. *Stukely* verſus *Bulhead.*

Cro. Eliz. 191. 2. *ſſ.* The Plaintiff being a *Juſtice of Peace*, and High Sheriff, the Defendant ſaid, *'tis well known* I am a true Subject; but thou (*innuendo* the Plaintiff's Servant) *ſerveſt no true* * *Subject, and thine own Conſcience may accuſe thee thereof*; actionable. 1 *Leon* 335. *Walgrave* verſus *Agar.*

* *This touched him in Point of Allegiance.* 3. The Plaintiff was a *Land Meaſurer*, and the Defendant having ſome Diſcourſe about Meaſuring Lands, ſaid, *Thou art a* * *cozening and ſhifting Knave*, and a *cheating Knave*; adjudged, that a Surveyor of Land being an Office of Skill, the Words are actionable. 2 *Cro.* 504. *Blunden* verſus *Euſtace. Godb.* 287. *S.C.*

* Poſtea (c) 17. S. P. 4. *ſſ.* The Plaintiff being an *Auditor of the Exchequer*, the Defendant ſaid, *You have taken Money for Engroſſing Feodaries* (*innuendo* Accompts) *you are a Cozener, and live by Cozenage, and I will prove that to be Cozenage:* it was objected, that the Word *Feodaries* is inſenſible, and that the *innuendo* will not help it, and that the Word Cozener is not applicable to his Office. *Winch* 33, 40. *Curle* verſus *Turke.*

5. *ſſ.* The Defendant ſpoke of a *Juſtice of Peace*, (viz.) *I am in Danger of my Life, my Blood is ſought, and I was like to have been murdered*; *I was at Sir John Harper's Houſe, and his Son John Harper drew me forth to ſee a Gelding in the Stable, and then Tho. Beaumont, Sir Henry Beaumont's Son did throw his Dagger at me twice, and thruſt me thro' the Breeches twice with his Rapier, to have killed me*; all this was *done by the Inſtigation of Sir John Harper, and I can prove it.* 2. *Cro*, 56. *Sir John Harper* verſus *Beaumont*; actionable.

Yelv. 62. 6. Words ſpoke of a *Commiſſioner* to examine Witneſſes in Chancery, ſſ. *Sir George Moor is a corrupt Man, and hath taken Bribes of King for executing that Commiſſion; King hath ſet Sir Geo. Moor on Horſe-back, with his Bribes to pervert Juſtice and Equity:* it was objected, that the Plaintiff was only a *Voluntary Commiſſioner*, by the Aſſent of the Parties, and an Arbitrator, and not a Judge; but adjudged, that tho' not ſworn, yet having the King's Commiſſion to execute, 'tis a Truſt, and the Breach of it is puniſhable. 2 *Cro.* 65. *Sir George Moor* verſus *Foſter.*

7. *ſſ.* The Defendant ſpoke of a *Juſtice of Peace*, ſſ. *Mr. Kemp is a Basket Juſtice, a partial Juſtice, I will give* 5 *l. every Year for his Gifts in Juſtice Matters*; not actionable, for one may take a Preſent in Victuals, without any Offence. 2 *Cro.* 90. *Kemp* verſus *Houſegoe.*

8. *ſſ.* The Defendant ſpoke of a *Juſtice of Peace*, ſſ. *You are a ſweet Juſtice, you ſent your Warrant for R. B. to be brought before you for Suſpicion of Felony*, and *afterwards ſent R. B. to him to give him Warning thereof, that he might abſent himſelf*; actionable. 2 *Cro.* 413. *Burton* verſus *Token.*

9. *ſſ.* The Defendant ſpoke of a *Juſtice of Peace*, ſſ. *He* (*innuendo* the Plaintiff) *for Malice and Spleen, did many Times wreſt the Law, and pervert Juſtice to ſerve his own Turn:* it was objected, that the Words might be ſpoken before the Plaintiff was a Juſtice; but adjudged they ſhall be taken in the *worſt Senſe.* 2 *Cro.* 240. *Beaumont Sir Tho.* verſus *Haſtings.*

1 And. 119. * Poſtea (c) 32,34. (M) 10. 10. *Caſe, &c.* againſt the *Biſhop of Litchfield and Coventry*, for Writing a * Letter to the *Earl of Leiceſter*, that the Plaintiff, who was a *Juſtice of Peace, was a Vermin in the Commonwealth, a falſe and corrupt Man, an Hipocrite in the Church of God, a Diſſembler; he hath*

uſed many corrupt Practiſes to work his Will, he procured my Regiſter to be indicted for Extortion, he willingly and wittingly hath boulſtered out one Greenwood, a lewd Man, convicted of many Offences, and knowing him to be an evil Man, maintaineth him againſt me, without Law, Conſcience, or Honeſty; upon Not guilty pleaded, the Plaintiff had a Verdict and 300 *l.* Damages; and it was moved in Arreſt of Judgment, that thoſe Words *written in a Letter* are not actionable, but that there muſt be ſome Overt-Act to make them a Scandal; but * adjudged, that if the *Letter* had been written to the Plaintiff himſelf, it might be ſo, but being written to another, 'tis actionable. *Moor* 141. *Broughton's* Caſe

* Nota, *Some of theſe Words were not actionable.*

11. Caſe for theſe Words ſpoken of a *Juſtice of Peace, my Brother hath ſtole a black Mare, and you (the Plaintiff) were privy to it*, &c. now, tho' Privity doth not make a Man acceſſary to the Felony, yet the Words being ſpoken of a Juſtice of Peace, are actionable. *Moor* 401. *Laſſells* verſus *Laſſells.*

12. *Caſe, &c.* for theſe Words ſpoken of a *Juſtice of Peace*, (viz) *He hath received Money of a Thief (that was apprehended and brought before him for Stealing of Sheep) to let him Eſcape and to keep him from the Gaol*; upon Not guilty pleaded, the Plaintiff had a Verdict and 40 *l.* Damages, and upon a Writ of *Error in the Exchequer-Chamber* the Judgment was affirmed. *Moor* 695. *Marriner* verſus *Cotton.*

13. *Caſe* for theſe Words ſpoken of a Juſtice of Peace, *one W. W. being taken as acceſſary to the Stealing his own Goods, Mr. Stafford knowing thereof, diſcharged him by an Agreement of 3 l. to which Mr. Stafford was Party, whereof* 30*s. was paid to him, and the reſt was paid to his Man by Appointment*; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment, which was affirmed in the *Exchequer-Chamber. Moor* 704. *Stafford* verſus *Powler.*

2 And. 47. Cro. Eliz. 536.

14. *Caſe* for theſe Words ſpoken to a *Juryman, Thou art a Juryman, and haſt been the Overthrow of* 100 *Men by thy ſubtile and falſe Means*, actionable, with an Averment that he had been a Juryman in Juries upon Life and Death. *Moor* 876.

15. *Of a Juſtice of Peace*, (viz.) *he had two Servants preſented five or ſix Years ſince for ſtealing Sheep, and he deſired me not to proſecute them*; actionable, with an Averment that he was a *Juſtice of Peace* for the County where the Words were ſpoken. *Latch* 49. *Burton's* Caſe.

16. *Caſe, &c.* in which the Plaintiff declared, that he was a *Juſtice of the Peace* and *Deputy Lieutenant* of *Suſſex, &c.* and had been often employed in Commiſſions, and that a Commiſſion out of Chancery was directed to him and others, to examine Witneſſes in a Cauſe there depending between the now Defendant *Large* and *T. S.* and that he took the Depoſitions of Witneſſes, *&c.* and that the Defendant ſaid *Sir William Parker hath put out Depoſitions that were taken*, and hath *inſerted others which were not taken*; adjudged actionable. *Palm.* 67. *Parker* verſus *Large.*

2 Roll. Rep. 153. Fiſh *hath returned Depoſitions of Witneſſes never ſworn; actionable.* Cro. Eliz. 623. Fiſh *v.* Thorogood. Antea 26. S. P.

17. Caſe, *&c.* in which the Plaintiff declared, that there was a Diſcourſe between the Defendant and one *Horewood* of him (the Plaintiff) who was *Receiver of the Court of Wards*, and that the Defendant ſpoke theſe Words of the Plaintiff, (*viz.*) *Mr. Deceiver hath deceived the King, and dealt falſly with him, and I have him in Queſtion, and I doubt not but to prove it*; after a Verdict for the Plaintiff, and 400 Marks Damages, it was objected, that here was not a ſufficient Deſcription of the * Perſon; beſides, he is not charged with any Misbehaviour in his Office, but adjudged actionable, for the Word *Deceiver* cannot be intended of any other Deceipt than in his Office. *Palm.* 69. *Fleetwood* verſus *Curle.*

2 Cro. 557. 1 Roll. Rep. 148. Hob. 267. * Antea 2, 13.

18. *ſſ.* The Plaintiff being a *Juſtice of Peace*, the Defendant ſpoke theſe Words, ſſ. *Mr. Hamond did put in of his own Head* theſe Words taken in Examination by him, (*viz.*) *R. B. did ſteal twenty Sheep of ſuch a Man's*, and *Mr. Hamond is a debauched Man, and not fit for a Juſtice*; the firſt Words actionable, but the laſt the Court took Time to conſider. *Style* 22. 210. *Hamond* verſus *King ſmell.*

19. The Defendant ſpoke of an Officer, (*viz.*) *You have cozened the State of* 20000 l. *and I will prove it, for you have received* 25000 *l. of the Office, and not compounded for it, and have foiſted in Words in the Order of your Commiſſion*; actionable. *Style* 436. *Henley* verſus *Sir Edw. Baynton.*

20. *Caſe, &c.* for theſe Words ſpoken of a *Juſtice of Peace and Deputy Lieutenant of the County of Warwick*, (viz.) *I have heard that a Maid of Sir John Knightly's ſhould report, that he being ſick, and ſhe looking thro' a Hole of the Door where he then lay*, ſaw a *Prieſt* (*Innuendo*, a Popiſh Prieſt) *give* the *Euchariſt and Extreme Unction to Sir John Knightly*, and that the Defendant, of his farther Malice, *&c.* at another Day ſaid, *I have heard that a Maid-Servant, who then lived with Sir John Knightly, peeped thro' a Cranny of a Door where Sir John lay ſick, and ſaw a Popiſh Prieſt Anoint* him (Extreme Unction, *Innuendo*) and give *him the Sacrament of the Euchariſt*; after a Verdict for the Plaintiff and 1000 *l.* Damages, it was objected, that theſe Words did not amount to calling him *Papiſt*, for by the firſt Words it doth not appear of what Religion the *Prieſt* was, unleſs by an *Innuendo*, and in the latter Words the *Extreme Unction* is brought in by an *Innuendo*, which is not ſufficient; but adjudged, that one Part of the Words explain the Scandal of the other, for a *Prieſt who gave the Euchariſt and Extreme Unction* muſt be a *Popiſh Prieſt*, and he to whom 'tis given muſt be a Papiſt, and the Word *Anoint* cannot be intended of any Thing elſe but *Extreme Unction*, which is never done, nor the Euchariſt given but to thoſe who are Papiſts. 3 *Lev.* 68. *Knightley* verſus *Marrow.*

21. *Caſe,*

21. *Case, &c.* in which the Plaintiff declared, that he was a true Profeſſor of the *Proteſtant Religion, &c.* and had been a Member of the Long Parliament, of both which, the Defendant diſcourſing ſaid to *T. W.* the Plaintiff's Servant, *Your Maſter is a Papiſt, when he is at home he goes to Church, and when at London he goes to Maſs, &c.* upon Not guilty pleaded the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Words are not actionable; for to call a Man *Papiſt* is not actionable, unleſs ſpoken of a Biſhop. 1 *Leon.* 336. and *Cro. Car.* 192. *Savage* verſus *Cook*; 'tis true, if ſpoken of a Man in ſome eminent Office, 'tis otherwiſe, and that was *Sir John Knightly*'s Caſe, who was a Juſtice of Peace and Deputy Lieutenant; ſo in *Peak* and *Tucker*'s Caſe, where the Plaintiff was a Merchant, and the Defendant ſaid of him, *He is a Rogue, a Papiſt Dog, never a Rogue in Town would have Bone-fire but he*; this was on the Day when King *James* came to the Crown; adjudged in the principal Caſe, that the Words were actionable, becauſe he who goes to Maſs forfeits 100 *l.* by the Statute 23 *Eliz. cap.* 4. and is to be impriſoned for a Year, therefore to ſay the Plaintiff *goes to Maſs* is actionable, for it expoſes him to corporal Puniſhment. See *Allen, Rep.* 11. To ſay a Man committed Petit Larceny, actionable. 2 *Vent.* 265. *Sir Lionel Walden* verſus *Mitchell.*

22. *Caſe, &c.* for theſe Words ſpoken of a Juſtice of Peace, *He is a forſworn Juſtice, and not fit to be Juſtice of Peace*; after a Verdict for the Plaintiff it was inſiſted, that the Words were not actionable, becauſe *forſworn* doth not intend *judicial Periury*, and there was no Diſcourſe of his Office, but adjudged actionable, becauſe the Words *forſworn Juſtice* ſhew that the Defendant intended *Perjury* relating to his Office, for *ſermo refert ad conditionem perſonæ.* 1 *Vent.* 50. *Kirle* verſus *Oſgood.* 1 *Lev.* 280. *S. C. Sid.* 432. *S. C.* 1 *Mod.* 22. *S. C.*

23. *Slander, &c.* brought by a *Doctor of the Civil Law*, who was alſo a *Juſtice of Peace* and *Chancellor of the Biſhoprick of Norwich*, for theſe Words, *He is not to be a Chancellor or a Juſtice of Peace, He is a Knave, a Raſcal and a Villain, he is not fit to practiſe, he ought to have his Gown pulled over his Ears*; actionable, the Plaintiff had a Verdict and 40 *l.* Damages. 2 *Lutw.* 1288. *Pepper* verſus *Gay.*

24. *Slander, &c.* in which the Plaintiff ſet forth, that he was formerly choſen *Knight of the Shire for the County of Glouceſter*, and intending to ſtand *Candidate* at the next Election, there being a Writ iſſued out to chuſe two Knights, *&c.* the Defendant, before the Election, ſaid, *Jack How is an Enemy to the King and Kingdom, and in the French Intereſt*; actionable; the Plaintiff had a Verdict and great Damages, and upon a Writ of Error in Parliament the Judgment was affirmed. 2 *Lutw.* 1293. *How* verſus *Perry.* 2 *Salk.* 649. *S. C.*

Lev. 30. Mod. 26. 25. *Caſe, &c.* in which the Plaintiff declared, that he was a *Deputy Lieutenant for the County of Middleſex*, and a *Privy Councellor in Ireland*, and that he ſtood to be choſen Burgeſs for Parliament at *Chriſt-Church, &c.* and that the Defendant ſpoke theſe Words of him, *(viz.) He is a Papiſt*; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment, and afterwards a *Writ of Error* was brought, and the Judgment affirmed, becauſe by the Statutes 23 *Eliz.* and 3 *Jac.* and 25 *Car.* 2. Papiſts are expoſed to ſeveral Penalties and Incapacities, *à fortiori*, as the Words ſpoken do relate to a Perſon thus qualified; 'tis true, the Word *Papiſt* was not actionable formerly, but Times alter the Senſe of Words, and this Word is now a Word of Reproach; ſo the Word *Knave* formerly ſignified a *Servant*, but now 'tis actionable to call an *Attorney Knave*, and to ſhew that the Law doth alter with the Times, there is no Precedent before 21 *Ed.* 3. 23. *of an Infant bringing an Appeal*, but ſince that Time, and now 'tis very frequent. *Raym.* 482. *Row* verſus *Clargis.* 3 *Lev.* 50. *Stanell* verſus *Cann. S. P.* See 2 *Brownl.* 166. *Ireland* verſus *Smith*, and 2 *Cro.* 484. *Tasborough*'s Caſe.

26. *Caſe, &c.* for theſe Words ſpoken *of a Juſtice of Peace, He makes uſe of the King's Commiſſion to worry me out of my Eſtate*, and afterwards the Words were laid in *Latin* (without an *Anglice ad tenorem & effectum ſequen'*; after a Verdict for the Plaintiff and entire Damages, the Judgment was ſtayed, for tho' *per Curiam*, the Words are actionable, yet being laid *Ad tenorem & effectum ſequen'*, ſomething may be omitted which may alter the Senſe, and 'tis not an expreſs Allegation, that the Defendant did ſpeak the Words. 3 *Mod.* 71. *Newton* verſus *Stubbs.*

27. *Caſe, &c.* for theſe Words ſpoken of a *Juſtice of Peace*, ſetting forth, that there was a Rebellion in the *Weſt* by the *Duke of Monmouth*, that Search was made for the Defendant, being ſuſpected to be in that Rebellion; thereupon the Defendant ſaid, *John Prowſe is a Knave and a buſy Knave for Searching after me and other honeſt Men of my Sort, and I will make him give me Satisfaction for plundering me*; after a Verdict for the Plaintiff it was objected, that here was no *Colloquium* laid of his Office, or that the Words were ſpoken relating to his Office, therefore an Action would not lie, tho' an Information might; the Court was divided. 3 *Mod.* 163. *Prowſe* verſus *Wilcox.*

(b)

Where it will not lie for Words ſpoken of Magiſtrates, and of Men in Office.

1. *ſſ.* THE Plaintiff being a *Juſtice of Peace*, the Defendant ſaid, *Sir William Barton*'s Men have ſtolen Sheep, and he ſpoke to me that I ſhould not proſecute them; not actionable, becauſe not averred, that *Sir William is a Juſtice of Peace. Sir William Barton*'s Caſe. *Poph.* 180.

2. Of a *Juſtice of Peace*, *Thou haſt* forged a *Recognizance taken of one Fiſher, and others*, actionable, for the Word (forged) ſhall be intended (counterfeited) and the Word (taken) ſhall be intended acknowledged. *Cro. Eliz.* 865. *Chichely* verſus *Barker*.

3. *ſſ.* The Plaintiff was *Bailiff* to *R. B.* for three Years, and had the Selling of all his Corn; and the Defendant ſaid, ſſ. *Thou art a coſening Knave, and thou haſt coſened me in ſelling falſe Meaſure in my Barley, and the Country is bound to curſe thee for ſelling with falſe Meaſure, and I will prove it, and thou haſt changed my Barley which I bought of thee*, not actionable, becauſe it doth not appear that the Words were ſpoken of the Sale of *Corn whilſt he was* * *Bailiff*. *Hob.* 6. *Bray* verſus *Hayes*. See *Brownl.* 4. * Poſtea, 4.

4. The Plaintiff being a *Knight* and one of the Gentlemen of the King's Privy Chamber, the Defendant ſaid, *Sir William Bronker is a coſening Knave and lives by Coſenage*, not actionable. 2 *Cro.* 427. *Sir William Bronker*'s Caſe. *Godbolt* 284. *S. C.*

5. *Caſe, &c.* for theſe Words ſpoken of a *Juſtice of Peace*, upon a *Colloquium* between the Defendant and another concerning the Right of Patronage to the Church of *C.* that he was the right Patron thereof, whereupon the Defendant ſaid, that *Tasborough* (the Plaintiff) was the true Patron, but that he had loſt the Patronage by being a *Schiſmatick and Recuſant*, both which he would prove on him, not actionable, without alledging temporal Damages. 2 *Roll. Rep.* 43. *Tasborough*'s Caſe. 2 Cro. 484.

6. *ſſ.* Of an *Attorney* and *Town-Clerk of Southampton*, who kept the Court-Roll, *Thou haſt made many falſe Certificates to the Mayor and Burgeſſes, and the more thou ſtirreſt in it the more it will ſtink*; not actionable, becauſe the Plaintiff did not alledge that there was a *Colloquium* of his Office, nor that the making Certificates did belong to his Office, or that he knew them to be falſe. *Hutt.* 123. *Smith* verſus *Cornelius*.

7. *Caſe, &c.* for theſe Words, ſſ. *The Mayor of Tiverton hath coſened the Town and Country*; adjudged, that the Words are not actionable. *W. Jones* 308. *The Mayor of Tiverton*'s Caſe.

8. *Caſe*, in which the Plaintiff declared, that King *Charles* I. by Letters Patents made him Collector of the Cuſtoms in the Port of *Sandwich*, and that the Defendant malitiouſly intending to cauſe the ſaid Grant to be repealed, did ſuggeſt to the King, that the Plaintiff had extorted Money from the Merchants, and expended it in Maintenance of Rebels, which Suggeſtions he cauſed to be inſerted in other Letters Patents, by which the Grant of this Office to the Plaintiff was repealed; and it was granted to the Defendant, that afterwards, when King *Charles* II. was reſtored, the Plaintiff and Defendant contending about their Intereſts to this Office, it was referred by the King to the Attorney-General, to certify whether the Letters Patents of Revocation were lawful, whereupon both Parties attending, and the Letters Patents being produced, one *John Delabar, &c.* did affirm the Suggeſtions therein to be falſe, to which the Defendant then and there malitiouſly anſwered and affirmed (but did not ſay *in auditu quamplurimorum*) that they were true, by Reaſon whereof the Plaintiff was hurt in his good Name and Trade of Merchandiſe, *ad damnum* 10000 *l. &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict and Damages to 500 *l.* and now it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not alledge that the Words were ſpoken *in auditu quamplurimorum*; beſides, they were ſpoken in *Evidence, Juſtification, and Defence* of the Defendant's Cauſe, to which it was anſwered and ſo adjudged, that the Omiſſion of the Words *in auditu quamplurimorum, &c.* was helped after a * Verdict, and ſo it was adjudged in the Caſes in the Margin; and as to the other Objection, the Words were not ſpoken in Juſtification and Defence of the Defendant's Right, but collateral to it, for it was the Validity of the Letters Patents of Revocation, which was referred to the Attorney-General, and not the Truth or Falſhood of the Suggeſtions; ſo that the affirming thoſe ſcandalous Suggeſtions to be true, had no Manner of Relation to any Evidence or Juſtification of the Cauſe; but this Judgment was reverſed in the Exchequer-Chamber. *Hardres* 221. *Le Bar* verſus *Jones*. * 3 Cro. 199. Smart *v.* Eaſdale, *and* Heel *v.* Taylor.

9. *Caſe, &c.* for Words ſpoken of a *Juſtice of Peace* to his Servant, (viz.) *Your Maſter's Witneſſes* (in ſuch a Cauſe) *were perjured, and your Maſter is the Maintainer and Upholder of them*; after a Verdict for the Plaintiff it was objected, that the Words were not actionable, for they did not relate to the Plaintiff's * Office, beſides, 'tis not ſaid that he *upheld their Perjury*, but that he upheld and maintained *their Perſons*; but the Chief Baron *Hale* held the Words actionable, for if true, they were a Scandal to his Office, and the Word *Upholding* can have no other Meaning than *Abetting* them in their Perjury. *Hardres* 501. *Pugh* verſus *Owen*. * 4 Rep. 16.

10. *Caſe, &c.* for theſe Words, *You would be a Juſtice of Peace like Major Bill* (*Innuendo* the Plaintiff) *a Fool, an Aſs, a Coxcomb, a Bufflehead Juſtice*; not actionable, adjudged in Arreſt of Judgment, unleſs the Plaintiff had a particular Loſs. *Sid.* 67. *Bill* verſus *Field*. See 2 *Cro.* 58. *Hollis* verſus *Briſtow*. *S. P.* 1 Lev. 52.

11. The Defendant was *indicted*, for that he *ſcandaloſe & contemptuoſe propalavit & publicavit verba ſequentia* (viz.) *none of the Juſtices of the Peace do underſtand the Statutes for the Exciſe, unleſs G. D. and he underſtands but little of them, no, nor many Parliament Men do not underſtand them*, &c. adjudged, that a Man might be bound to his Good Behaviour, but cannot be indicted for theſe Words. 1 *Vent.* 16. *The King* verſus *Burford*.

12. Caſe, *&c.* in which the Plaintiff declared, that he was *Chancellor to the Biſhop*, and ſtood for Parliament Man, and that the Defendant ſaid, *There goes your rare Chancellor to ſuborn Witneſſes to ſwear againſt the Parſon*; not actionable, for the firſt Words are only a Deſcription of his Perſon, and thoſe which follow do not relate to *his Office*; ſo to ſay a Man is forſworn is not actionable, Mod. Caſes 200.

tionable, and *Suborning* is not a Crime abſtractedly in it ſelf, but as it relates to Perjury, for there can be no Subornation but where there is Perjury. 2 *Salk.* 696. *Walmſley* verſus *Ruſſel.*

(c)

Where it lies for Words ſpoken of Men of Profeſſions, as Lawyers, Attornies and Parſons, &c.

1. THE Defendant ſpoke of a *Clerk of the King's Bench, You are known to be a corrupt Man, and to deal corruptly*; actionable, for the Words imply, that he dealt corruptly in his Profeſſion. 4 *Rep. Birchley's* Caſe.

Goldſ. 126. Moor 409. 2. *ſſ.* The Defendant ſpoke of a *Steward of a Court and a Barreſter, I marvel you will have ſuch a paultry Lawyer for your Steward, for he hath as* * *much Law as a Jackanapes*, by Reaſon whereof he loſt his Stewardſhip, actionable. *Owen* 13. *Palmer* verſus *Bowyer.*

* Poſtea 30. S. P. 3. ſſ. *Is Martin your Attorney, he is the fooliſheſt and ſimpleſt Attorney towards the Law, and if he do not overthrow your Cauſe I will give you my Ears, he is a Fool and an Aſs, and ſo I will prove him. Goldſ.* 128. *Martin* verſus *Burling.* Actionable.

4. Of an Attorney: He will overthrow his Client's Cauſe; actionable. *Cro. Eliz.* 594. *Tiſdale* verſus *Bedington.*

5. Of an Attorney: *He is the falſeſt Knave in the World, and by God's Blood he will cut thy Throat*; actionable. *Moor* 61.

6. *Caſe* for Words ſpoken of *Attorney, John Jenkinſon* (the Plaintiff) *deſerveth to have his Ears nailed to the Pillory*; actionable. *Paſch.* 37 *Eliz. Moor* 401. *Jenkinſon* verſus *Wray.*

2 And. 40. 7. *Caſe* for theſe Words ſpoken of a *Barriſter* at Law and Reader, *(viz.)* one told the Defendant, that the Plaintiff *Hele* affirmed upon his Credit, that the Fee-ſimple of ſuch Lands was in the Grantees of the King, whereupon *Giddy* the Defendant replied, *No, Friends, Hele's Warrants we know well, a great Number in this Country truſting to his Warrants have been undone*; upon Not guilty pleaded, the Plaintiff had a Verdict and 100 *l.* Damages, and upon a Writ of *Error* brought in the *Exchequer-Chamber*, the Judgment was affirmed, for the Words are actionable. *Moor* 695. *Giddy* verſus *Hele. Trin.* 33 *Eliz.*

8. ſſ. *Brown is a good Attorney, but he will play on both Sides*; actionable, but no Judgment entered, becauſe the Plaintiff did not aver the Words were ſpoken of himſelf. *Brownl.* 5. *Brown* verſus *Hool.*

Moor 867 Brownl. 17. 9. The Defendant ſpoke of an *Attorney:* ſſ. *Thou art a common Maintainer of Suits and a Champertor, and I will have the thrown over the Bar*; actionable, by Reaſon of the Word *Champertor. Hob.* 117. *Box* verſus *Barnaby.*

Poſtea 13. S. C. 10. Of a *Barreſter,* ſſ. *A Fool, an Aſs, an Hangman, a Counſellor at Law, a Fool in the Profeſſion*; actionable. *Poph.* 207. *Cary's* Caſe.

11. *Of an Attorney:* ſſ. *Thou art a paltry Fellow, thy Credit is fallen, for thou dealeſt on both Sides, and doſt deceive many who truſt thee*; actionable, tho' an Attorney may lawfully *deal on both Sides* as an Arbitrator, yet by taking all the Words together it ſhall be intended they were ſpoken in the *worſt Senſe. Yelv.* 32. *Shire* verſus *King.*

12. The Defendant ſpoke theſe Words of an *Attorney* to his Client, *your Attorney is a bribing Knave, and hath taken* 20 l. *of you for a Bribe to cozen me*; adjudged actionable. *Moor* 855. *Yardley* verſus *Ellis. Hob.* 9. *S. C.*

Hob. 116. * Antea 9. S. C. 13. *Caſe* for theſe Words ſpoken of an *Attorney, Thou art a common Maintainer of Suits, and a* * *Champertor, I will have thee thrown over the Bar next Term*; actionable. *Moor* 867. *Cox's* Caſe.

Godb. 157. 14. *Caſe,* in which the Plaintiff declared, that he was *Steward* of a Court, *&c.* and alſo *Town-Clerk* of *Plymouth,* and that the Defendant ſpoke theſe Words of him, (viz.) He is a *Preciſian, Puritan, diſſembling, bribing,* and a *corrupted Knave*; upon Not guilty pleaded the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that the Words are not actionable, becauſe there was no *Colloquium* laid of the Plaintiff, or of his Offices of Steward and Town-Clerk; but the Plaintiff had Judgment. 2 *Roll. Rep.* 23. *Powell* verſus *Cole.*

15. The Defendant diſcourſing of *Stone the Lawyer,* ſaid, this is a *counterfeit Warrant made by Stone,* it was a Warrant to the Sheriff to arreſt another; actionable. 2 *Roll. Rep.* 266. *Stone's* Caſe.

16. *ſſ.* The Defendant ſpoke of an *Attorney:* ſſ. *He is a common Barretor, a Judas, and a Promoter*; and at another Time, *He is a common Barretor, a Cheater, and I will make him be barred of his Practiſe*; the Words muſt be taken according to the Quality and Condition of the Plaintiff; adjudged actionable. *Cro. Car.* 139. *Tailour* verſus *Starkey. Hutt.* 104. *Cro. Car.* 406. *Reynolds's* Caſe. *Moor* 180. *S. P.*

* Antea (a) 3. S. P. 17. *ſſ.* Words ſpoken of an *Attorney:* ſſ. *He is a Coſener and* * *coſens his Clients in the Sheriffs Court of London*; the Judgment affirmed in *Error. Cro. Car.* 190. *Mead* verſus *Perkins.*

18. Of an Attorney: ſſ. *I marvel you will employ ſuch a Knave as Nicholls, you will have but Diſgrace and Diſcredit in employing him, he is proclaimed Knave in a Market*; the Judgment for the Plaintiff affirmed in *Error. Cro. Car.* 331. *Nicholls* verſus *Webb.*

19. Of a *Doctor of Phiſick*, ſſ. *Thou art a drunken Fool, and an Aſs, thou never wert a Scholar, and art not worthy to ſpeak to a Scholar, and that I will prove and juſtify*; actionable. *Cro. Car* 196. *Cawdry* verſus *Highley*, and *Godb.* 441. *S. C.* *Of a Surgeon, that he poiſoned the Wound; actionable.* 1 And. 268. W. Jones 450. Winch 40. Poſtea 34. W. Jones 266.

20. Of a *Barriſter*, ſſ. *He is a Dunce, and will* get little by *the Law, he was ever acounted but a Dunce in the Middle-Temple*; actionable. *Cro. Car.* 278. *Peard* verſus *Johns.*

21. Of an *Attorney*, ſſ. *He is a very baſe Rogue, and a cheating Knave, and doth maintain himſelf, his Wife and Children by Cheating*; the Judgment for the Plaintiff affirmed in Error. *Cro. Car.* 570. *Ireland* verſus *Blockwell.*

22. Of a Doctor *in Divinity*, ſſ. *Doctor Sibthorp is robbing the Church*, and at another Time, *Doctor Sibthorp hath robbed the Church*; actionable. *Cro. Car.* 301, 417. *Dr. Sibthorp's* Caſe. See *antea* (W.) 20.

23. ſſ. Of a *Barreſter* (viz.) *William Gibbs hath done Falſe by me, being his Client, and hath joined with my Adverſary*, the Plaintiff averring, that he was a Practitioner. *Style* 283. *Gibbs* verſus *Price.*

24. *ſſ.* Of an *Attorney*, *He hath forged the Will of W. R.* Upon Not guilty pleaded, the Plaintiff had a Verdict; adjudged actionable. *Hutt.* 29. *Cardinal's Caſe.*

25. The Defendant *Harriſon*, who was a *Batchelor in Divinity*, came to the Common Pleas, where *Juſtice Hutton* was ſitting, and ſaid, *I accuſe Juſtice Hutton of High Treaſon*, for which Words an Action was brought by the Judge, and he had a Verdict, and 10000 *l.* Damages. *Hutt.* 131. *Hutton* verſus *Harriſon.* See *antea* (W.) 13.

26. Of an *Attorney*, ſſ. *He ſtirreth up Men to Suits*, and *promiſeth, that if he doth not recover for them* he will *have no Fees*, *&c.* actionable, for the Words tend to ſlander the Plaintiff in his Profeſſion, by ſtirring up Suits unlawfully. *Styl* 184. *Smith* verſus *Andrews.*

27. *Of an Attorney, ſſ.* There being a *Colloquium* of him laid, the Defendant ſpoke theſe Words, *Go tell the Lawyer, that he is a baſe Raſcal*, and that I *will have him looſe his Ears*, and teach *him, or any Lawyer of them all, how they dare ſerve a Writ on me*; actionable, by Reaſon of the Words, *I will make him looſe his Ears. Latch* 220. *Trowbridge* verſus *Hart.* Ley. 70. *By the Name of* Roberts v. Lord.

28. *Caſe*, *&c.* in which the Plaintiff declared, that he was an *Attorney*, *&c.* and that the Defendant ſaid to him, *You are a Knave, you were Attorney to my Mother, and for my Mother againſt my Husband, and made him ſpend* 100 *l. and ſuch Knaves as you have made my Husband ſpend all his Eſtate*; after a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that here was no *Colloquium* laid of the *Plaintiff's Profeſſion*, ſo that the Word *Knave* could not be applied to his being an *Attorney*; but the better Opinion was, that the ſubſequent Words ſhew, that the Word *Knave* was intended in his Profeſſion, and therefore a *Colloquium* of it was not neceſſary. *Allen* 13. *Hilton* verſus *Plater.*

29. *Caſe*, *&c.* in which the Plaintiff declared, that he was inſtituted and inducted into a Parſonage in, *&c.* and that he executed the Office of a Paſtor in that Church for the Space four Years, and that the Defendant ſaid of him, *You are a Drunkard, a Whore-Maſter, a Common Swearer, and a Common Lyar, and you have preached falſe Doctrine, and deſerve to be degraded*; after a Verdict for the Plaintiff, it was objected, that the Words are not actionable, becauſe they impute no Civil or * Temporal Damage to the Plaintiff; but adjudged actionable, for if true, he may be degraded, and ſo looſe his Freehold. *Allen* 63. *Dodd* verſus *Robinſon.* * Poſtea (d) 3.

30. *Caſe*, *&c.* for theſe Words ſpoken of an *Attorney*, *He hath no more* * *Law then Mr. C.'s Bull:* After a Verdict for the Plaintiff, it was objected, that the Words were not actionable in themſelves, and if they were, 'tis not averred, that Mr. *C.* had a Bull; but adjudged actionable, without that Averment. *Sid.* 237. *Baker* verſus *Morfue.* * Antea 2. S. P.

31. Caſe, *&c.* in which the Plaintiff declared, that he is an *Attorney*, and that the Defendant and *T. P.* had Diſcourſe of the Plaintiff and his Profeſſion, and that he (the Defendant) ſaid of the Plaintiff, in the Hearing of ſeveral People, *Thou canſt not read a Declaration*, by Reaſon whereof *T. P.* and *R. W.* who were formerly his Clients deſerted him. Upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment. *Raym.* 196. *Jones* verſus *Powell.* 1 Mod. 272. 1 Vent. 98. Poſtea (d) 11. S. C.

32. Information for Writing a ſcandalous *Letter* to *Hatton Rich*, who owed the Defendant 300 *l.* and he delaying the Payment, and going into the King's Bench, the Defendant, *Sanders*, wrote this Letter to him, That if he had any *Honeſty, Civility, Sobriety, or Humanity, he would not deal ſo by him, and that he would one Day be damned and in Hell for Cheating him*; then the Information ſets forth, that he **publiſhed* this Letter in the Preſence of many People: Upon Not guilty pleaded, there was a Verdict for the Informant, and it was moved in Arreſt of Judgment, that the Subſtance of this Letter is not ſcandalous, but impertinent, and ſhewed only his Senſe of the Injury done him in not paying what was due to him; but adjudged, that the Letter is ſcandalous, and tends to incenſe *Mr. Rich* to break their Peace, and therefore an Information lies, and *Sanders* was fined forty Marks. *Raym.* 201. *The King* verſus *Sanders.* Antea (a) 10. (c) 34. * 1 Mod. 58. S. P.

33. *Caſe*, *&c.* for theſe Words ſpoken of a *Parſon*, who was about to be retained Chaplain to the Duke of *Ormond*, (viz.) *He hath a Baſtard on the other Side of the River, and 'tis ſo certainly his that I fear not to devulge it, and if I am troubled for it, I will juſtify it*, whereby he loſt his Chaplainſhip: After a Verdict for the Plaintiff, it was objected, that the Chaplainſhip was Spiritual; but adjudged, that his Preferment was Temporal. 1 *Lev.* 248. *Pain* verſus *Bewmorris.* Sid. 376.

Antea (a) 10. 34. *Case, &c.* for that the Plaintiff being bred up to the *Law*, and Practising it, the Defendant did *falso & malitioſe write a* * *Letter to* Anne *Counteſs of* Lincoln, who was his (the Plaintiff's) Client, that the Plaintiff *would give vexatious and ill Counſel, and ſtir up a Suit*, and that he (the Plaintiff) *would milk her Purſe, and fill his own Large Pockets*, *per quod* he loſt the ſaid *Counteſs* and other Clients: After a Verdict for the Plaintiff, and a Motion in Arreſt of Judgment, *Vaughan* held theſe Words were not actionable; that in antient Books no Words were actionable, unleſs the Slander concerned Life; that the Growth of theſe Actions would ſpoil all converſe, for they extend to all Profeſſions; that theſe Words relate no more to the Plaintiff's Profeſſion than to ſay, that *he had a little Head*; for every Counſel gives vexatious and ill Advice, when he adviſes an Action which proves unſucceſsful, becauſe the Party is amerced *pro falſo clamore*, and to ſay, that all Words together make a Slander, is to Reaſon *a male diviſis ad bene conjuncta*, which is never allowed; 'tis true, to ſay, that he had the *Uſe of a Woman's Body*, is actionable, it being an *Idiom* of Speech that he *lay with her*; but to ſay he will *milk your Purſe*, ſignifies no more than *milking a Bull*, if we take the Words *enunciatively*, for this Phraſe is not come to an *Idiom*; but the other three Judges held, that the Words were actionable. 2 *Vent.* 28. *Ring* verſus *Sir Edw. Lake.* 1 *Saund.* 131. *S. C.*

Antea 21. 35. *Caſe, &c.* by an *Attorney*, for theſe Words, *He is a* * *cheating Knave, and not fit to be an Attorney:* After a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Words did not relate to his Practiſe, and that he had not laid any Communication of his Poſſeſſion; but adjudged actionable, for ſaying, *he was not fit to be an Attorney*, ſhewed, that the preceding Words, *cheating Knave*, muſt neceſſarily refer to his Profeſſion as an Attorney. 2 *Vent.* 172.

(d)

Where it will not lie for Words ſpoken of Men of Profeſſions.

1. OF *a Phiſician*, ſſ. *He hath killed me with Phiſick*; not actionable; but to ſay, that he *ſcienter & voluntarie* did adminiſter Phiſick to one to kill him; actionable. *Cro. Eliz.* 620. *Poe* verſus *Dr. Montford.*

2. *Of a Preaching Parſon*, ſſ. *Parrat is an Adulterer, and had two Children by B. G.'s Wife*, and I will *cauſe him to be deprived for it*; not actionable, for 'tis a * *Spiritual Defamation*, and puniſhable in that Court. *Cro. Eliz.* 502. *Parrat* verſus *Carpenter.*

* Antea (c) 30.

3. *Caſe, &c.* for theſe Words ſpoken of a *Lawyer:* The Plaintiff being of Counſel for the Defendant, he, the ſaid Defendant, ſpoke theſe Words, That the Plaintiff *had delivered Copies of his Evidence to his Adverſary*; not actionable, becauſe he might deliver them to a good Intent, as well as a bad one. *Moor* 409. *Stone* verſus *Mountford.*

4. Of a Barriſter, *(viz.) You are a Paltry Lawyer, and uſe to play on both Hands*; not actionable. 2 *Cro.* 267. *Rich* verſus *Holt.*

Godb. 287. 5. *Caſe, &c.* in which the Plaintiff declared, that he was educated in the Study of the *Mathematicks*, and for ſeveral Years had been employed by his Neighbours, and others, in Meaſuring Land, and that at ſuch a Time and Place, there being a Diſcourſe between him and the Defendant, concerning his (the Plaintiff's) Profeſſion and Art aforeſaid, he (the Defendant) did then and there ſay to him (the Plaintiff) *Thou art a Cozener and a cheating Knave, and that I can prove, &c.* Upon Not guilty pleaded, the Plaintiff had a Verdict, and upon a Motion in Arreſt of Judgment, it was agreed by the Court, that if theſe Words had been ſpoken of one who got his Living by a Trade or Manual Occupation, as of a *Shoemaker, Baker, &c.* the Action would not lie, becauſe the Goodneſs or Defects of their Wares might be ſeen, and it was the Folly of the Buyer, that he was deceived in what he might have ſeen; but that a *Land-meaſurer* was an artificial Labour, and his Deceit could not be perceived but by Men of Skill and Art; but if the Words had been ſpoken of a *Common Meaſurer, (viz.)* of one who Meaſures by the Rod, an Action would not lie, becauſe every Husbandman could Meaſure after that Manner; not adjudged. 2 *Roll. Rep.* 72. *London* verſus *Eaſtgate.*

1 Bulſt. 16. 6. *Caſe, &c.* in which the Plaintiff declared, that he had been an Attorney *diverſis Annis jam elapſis*, and that the Defendant malitiouſly ſpoke theſe Words of him, *(viz.) He is a forging Knave:* After a Verdict and Judgment for the Plaintiff in *C. B.* and a Writ of *Error* brought in *B. R.* it was objected, that the Word *Forging* is *adjectively* ſpoken, and therefore the Action will not lie, unleſs it appear, that the Plaintiff was an Attorney at that Time, which did not appear in this Caſe; for it was ſaid, that he was an Attorney *pro diverſis Annis elapſis*, which might be thirty Years ſince, it ſhould have been *ultimo elapſis*; but as he had declared, he might be an Attorney long ſince, and not at the Time of the Words ſpoken, and the Words in themſelves do not import a Scandal in his Profeſſion; and for this Reaſon the Judgment was reverſed. 2 *Roll. Rep.* 84. *Moor* verſus *Symms.*

1 Cro. 536. * 2 Leon. 171. S. P. Middlemore's *Caſe*; *but it doth not appear of what Profeſſion the Plaintiff was in that Caſe.*

7. *Caſe, &c.* for theſe Words ſpoken of a *Scrivener, He is a baſe Rogue, a* * *cozening Rogue, a Coney-catching Rogue, and Cut-purſe Rogue:* After a Verdict for the Plaintiff, the Judgment was ſet aſide, for that the Words are not actionable, becauſe a *Scrivener* is not a Profeſſion ſo much regarded in Law, as to enable him to maintain an Action for calling him by ſuch adjective Names. 2 *Roll. Rep.* 91. *Brett* verſus *Trevilian.*

8. The

8. The Plaintiff declared, that the Defendant to defame him, being a Merchant, did ſay, *De præfat' the Plaintiff*, (viz.) *He, innuendo* the Plaintiff, is a *Bankrupt*; adjudged, that if theſe Words, *de præfat' the Plaintiff* had been left out, the Plaintiff could never have Judgment, for by the *Innuendo* there is not a ſufficient * Certainty of whom the Words were ſpoken. 2 *Roll. Rep.* 243. *Scutt* verſus *Hawkins*. Antea (Z) 15.

9. There was a Suit in the *Star-Chamber* between the Company of Woodmongers and Carmen, and *Serjeant Richardſon* being retained for the Carmen, ſaid, *That he did know of his own Knowledge, that the Company of Woodmongers had ſet up Engine-Cars, machinans & intendens deceptionem, &c. Curiæ Domini Regis*, and to ſcandalize the ſaid Company, all which was found by the Jury upon an Indictment exhibited againſt him upom the Statute *Weſtm.* 1. *c.* 29. and they likewiſe found that the Company did not ſet up any Engine-Carrs; it was moved, that this Indictment was inſufficient, becauſe it was never intended by that Statute to puniſh a Pleader for Words ſpoken in his Clients Cauſe, but for ſome Act done in Pleading by Colluſion or Deceit to inveigle the Court; and *Juſtice Dodderidge* ſaid, that he never ſaw but one Indictment upon this Statute, and that was in the Reign of *Edw.* 1. and it was upon Pleading, and not for bare Words; the Indictment was quaſhed. *Palm.* 287. *Serjeant Richardſon's* Caſe.

10. *Caſe, &c.* for theſe Words ſpoken of an Attorney of *B. R. You are a Knave on Record, and a Forgery Knave*; the Opinion of the Court, as reported by *Palmer*, that theſe Words are not actionable. *Palm.* 441. *Daubny* verſus *Martin*. Poph. 177. Latch 20.

11. *&c.* for theſe Words ſpoken of an *Attorney*, (viz.) *That he could not read a Declaration*, by Reaſon whereof his Clients left him; the Court inclined not actionable, unleſs the Words had imported ſome Slander concerning his Knowledge in his Profeſſion, for the Allegation of Damages would not maintain the Action; and 'tis very probable, that a Declaration might be wrote in ſuch a Hand that a Man might not read it. 1 *Vent.* 98. *Jones* verſus *Powell*. 1 *Lev.* 297. *S.C. Raym.* 196. *S.C.* 1 *Mod.* 272. *contra*. Antea (c) 31. S. C.

12. *Caſe, &c* for theſe Words ſpoken of an *Attorney*, ſſ. *You are a Presbyterian, and deſign to Practice againſt the King and his Intereſt*; the Defendant demurred to the Declaration, and had Judgment, for *per Curiam*, the Words are not actionable. *T. Jones* 23. *Paine* verſus *Verdon*.

(c)

Where it lies for Words ſpoken of Tradeſmen, Merchants, &c. and other Occupations.

1. ſſ. *William Kemp will be within theſe two Days a Bankrupt*; actionable. *Dyer* 72.

2. ſſ. Of a *Gentleman* trading in Lead in *Derbyſhire*, (viz.) *He is an Bankrupt, and is not able to pay his Debts, but will run his Country*; actionable. *Allen* verſus *Smith. Hutt.* 46.

3. Of a *Merchant*, being an *Alien* born (*viz.*) *Tirſot is a Bankrupt*; actionable. 1 *Bulſt.* 134. *Tirſot* verſus *Merne*. *S. C. Yelv.* 198. *Tuerloot* verſus *Morriſon*.

4. *ſſ.* Of a *Dyer*, Thou art a *Bankrupt Knave*; actionable, tho' two Subſtantives; but if it had been *Bankruptly Knave*, otherwiſe. 2 *Cro.* 345. *Selby* verſus *Carrier*. *Poſtea* (n) 2. *Palm.* 151. *Squire* verſus *Jones*. 2 *Cro.* 585. *S. C.* 1 Roll. Rep. 21. S. C.

5. *ſſ.* Of a *Merchant*, *He is a Bankrupt Slave*; actionable. 2 *Cro.* 578. *Uſher* verſus *Betts*.

6. Of a *Shoe-maker*, He is a *Bankrupt Rogue*; actionable, for tho' it was inſiſted, that the Word *Bankrupt* is but an Adjective to Rogue, and ſo 'tis extenuated; yet it was adjudged, that the Addition of the Word Rogue to Bankrupt doth aggrivate it; and that a Shoe-maker is within the Statute of Bankrupts, for he gets his Living by Buying and Selling. *Hutt.* 52. *Cro. Car.* 21. *Cramp* verſus *Barnes*. *Poph.* 184. *Barker* verſus *Ringroſe*, *S. P.* and *Hawkins* verſus *Cutts*. *S. P.*

7. ſſ. Of a *Midwife*, (viz.) *Many have periſhed for her want* of Skill; actionable. *Cro. Car.* 153. *Flower's* Caſe.

8. ſſ. Of a *Merchat*, (viz.) *He is not worth a Groat, he is* 100 *l. worſe than naught*. *Cro. Car.* 193. *Goodyear* verſus *Biſhop*, and * *Leycroft* verſus *Danker*, 231. and *Daw* verſus *Palmer*. *Hutt.* 125. *S. P.* *W. Jon. 321. Poſtea 11.

9. ſſ. Of a *Merchant*, (vix.) *Thou art a Rogue and a beggarly Fellow, and I will prove thee a Bankrupt before next Term*, and at another Time he ſaid to one *Harris*, *Truſt him not for* he will be thy Undoing; actionable. *Cro. Car.* 171. *Jackſon* verſus *Tanner*.

10. ſſ. Of a *Merchant* (viz.) *He is a cheating Knave, and hath cheated his Father, by returning* 20 *l. for Wares*; actionable. *Cro. Car.* 413. *Arundell* verſus *Mare*.

11. Caſe, &c. *Thou cameſt a broken Merchant from Hambrough into England*; actionable, for 'tis the ſame as to ſay he is a Bankrupt. *W. Jones.* 321. *Leycroft* verſus *Bumkin*.

12. There was to be a Trial at *Guild-Hall*, between one *Buxton* and another, Plaintiffs, and *Johnſon* Defendant, who was likewiſe a Merchant, and the Day before the Trial, one *Bolton* diſcourſing with the now Defendant *Lemman*, asked him, Will you be at the Trial to Morrow between *Buxton and Johnſon*, who replied, *Johnſon is broke, I warrant you he dares not be there*; adjudged actionable. *Palm.* 63. *Johnſon* verſus *Lemman*. 2 Cro. 562. 2 Roll. Rep. 144.

13. ſſ.

13. ſi. *Copartners in Trade*, and one ſaid of the other, *You are a cozening Knave, and did cozen me of* 1200 *l. at one Time, and that was in making an Accompt in the Year* 1648. actionable, tho' the Accompt being Partners is a Private Thing. *Style* 388. *Townſend* verſus *Barker.*

14. *Caſe* for theſe Words ſpoken of *Malſter*, wherein the Plaintiff laid a *Colloquium* of his Trade; the Words were, *Have a Care of him, and do not deal with him, he is a Cheat and will cheat you, he has cheated all the Farmers at Epping, and dares not ſhew his Face there, and now he is come to cheat at Hatfield:* Upon Not guilty pleaded, a ſpecial Verdict found all theſe Words, but there was no *Colloquium* of his Trade; adjudged, that the Words ſupply the *Colloquium*, ſo they appear to be ſpoke of his *Trade.* 2 *Lev.* 62. *Reeves* verſus *Holgate.*

15. Three Years before the laſt Caſe, an Action was brought by a *Draper* for theſe Words, *You are a cheating Fellow, and keep a falſe Book, and I will prove it:* Upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe the Plaintiff did not alledge, that there was any *Colloquium* of his Trade, or of his Buying and Selling at the Time when the Words were ſpoken; for to ſay a Man is a *cheating Fellow*, it doth not follow that he is ſo in his Trade, for he may cheat at Gaming, and not in his Dealing, and the Words being General, may as well be applied to that as to his Trade; and the keeping a *falſe Book* doth not imply, that the Defendant kept a *falſe Debt-Book*, for he might have a Book which is *falſe* printed, as well as a *falſe Debt Book.* 2 *Saund.* 307. *Todd* verſus *Haſtings.*

1 Lev. 65. 16. *Caſe, &c.* for theſe Words, *(viz.) Orton ſays, I am a perjured Knave*, but *he is a perjured Knave as well as I, for he and Feild ſwore for one another:* After a Verdict for the Plaintiff, it was moved, that this was no poſitive Charge that the Plaintiff was perjured, but only by Relation, *(viz)* That *he was perjured as well as the Defendant*; but adjudged for the Plaintiff. *Raym.* 51. *Orton* verſus *Fuller.*

17. *Caſe, &c.* for Words of a *Broker*, ſpeaking of his Profeſſion, *he is a cheating Knave, he hath cheated me with Braſs Money*; adjudged, that to call a Tradeſman a *Cheat* generally, an Action will not lie, but if you ſpeak of his Trade, it will lie. *Raym.* 62. *Davis* verſus *Jones.* See *Gettings* verſus *Redſeames. Hutt.* 13. *S. P.*

18. *Caſe, &c.* by a *Merchant* for theſe Words, there being a Communication of him, the Defendant ſaid, *I believe all is not well with Daniel Vivian, there are many Merchants that have lately failed, and I expect no otherwiſe of Daniel Vivian*: After a Verdict for the Plaintiff, the Words were held actionable. *Raym.* 207. *Vivian* verſus *Willet.*

1 Lev. 115. 19. *Caſe, &c.* in which the Plaintiff declared, that he is a *Lime-burner, &c.* and gets his Living by Buying and Selling *Lime*, and that the Defendant ſpoke of him (the Plaintiff) *in arte ſua*, ſi. *John Terry is a Run-away, and a cheating Rogue:* Upon Not guilty pleaded, the Plaintiff had a Verdict, it was moved in Arreſt of Judgment, that the Defendant did not ſpeake thoſe Words as relating to the Trade of *Lime-burning*, but generally *de arte ſua*, and he may have another Trade; but adjudged, that tho' in antient Times it was the conſtant Courſe to lay a *Colloquium* in Declarations for Words, and it was a Doubt, whether it was good without it till the Caſe of *Smith and Ward*, 2 *Cro.* 673. yet in that Caſe it was reſolved, that to alledge the Words to be ſpoken *de querente* ſupplied the *Colloquium*, and in the principal Caſe the Words are alledged to be ſpoken *de arte ſua*, which is applicable to his Profeſſion. *Raym.* 86. *Terry* verſus *Hooper. Levinz* ſays the Court was divided.

1 Lev. 250. 20. Caſe, in which the Plaintiff declared, that he is a *Mercer*, and that the Defendant ſpoke theſe Words, *Thou art a cheating Knave, and a Rogue:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that here was no *Colloquium* laid of his Trade; the Judgment was ſtaid. *Raym.* 169. *Smedley* verſus *Heap.*

Sid. 424 1 Lev. 276. 21. *Caſe* brought by a Merchant for theſe Words, *Auſtin Drake is broke, he is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts:* Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that theſe Words are not actionable, for he may be an honeſt Man, and not worth a Groat, and to be a beggarly Fellow is no Crime, for it imports, that he was a poor Man, and that is not a Fault, but a Misfortune; but the Plaintiff had Judgment, becauſe to ſay, *he is not able to pay his Debts*, is actionable. *Raym.* 184 *Drake* verſus *Hill.*

22. *Caſe, &c.* in which the Plaintiff declared, that he is Keeper of a *Livery Stable*, and of *Belſavage-Inn*, and that the Defendant had other Stables in the ſame Yard, and that *T. P.* coming with a Waggon into the Yard, and enquiring of the Defendant, which was *Belſavage-Inn*, the Defendant replied, *This is Belſavage-Inn, deal not with Southam (the Plaintiff) for he is broke, and there is neither Entertainment for Man or Horſe:* After a Verdict for the Plaintiff and great Damages, the Judgment was affirmed. *Raym.* 231.

23. Caſe, *&c.* in which the Plaintiff declared, that by Buying and Selling Wares, *uberrimam ſibi & familiæ acquiſivit vivendi ſuſtentationem*, (without mentioning any *Trade*) and that the Defendant ſaid of him (the Plaintiff) *Thou art a pittiful, beggarly, broken Fellow:* After a Verdict for the Plaintiff, it was objected, that the Plaintiff did not alledge, that he was of any Trade; but this Objection was over-ruled, and the Plaintiff had Judgment. *T. Jones* 140. *Peacock* verſus *Leech.*

24. Caſe, *&c.* in which the Plaintiff declared, that he is a Renter of Lands, and that he had gained great Profit by Buying and Selling *Wheat, Barley, &c.* and that the Defendant ſaid theſe Words of him, *(viz.) He hath cheated in Corn:* After a Verdict for the Plaintiff, it was held *per Curiam*, that the Words are not actionable, and that the Words of Inducement were only a

Deſcription of a *Farmer*, and if they ſhould be actionable, every Farmer would be entituled to the like Action. *T. Jones* 156. *Fox* verſus *Lapthorn*.

25. *Caſe, &c.* in which the Plaintiff declared, that there being a Communication of his Trade, the Defendant ſaid *He was a cheating Knave and kept a falſe Debt-Book, with which he cheated the Country*; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that to ſay of a Tradeſman, he is a *cheating Knave*, tho' there was a *Colloquium* of his Trade, is not actionable, becauſe it may be intended he ſold his Goods too dear, and ſo cheated the Buyer in the Price; and to ſay he *kept a* * *falſe Book* is not actionable, becauſe he may keep ſuch a Book, not knowing it to be falſe; but adjudged, that the Words taken altogether are actionable, for Tradeſmen's Books are often given in Evidence, and therefore they ought not to be falſe. 1 *Vent.* 263. *Crawford* verſus *Dale*. * Poſtea (f)

26. *Caſe* for theſe Words ſpoken of a Merchant who made a *Bone-fire* at his Door when King *James* the Second came to the Crown, *(viz.) He is a Rogue, a Papiſt Dog, and a pittiful Fellow, and never a Rogue in Town had a Bone-fire before his Door but he*; after a Verdict for the Plaintiff, and 500 *l.* Damages, a Writ of Error was brought; but *per Curiam*, the *Words are actionable*. 3 *Mod.* 103. *Peak* verſus *Meker*.

27. *Caſe, &c.* for theſe Words ſpoken of a *Farmer, He owes more Money than he is worth, he is broke and run away*; after a Verdict for the Plaintiff, *per Curiam*, the Words are actionable. 3 *Mod.* 112. *Dobſon* verſus *Thorniſtone*.

28. Caſe for theſe Words ſpoken of a *Carpenter*, He is broke and run away, and will never return again; the Court was divided, ſo the Plaintiff had Judgment. 3 *Mod.* 155. *Chapman* verſus *Lamphire*. *See* Latch 114.

(f)

Where it will not lie for Words ſpoken of Tradeſmen, Merchants, &c.

Godb. 243. Moor 409.

1. HIS *Son Brooks hath deceived me in a Reckoning for Wares, and his Debt-Book which he keepeth for Sale of his Wares in his Shop, is a* * *falſe Debt-Book, and I will make him aſhamed of his Calling*; not actionable. *Brownl.* 4. *Brook* verſus *Clarke*. * Antea (E) 25.

2. The Plaintiff declared, that for many Years paſt *fuit mercator, &c.* and the Defendant ſaid, *Thou art a beggarly Knave and a Bankrupt*; it was doubted whether actionable, becauſe he did not alledge that he was a Merchant at *the Time the Words* were ſpoken. *Cro. Eliz.* 794. *Dears* verſus *Ford*.

3. *He hath broken twice, and I will make him break again*; not actionable, becauſe the Plaintiff did not name himſelf of any *Trade*. *Cro. Car.* . *Hutton* verſus *Boreman*. *Dalliſon Rep.* 170. *S.P.*

4. ſſ. *Coſening Knave*, not actionable. See *Antea* (Z) 19.

5. ſſ. *Half Knave*, not actionable. *Walcot* verſus *Hind. Hutt.* 14. See *Antea* (Z) 21.

6. To call a Man *pilfering Merchant*; not actionable. *Charter* verſus *Hunter, Hutt.* 14. *You are a* * *filching Fellow, for you ſtole* 5 *l. from T. S.* for to filch is to get Money craftily, and the ſubſequent *Steal* ſhall be taken *in mitiori ſenſu*. *Palm.* 29. *Bradſhaw* verſus *Walker*. *Hutt. 34.

7. Caſe by an Inn-keeper againſt the Defendant, for calling him (the Plaintiff) *Caterpillar, for he liveth by Robbing his Gueſts*; adjudged not actionable. *Moor* 179.

8. *Caſe, &c.* for theſe Words ſpoken of an *Inn-keeper, your Maſter Thomas Clerke did Harbour and Lodge Cut-purſes and Rogues, and did receive ſtolen Goods, and there are yet ſome in his Houſe*; and declared, that by Reaſon of Speaking thoſe Words he loſt his Gueſts; adjudged not actionable, for an Inn-keeper's Houſe being common to all his Gueſts, he may lodge *Cut-purſes, and receive ſtolen Goods*, and not *know them to be ſuch*. 2 *Roll. Rep.* 136. *Clerk*'s Caſe. Godb. 89. 1 Bulſt. 109.

9. *Caſe, &c.* againſt Husband and Wife, in which the Plaintiff declared, that he was a *Freeman of London* and a *Tradeſman*, and that he got his Living by *buying and ſelling Crewel*, and that the Wife, *&c.* ſaid, He (the Plaintiff) *is a Cheater, and hath coſened and cheated my Husband of* 500 *l.* after a Verdict for the Plaintiff and 40 *l.* Damages, the Judgment was arreſted, for that the Words were actionable, becauſe it did not appear that the *Coſening and Cheating* was in any Thing concerning his *Trade*. *W. Jones* 366. *Needler* verſus *Simnell*. Cro. Car. 417.

10. *Caſe, &c.* in which the Plaintiff declared, that he was a *common Brewer*, and that the Defendant, upon a Diſcourſe, which he had with another concerning the Plaintiff, ſaid theſe Words of him, *I will give my Mare a Peck of Malt, and give her Water after it, and ſhe ſhall piſs as good Beer as Thomas Fen breweth, (Innuendo*, the Plaintiff) by Reaſon whereof *he loſt ſeveral* * *Cuſtomers*, but mentioned none *in particular*; and that being moved in Arreſt of Judgment, after a Verdict for the Plaintiff the Judgment was reverſed; for the Words are not actionable, without alledging a particular Loſs. *W. Jones* 444. *Fen* verſus *Dixe*. March 59. * Poſtea, 16.

11. *Caſe* for theſe Words ſpoken of a *Diſtiller*, in which the Plaintiff declared, that the Defendant diſcourſing with one *Iles*, asked him of whom he bought *Aqua Vitæ*, who replied, of *Mr. Godfrey* (the Plaintiff); thereupon the Defendant ſaid, *He is a Varlet, he hath ſuppreſſed his Brother's Will, to coſen and deceive Men of their Legacies, we will make him cry* Peccavi *on his Knees, he maketh ſhew of Religion, but is an Hypocrite*; adjudged not actionable, becauſe the Words do not relate to his *Trade*. *Palm.* 21. *Godfrey* verſus *Owen*. Poph. 148.

12. The

12. The Plaintiff being a *Mercer*, declared againſt the Defendant for theſe Words, *(viz.) Thou doſt owe more than thou art worth, and art not able to pay thy Debts*; adjudged not actionable, becauſe the Words do not imply any *Fraud* or *Deceit*, ſo they will not amount to a Bankruptcy within the Statutes, for a Man may owe more than he is worth, and yet be an honeſt Man, and have credit by Friends to ſupport him in Trade. *Style* 213. *Vicary* verſus *Barnes*.

* Poſtea 16. 13. *Caſe, &c.* for theſe Words ſpoken of a *Merchant*, *Thou art a cheating Rogue and a* * *Runnegate Rogue*; after a Verdict for the Plaintiff, adjudged not actionable; for to ſay generally, that a Man is a *Cheater*, is not actionable without a *Colloquium* laid of his Trade or Profeſſion, which was not done in this Caſe. *Hardres* 8. *Wake* verſus *Chapman*.

14. *Caſe, &c.* for theſe Words ſpoken of a Watch-maker, (*viz.*) *He is a Bungler, and knows not how to make a good Piece of Work*; after a Verdict for the Plaintiff, wherein the Jury found that he was a *Watch-maker*, it was objected, that there was no *Colloquium* laid of his *Trade*; 'tis true, if the Words had been, he could not make a *good Watch*, it would have been known what he meant, but here the Words are indifferent and may have no Relation to his *Trade*, the Judgment was ſtayed. 1 *Mod.* 19. *Redman* verſus *Pyne*.

15. *Caſe, &c.* in which the Plaintiff declared, that he was a *Merchant*, and that by his good Name he had the Good-will of his Neighbour, and alſo that by *Buying and Selling* he got *diverſa lucra, &c.* and that the Defendant called him a *Bankrupt*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe it did not appear that he gained his *Living* by *Buying and Selling*; the Judgment was ſet aſide. *Sid.* 299. *Emerſon* verſus *Fairfax*. See *Hutt.* 50. 1 *Bulſt.* 40.

16. *Caſe, &c.* in which the Plaintiff declared, that he for ſeven Years laſt paſt, had lawfully uſed the *Art of Buying and Selling*, and had gained *great Profit* thereby, for the Support of himſelf and Family, and that the Defendant *falſo & malitioſe* ſaid of him (the Plaintiff) *He is a* * *Runnegate, and worſe than a Rogue, and if he had his Deſerts he had been hanged*, whereby he loſt his † Cuſtom, but he did not lay any ſpecial Damage; after a Verdict for the Plaintiff the Judgment was ſtayed, becauſe *Runnegate* is not of the ſame Signification as *Bankrupt*; and here the Plaintiff did not ſet forth what Trade he uſed, it might be of a *Tinkar* or *Pedlar*, who are *Rogues* by the Stat. *Eliz.* ſo the Words not actionable. 2 *Lev.* 214. *Cockaine* verſus *Hopkins*.

* Antea 13.

† Antea 10.

17. *Caſe, &c.* in which ſhe declared, that ſhe was skilled in *Dancing*, and taught young Women to dance, by which *ſhe gained a Livelihood*, and that the Defendant, to injure her, ſaid, *She is as much a Man as I am, ſhe is an Hermaphrodite*, by which ſhe loſt divers Scholars, *but did not mention any in particular*; after a Verdict for the Plaintiff it was adjudged, that the Words are not actionable, for 'tis no Scandal to her Profeſſion to ſay ſhe is an *Hermaphrodite*, for young Women are commonly taught by Men to dance, and here is no ſpecial Damages laid. 2 *Lev.* 233. *Wethered* verſus *Armitage*.

5 Mod. 395. 18. *Caſe, &c.* in which the Plaintiff declared, that he is a *Trader*, and that the Defendant ſpake theſe Words of him, *You are a Cheat, and have been a Cheat for many Years*; not actionable without laying a *Colloquium* of his *Trade*. 2 *Salk.* 694. *Savage* verſus *Robery*.

19. *Caſe* for Words ſpoken of a *Butcher*, in which a *Colloquium* was laid of a *Cow killed by him*, and of the Fleſh of that Cow; and that the Defendant ſaid, *The Cow died with Calving*, by Reaſon whereof he loſt ſuch and *ſuch Cuſtomers*; there was a Verdict for the Plaintiff, *&c.* and upon a Writ of Error brought, the Judgment was reverſed, becauſe the Words in themſelves are not actionable; 'tis true, here are *ſpecial Damages* laid, but yet that will not help, becauſe he did not alledge, that he could *not ſell the Cow*, but only that he *loſt his Cuſtomers*. 2 *Salk.* 695. *Taſſan* verſus *Rogers*.

(g)

Where charging the Plaintiff with falſe Swearing and Perjury, is actionable. See (h) pl. 7. Antea (Y) 7, 8, 11, 27.

1. ſſ. B *Ritteridge is a perjured old Knave*, and *that is proved by a Stake* parting the Lands of *B.* and *R.* there being a Controverſy between two, whether the Stake ſtood upon the Land of the one or the other; and the Plaintiff as a Witneſs depoſed, *&c.* and perjured himſelf in the Depoſitions; if this had been ſet forth, the Words had been actionable. 4 *Rep.* 19. *Britteridge's* Caſe. *Moor* 666. *S. C.* By the Name of *Bridge* verſus *Atkyns*. *Yelv.* 10. *S. C.*

2. ſſ. *Thou didſt ſuborn, procure, and bring in falſe Witneſſes in B. R. at Weſtminſter*; it was found, that he did *procure and bring in falſe Witneſſes*, but he was acquitted of the *Subornation*; adjudged actionable. 1 *Leon.* 101. *Prowſe* verſus *Carey*.

3. ſſ. *Thou waſt forſworn in the Court of Requeſts, and I will make thee ſtand upon the Stage for it*; it muſt be intended in a *Court of Juſtice*, and before the Judges there. 1 *Leon.* 127. *Brook* verſus *Dowley*, and *Foſter* verſus *Thorne*, *ibid.* and 2 *Leon.* 98. *Rymerſly* verſus *Cooper*.

4. ſſ. *Pierce hath taken a falſe Oath in the Court of the Conſiſtory of the Biſhop of Exceſter*; it was objected, that the Action would not lie for Matters in the *ſpiritual Court*; but adjudged actionable. 1 *Leon.* 131. *Peirce* verſus *Howes*.

5. ſſ. *William Crow is forſworn and perjured, in Swearing at the Common Pleas Bar, upon the Deeds which he then had in his Hands*; actionable. *Owen* 13. *Crow* verſus *Carter*.

6. ſſ. *He is perjured, and I will prove him ſo by two Witneſſes*; actionable, and the Judgment affirmed upon *Error in the Exchequer-Chamber. Owen* 62. *Rainer* verſus *Grimſton.*

7. *Thou art a lewd Fellow*, for thou haſt drawn *B. G. to perjury*; actionable, for 'tis as much as to ſay he had ſuborned him to perjury himſelf. *Cro. Eliz.* 899. *Clerk* verſus *Perkins.*

8. *Thou art thrice perjured in thy Anſwer in Chancery to my Bill*; actionable. *Cro. Eliz.* 907. *Poultney* verſus *Wilkinſon.*

9. ſſ. *Thou art a mainſworn Thief*; actionable, tho' not averred, that the Words were ſpoken in the Preſence of them who *underſtood the Meaning*, which in the *North* ſignifies *perjured Thief. Brownl.* 6. *Smaile* verſus *Bell*, and *Slater* verſus *Franks. Hob.* See *Antea* 8. *Hill.* 10 *Jac. Brownl.* 4. *Morton* verſus *Leedall. S. P.* Hob. 126. Poſtea 10. S. P.

10. *ſſ.* The Defendant called the Plaintiff *Idonor*, and he averred that it was ſpoken in the Preſence of them who *underſtood Welſh*, which in *Engliſh* ſignifies *perjured*; actionable. *Hob.* 191. *Gibbs* verſus *Jenkins* and 126, and *Howel* verſus *Evans.* Antea 9. S. P.

11. ſſ. *He hath forſworn himſelf before the Counſel of the Marches of* Wales, *in a Suit I had againſt him there, and I will ſue him for Perjury*; actionable. *Hob.* 283. *Adams* verſus *Flemming.*

12. ſſ. *He* (the Plaintiff) *and one Allen, are perjured Knaves*; actionable. 2 *Cro.* 102. *Turner* verſus *Darcie.*

13. ſſ. *My Brother is perjured*; it was objected, that it was incertain what Brother he meant, for he might have *divers Brothers*; but it being averred, that the Words were ſpoken of the Plaintiff, it was adjudged actionable. 2 *Cro.* 107. *Wiſeman* verſus *Wiſeman.*

14. ſſ. *Thou haſt procured one Smith to come thirty Miles to commit Perjury before my Lord of* Winchester, *and haſt given him* 10 *l. for that Purpoſe*; actionable. 2 *Cro.* 158. *Harris* verſus *Dixon.*

15. ſſ. *Arthur Colome is a forſworn Man, and hath taken a falſe Oath in his Depoſitions at Tiverton, where he waged his Law againſt.* 2 *Cro. Colome's* Caſe.

16. *ſſ.* For Words ſpoken of the Wife, (*viz.*) *Thou perjured Beaſt, I will make thee ſtand upon a Scaffold in the Star-Chamber*; actionable. 2 *Cro.* 613. *Benſon* verſus *Hall.*

17. ſſ. *Old Apthorp is a perjured Knave, for he did ſwear at the Aſſizes, that ſuch a Wood was worth* 40 *s. whereas it was dear at a Marke*; he ought to aver that it was not worth a Mark, otherwiſe not actionable. 3 *Bulſt.* 147, 150. *Apthorp* verſus *Cockerill.* 2 Roll. Rep. 287.

18. ſſ. *Where is this Baker (Innuendo Carolum Baker) he hath taken a falſe Oath, and I could make him look thro' the Pillory*; actionable. 3 *Bulſt.* 72. *Baker's* Caſe. 1 Roll. Rep. 227.

19. ſſ. *Thou art a falſe forſworn Knave, and thou haſt been indicted for Perjury by twelve Men, and haſt compounded for the ſame*; it was objected, that the Words are too general, and an Indictment is but an Accuſation, and may be compounded for juſt Cauſe; but adjudged actionable. 3 *Bulſt.* 304. *Gibert* verſus *Rodes.*

20. *ſſ.* There being a *Colloquium* of the Plaintiff, the Defendant ſaid, *that perjured Knave (Innuendo*, the Plaintiff) *ſtands perjured on Record at Guildhall, London, and I will prove it*; and at another Time he ſaid to the Plaintiff, *Thou art a perjured Knave and ſtands perjured on Record for denying thy Hand, and I will prove it*; it was objected, that 'tis not ſhewed in what Court the Plaintiff was perjured, there being two Courts there; but adjudged, that it muſt be in a Court of Record, and ſo intended. 3 *Bulſt.* 283. *Meſſlyn* verſus *Farrenden. Style* 17. *White's* Caſe. *S. P.* Damages. (F) 8. S. C.

21. *I will prove thee a perjured Knave by the whole Court*; *actionable*, for 'tis an *Affirmative* which imports not only a Perjury done, but that the Defendant would openly defame the Plaintiff in Court. *Yelv.* 160. *Staverton* verſus *Relfe.*

22. *Caſe, &c. He and one Allen are perjured Knaves*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Particle *He* cannot be referred to two Perſons, and the Words are *perjured Knaves* in the plural Number, which cannot refer to one Perſon; but adjudged well enough, tho' 'tis not *grammatical Engliſh*; and 'tis not like where one ſaid *W. R. and W. W. is perjured*; becauſe that muſt be void for the Incertainty. *Paſch.* 3 *Jac.* 2 *Cro.* 102. *Turner* verſus *Sir Ed. Darcie.*

23. *Caſe, &c.* for theſe Words ſpoken of the Plaintiff, *He hath forſworn himſelf, and I will prove him perjured, or elſe I will pay his Charges*; actionable, tho' the Sentence is in the * *Diſjunctive. Moor* 365. *Woodliffe* verſus *Vaughan.* * Antea (X) 8. S. P.

24. The Son and Brother of the Plaintiff having a Diſcourſe with the Defendant, he ſaid, *Thy Father and Brother is a forging and extorting Knave, and did ſuborn W. R. to forſwear himſelf before my Lord Chief Juſtice*; it was objected, that the Plaintiff did not alledge that he forſwore himſelf *in Court: Sed per Curiam*, an Oath may be taken judicially by the *Chief Juſtice* out of Court. 2 *Roll. Rep.* 410. *Pool* verſus *Carrell.*

25. ſſ. *He* (the Plaintiff) *is forſworn in his Anſwer to a Chriſtmas Bill*; it was objected, that it was not ſhewn in what Point he was perjured. *Cro. Car.* 234. *Snowd's* Caſe.

26. ſſ. *Thou haſt gotten R. B. 9 l. for forſwearing himſelf in Chantery*; actionable. *Cro. Car.* 255.

27. ſſ. *He* (the Plaintiff) *hath made a falſe Oath before the Judge, and I have that in my Houſe can prove it*; actionable. 1 *Cro.* 275. *Robotham* verſus *Vanſeck.* W. Jones 352. Golding v. Wennall.

28. ſſ. *Theſe Jones's are proper Witneſſes, they will ſwear any Thing, they have already forſworn themſelves in Chancery, and the Lord Keeper committed them for it*; actionable. *Godb.* 444. *Jones* verſus *Ballard.*

29. The Plaintiff appeared before a *Juſtice of Peace* to give Evidence againſt another, and the Defendant, to weaken his Teſtimony, ſpoke theſe Words, *Thou haſt been a contentious Man theſe thirty Years, and a breeder of Strife, and haſt taken a falſe Oath againſt my Brother and Siſter in a Matter of Incontinency, and haſt taken* 20 *s. for it, and I will ſhew it on Record*; adjudged actionable, the Speaking being laid to be *falſo & malitioſe*. *Style* 335. *Heard* verſus *Read*, and 379. *S. P.*

30. Caſe for theſe Words, *Capt. Osborn is forſworn, and his Oath appears on Record*; the Defendant, as to the Word *Forſworn*, pleaded Not guilty, and as to the reſt he *juſtified*, for that the Plaintiff was *forſworn* in finding an Indictment of a forcible Entry; the Plaintiff replied, *de injuria ſua propria* as to the Juſtification, and both Iſſues were found for him; it was moved in Arreſt of Judgment, that the firſt Part of the Words were not actionable; and if not, then the Juſtification would not make them ſo: But adjudged, that the Words being ſpoken at the ſame Time, import, that the Plaintiff was *forſworn on Record*, which amounts to call him *perjured*, and that the Defendant's Juſtification had explained his Meaning to be ſo; tho' this ſeems contrary to * *Wheeler* and *Abbott's* Caſe, where the Words were, *Thou haſt ſtolen my Piece (Innuendo, a Gun)*; The Defendant juſtified, that the Plaintiff did ſteal his Gun; now here the Juſtification plainly ſhewed, that the Defendant did mean a *Gun*; and tho' the Plaintiff had a Verdict, he could never get Judgment, becauſe the Word *Piece* was of an *incertain Signification*, which could not be explained by an *Innuendo*. *Allen* 7. *Osborne* verſus *Brooks.*

* Antea (X) 31.

31. *Caſe, &c.* for theſe Words, *She is a forſworn Whore and a perjured Whore, and forſwore herſelf at Waterman's Hall, concerning the Servant of T. S.* after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Words are not actionable, becauſe the Charge is principally for *forſwearing*; but adjudged, that *perjured Whore* is a diſtinct Clauſe, and thoſe Words are actionable. *Hardres* 7. *Wales* verſus *Norton.*

32. *Caſe, &c.* in which the Plaintiff declared againſt Husband and Wife, for that the Husband being ſued in the Sheriffs Court, and the Plaintiff produced as a *Witneſs* againſt him, and a Verdict againſt him at the Trial; and that the Wife having a *Colloquium* of that Trial, ſaid of and to the Plaintiff, *Thou art a forſworn raſcally Fellow, and I will prove thou took'ſt a falſe Oath againſt my Husband and me this Day*; after a Verdict for the Plaintiff it was objected, that the Words were not actionable, becauſe it doth appear that the *Forſwearing* was in a *Court of Record*, and becauſe the Words relate to a Suit in which the Wife was not a Party: But adjudged, that by this Inducement of a *Colloquium* the Words are actionable. *Hardres* 151. *Brumrigg* verſus *Hanger & Ux'.*

33. *Caſe, &c.* in which the Plaintiff declared, that there was a Trial in *C. B.* at which he was produced as a *Witneſs*, and ſwore to the Matter then in Iſſue, and that the Defendant *habens Colloquium* of the Evidence then given by the Plaintiff, ſaid, *Mr. Mayne hath forſworn himſelf in every Thing he ſwore in the Cauſe*; after a Verdict for the Plaintiff it was objected, that the Plaintiff ought to have ſet forth with whom the Diſcourſe was had: *Sed per Curiam*, 'tis not neceſſary: Judgment for the Plaintiff. *T. Jones* 5. *Mayne* verſus *Okey.*

* W. Jones 306. Cro. Car. 288. Drake v. Corderoy. S. P.

34. *Caſe, &c.* wherein the Plaintiff declared, that iſſue was joined in ſuch a Cauſe between ſuch Parties, to be tried at the *Aſſiſes in York*, and that he was produced as a *Witneſs* at that Trial, and ſworn to ſpeak the Truth, which he did, but that the Defendant, malitiouſly to diſgrace him ſaid, *Sirrah, thou wert* * *forſworn at that Trial*; actionable. 2 *Lutw.* 1292. *Stable* verſus *Sayle.* See *Poſtea* (h) *pl.* 3. *Cro. Eliz.* 293. *Needham* verſus *Corſellis. S. P.*

(h)

Where it will not lie for charging the Plaintiff with forſwearing, and with Perjury.

1. ſſ. OF a *Juſtice of Peace* (viz.) Mr. *Stanhope hath but one Manor, and that he hath gotten by Swearing and Forſwearing*; adjudged not actionable, for 'tis *no direct charge of Forſwearing*, the Words are too *general and incertain*; and to charge a Man * generally, that he hath *forſworn* himſelf, is not actionable. *Stanhop* verſus *Blithe*, 4 *Rep.* 15.

* Poſtea 2. S. P.

2. ſſ. *Thou art a falſe forſworn Knave, and didſt take a falſe Oath againſt me at a Commiſſion Eccleſiaſtical, Innuendo a Commiſſion* out of the High Commiſſion Court; not actionable, and an * *Innuendo* will not ſupply Matter where the Words in themſelves are not ſcandalous. *Hutt.* 44. *Bowen's* Caſe.

* Poſtea 6. (l) 5.

* Antea 1. S. P.

3. To ſay a Man is *forſworn* * generally is not actionable, becauſe it is an equivocal Word, and it may be in common Converſation; neither is it actionable to ſay, that a Man was *forſworn in ſuch a Court*, if 'tis an *inferior Court*, unleſs the Plaintiff ſhew what that Court is; becauſe the Judges cannot take Notice *ex officio* of any Authority *inferior Courts* have to adminiſter an Oath; but if it appear in the Declaration, that it was a Court of Record, or that there was an Action depending; then 'tis actionable to ſay, a Man is forſworn in an *inferior Court.* 2 *Cro.* 190, 436. See *Antea* (g) *pl.* 34.

4. There

4. There were ſeveral *Affidavits* made by *Molton*, and read againſt the Defendant *Clapham* in Court, who openly ſaid, there was not a *Word true in them*, for which this Action was now brought; but adjudged not actionable, becauſe the Words were not ſpoken *malitiouſly*, but in Defence of his Cauſe, which was then depending. *March* 20. *Molton* verſus *Clapham*. W. Jones 431.

5. *Caſe, &c.* After a Verdict for the Plaintiff, it was moved, that the Words were not actionable, *viz. I have indicted Mr. Bull of Perjury, and I do not doubt but to prove him a perjured Perſon to all Intents and Purpoſes*; not actionable, for if they ſhould, no one would proſecute another, or inquire for Evidence to prove a Perjury. *Sid.* 220. *Bull* verſus *May*.

6. *Caſe, &c.* for ſaying of the Plaintiff, *Thou art a forſworn Man, and didſt take a falſe Oath againſt me before Juſtice Scawen, (innuendo) John Scawen a Juſtice of Peace:* After a Verdict for the Plaintiff, the Judgment was ſtaid; for tho' 'tis actionable to ſay, one is *forſwon before a Juſtice of Peace*, yet, in the principal Caſe it doth not appear that *Scawen* was a Juſtice of Peace, but by the * *Induendo*, which is not ſufficient, for it may be his Name is *Juſtice Scawen.* 3 *Lev.* 166. *Gwerneth* verſus *Terry*. See 4 *Rep.* 17. *Rutliche*'s Caſe. * Antea 2.

7. *Caſe, &c.* For that the Defendant being indicted at the Seſſions for a Forcible Entry, and the Plaintiff being produced as a *Witneſs*, he ſwore nothing but what was true, and that the Defendant afterwards, having a *Colloquium* of the ſaid Oath, did ſay, that the Plaintiff *took a falſe Oath againſt me at the Seſſions*: After a Verdict for the Plaintiff it was objected, that the Action did not lie, for the Defendant might mean an extrajudicial Oath, which is very true, if there had been no *Colloquium* laid, as it was not in *Pritchard's* Caſe, where the Words were, *he took a falſe Oath againſt me at the Aſſiſes*; but where a *Colloquium* is alledged, it ſhews to what the Words did relate. 1 *Vent.* 195. *Wood* verſus *Coate*.

(i)

Where it lies for Charging the Plaintiff with Witchcraft, or being a Witch.

1. THOU *art a Witch, and haſt bewitched Children*, and *they were waſted and deſtroyed*; actionable. 2 *Brownl. Robert*'s Caſe. 2 *Roll. Rep.* 86. *Banes* verſus *Mutton. S. P.* See *Cro. Car.* 341. Hutt. 13. Poſt. (k) 2. contr.

2. Error of a Judgment for the Plaintiff for theſe Words, *viz. She is a Bawd, and hath bewitched me* by Witchcraft and Sorcery; the Judgment was affirmed. *Godb.* 347. *Hix* verſus *Hollingſhed*.

3. Thou art a Witch, and I will prove thee a Witch; actionable. 2 *Cro.* 150. *Edwards* verſus *Onely*, and 36. *Tooſe*'s Caſe. *S. P. Sid.* 52. * *Dacy* verſus *Clinch, contra.* * Raym. 35. S. C.

4. *Chriſtian Hume is a Witch, and hath bewitched two of the Servants of W. R. to death*, and did not * *aver*, that any of the Servants were dead; actionable, becauſe the Word *Witch* is ſo. *Ibidem.* * Poſtea 9. S. P.

5. *Mr. Lewis is a Witch, and I will prove it, for I have ſeen his Imps* and evil Spirits; actionable; but upon a Writ of Error brought, the Judgment was reverſed. 3 *Bulſt.* 74. *Lowe*'s Caſe. 1 Roll. Rep. 255.

6. Words ſpoken of a *Midwife* at the Birth of a Child, (*viz.*) *Thou art a Witch, and wer't the Death of Mr. Mountford's Child*; actionable, for ſince the Statute 1 *Jac. cap.* 12. it hath been held actionable to call one Witch. *Moor* 906. *Morris* verſus *Smith. Bendl.* 117. * *Shute* verſus *Emott.* See *Hutt.* 132. *Sowſer* verſus *Burton. S. P. Style* 66. *Long*'s Caſe, *S. P.* and *Helena*'s Caſe, 11. *S. P.* * 2 Roll. Rep. 343. Godb. 341. S.C.

7. *Thou art a Witch, and didſt bewitch my Mother's Drink*; actionable. *Cro. Car.* 100, 141. *Hughes* verſus *Ferrars*. See *Noy* 22. *S. P.* and *W. Jones* 397. *S. P. Seely* verſus *Hopkins*. W. Jones 197. S. C.

8. Caſe for theſe Words, ſſ. *Thou and thy Wife Agnes are both Witches, and have bewitched my* * *Mare:* After a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that two cannot commit one Act of Witchcraft; but adjudged actionable, for the Act ſhall be referred to each of them, as if it had been done by each. * *Cro. Car.* 368. *Smith* verſus *Cooks*. See *Godb.* 435. *Mellon* verſus *Hern, S. P.* See *W. Jones* 325. *George* verſus *Harvey. S. P.* * W. Jon. 409. S. C. * Cro. Car. 282, 320. S. P.

9. *Thou art a Witch, and haſt bewitched my Cow*; actionable, without * averring, that the Cow was hurt, becauſe the Word *bewitched*, implies ſome Hurt done. *Style* 59. *Sawyer* verſus *Ruſſell*, and 65. *Long*'s Caſe, *S. P.* *Antea 4. S. P.

10. Caſe, *&c. Goody Slater is a Witch, and I know it, if ſhe croſs me I'll* * *hang her for it*: actionable, for the latter Words imply Witchcraft within the Statute 1 *Jac.* otherwiſe ſhe could not be hanged for it. *Sid.* 386. *Slater & Ux'* verſus *Davis*. Lev. 255. S. C. * Poſtea (k) 6. S. P.

(k)

Where it will not lie for charging the Plaintiff with Witchcraft.

1. LIbel in the Spiritual Court by Husband and Wife, for calling the Wife *Witch, Sorceress* and *Inchantress*. Upon a Motion for a Prohibition, it was denied, for 'tis a *Spiritual Defamation*, and punishable in their Court. 2 *Leon.* 53. *Morris*'s Case.

Antea (i) contra. 2. ſſ. *Thou art a Witch and an Inchanter, and haſt bewitched Strong's Children*; not actionable. *Brownl.* 2. *Hutt.* 13. *S. C. Robert*'s Case. See *antea* (i) 1.

3. The Defendant called the Plaintiff *Sorcerer* and *Inchanter*; not actionable, neither will an Action lie for calling a Man *Conjurer* or *Witch*, unleſs he ſaith, he is a *Conjurer of the Devil, or of ſome wicked Spirit*; *Sorcery* is thus defined, (*viz.*) *Rei futuræ per ſortes exploratio*, and a Sorcerer is he, *qui per ſortes pronuntiat*; *Inchantment*, is *verbis vel rebus adjunctis aliquid præter naturam molire*; *Conjuring* is *quando multi in alicujus pernitiem juraverunt*; but in the Statute 5 *Eliz. cap.* 16. 'tis taken for the Invocation of any evil Spirit, which is Felony; but Witchcraft, Inchantment or Sorcery, are not Felony, if ſome Perſon is not killed or dieth by it. 2 *Brownl.* 276. *Mutton*'s Case. See 2 *Leon* 30. *Clerk* verſus *Green*.

Allen 37. 4. ſſ. *Mary Yates is a Witch, and a White Witch, ſhe can bewitch and unwitch*; adjudged not actionable. *Style* 47. *Yates* verſus *Linden*, and *Turner*'s Case. *Ibid.* 47. *Palm.* 297. *Ann Knight*'s Case. *S. P.*

5. *I accuſe you to be a Witch:* After a Verdict for the Plaintiff, the Judgment was arreſted, becauſe the Words did not import any Accuſation of an Offence within the Statute; but if he had ſaid, *I accuſe you of bewitching ſuch a Man, or ſuch a Beaſt*, it had been actionable. *Allen* 2. *Markham* verſus *Adamſon*. See 2 *Leon* 53. *Norris*'s Case. *S. P.*

6. *Caſe, &c.* for theſe Words, *ſſ. Dacy is a Witch, and deſerves better to be hanged than old Arthur, who was hanged for a Witch:* Upon Not guilty pleaded, the Plaintiff had a Verdict, and Judgment, for tho' the Word *Witch* is not actionable, unleſs coupled with Words which ſhew ſome Act of Witchcraft done; yet here the Words import, that ſuch a Witch was intended that deſerves to be *hanged*, which muſt be for ſome Act of Witchcraft done. *Raym.* 35. *Dacy* verſus *Linch. Sid.* 52. *S. C.* See *Cro. Car.* 282. * *George* verſus *Harvey*, and *Hutt.* 13. *Stone* verſus *Roberts*. See 1 *Lev.* 355. *S. P. Sid.* 386. *S. C.*

* Antea (i)

1 Lev. 275. 7. Caſe, *&c.* for theſe Words, *You inchanted my Bull, and made him run mad about the Common:* After a Verdict for the Plaintiff, adjudged not actionable, becauſe the Words do not import any Bodily Hurt by bewitching, within the Statute 1 *Jac. cap.* 12. *Sid.* 424. *Seymour* verſus *Moor*.

8. Caſe, *&c.* for theſe Words, ſſ. *Thou art a Witch, and I will make thee ſuffer for it*; After a Verdict for the Plaintiff it was objected, that the Word *Suffer* is an incertain Signification, for it doth not import to *ſuffer Death*, but that Suffering might be by Citation in the Spiritual Court for a Witch, or by Ducking in the Water as is uſual; and the Word *Witch* alone is not actionable; but adjudged, that *Suffer* in this Place ſhall be intended to *ſuffer Death*. 3 *Lev.* 394. *Stephens* verſus *Corben*. See (W) *pl.* 71.

(l)

Where it lies for other Slanders of Women. See (m) pl. 10. (r) pl. 26.

Poph. 36. Moor 409. * Poſtea (m) 9. S. P. * Ac. Ca. (a) 26. 1. ſſ. THE Defendant ſaid to *Alcock*, who was a Suiter to the Plaintiff, (*viz.*) *I know Davis's Daughter well, ſhe did dwell in Cheapſide, and a Grocer got her with Child*; actionable. 4 *Rep.* 16. * *Davis* verſus *Gardner*. *Poſtea* (m) 13. This Case denied to be Law.

2. The Defendant ſpoke theſe falſe and ſcandalous Words, * *Quorum tenor* followeth, (*viz.*) *Thou art an errant Whore, an old Worm-eaten Jade, and one of thy Sides hath been eaten out with the Pox*; actionable, but the Declaration was not good, becauſe ſome Words might be omitted after the *Quorum tenor*, which might make the whole Sentence not actionable. *Cro. Eliz.* 857. *Grifith* verſus *Clerk*.

3. ſſ. The Plaintiff being in Communication of a *Marriage* with the *Earl of Kent*, the Defendant ſaid, that *Arſcot* reported, *that he had the Uſe of her Body, Innuendo*, that he had Carnal Copulation with her; actionable. *Lady Moriſon* verſus *Cade*. 2 *Cro.* 162.

4. ſſ. By the Husband, for Words ſpoken of his Wife, (*viz.*) *Mrs. Miller is a Whore, and hath had the Pox, and hath Holes one may turn his Finger in them, Mr. King the Apothecary gave her a Drink for it, and therefore take Head how you drink with her*; actionable. 2 *Cro.* 430. *Miller*'s Case.

5. *Caſe, &c.* for theſe Words, ſſ. *Elizabeth Roots did lie with a Weaver of Colcheſter in a Ditch, (innuendo* had Carnal Knowledge of her Body*) and the Weavers Breeches were down, and they were at it:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Weaver might lie with the Plaintiff without any Offence, and where the Words in them-

themſelves are not actionable, an * *Innuendo* will not make them actionable. *Sed per Curiam,* tho' the Words are not actionable, yet the Circumſtance which follows ſhews the Intention which was to Slander the Plaintiff, and adjudged, that the Action lies. 1 *Roll. Rep.* 420. *Root* verſus *Melling.* *Antea (h) 2, 6.

6. *ſſ.* Of a *Widow,* who was about to marry with one *Cowley,* ſſ. *She is a Whore, and her Chidren, which ſhe had by Brian her late Husband, are Frambiſhe's Baſtards,* tho' the firſt are Words of Heat, and the laſt repugnant; yet adjudged actionable. *Cro. Car.* 234. *Brian* verſus *Cockman.*

7. *ſſ.* Of an *Alehouſe-keeper's Wife,* (viz.) *Hang thee Bawd, thou art worſe than a Bawd, thou keepeſt an Houſe worſe than a Bawdy-houſe, and thou keepeſt a Whore* in thy Houſe to pull out my Throat; actionable. *Cro. Car.* 234. *Perſon* verſus *Gooday.*

8. *Caſe, &c.* for theſe Words, ſſ. *Thou art a Whore, and T. H.'s Whore, thou didſt play the Whore with him at ſuch a Gate, and didſt forget thy Gloves behind thee; thou hadſt a Baſtard by him, which was ſent to Ireland:* After a Verdict for the Plaintiff, it was objected, that the Action would not lie, becauſe the Plaintiff did not alledge any Temporal Loſs, this being in its Nature a * Spiritual Offence, and puniſhable in that Court; but adjudged, that by the *Statute* 18 *Eliz. and* 7 *Jac.* the one appointing a Puniſhment for a Woman, who hath a *Baſtard,* and the other appointing, that a *Whore ſhall be ſent to Bridwell* for a Year, had altered the Nature of the Offence, and given the Temporal Courts Juriſdiction, and tho' ſhe is not puniſhed by the Juſtices, by Vertue of theſe Statutes, 'tis ſufficient, that ſhe is liable to be puniſhed, and that was the Reaſon of the Judgment in * *Anne Davis's* Caſe; 'tis true, in that Caſe the Loſs of Marriage was alledged, which is Temporal, not as neceſſary to ſupport the Action, but to encreaſe the Damages. *Palm.* 298. *Vaughan* verſus *Standiſh.* 2 Roll. Rep. 433. Thompſon *v.* Twing. S. P. * Poſtea (m) 1, 13. *Antea 1.

9. *Caſe, &c.* in which the Plaintiff declared, that there was a Communication of a *Marriage* between the Plaintiff and one *Mary Hicks,* who had 300 *l.* Portion, which Marriage was like to take Effect, but that the Defendant, in the Hearing of ſeveral People, ſaid, *Mary Hicks* is *Mr. Edwards his Whore,* (*innuendo* the Plaintiff) whereupon ſhe refuſed to marry him: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that it was not alledged, that the Marriage was agreed on, nor that the Words were ſpoken *of the Plaintiff,* but only by the * *innuendo*; but the Judgment was affirmed. *Allen 6. Edwards* verſus *French.* See *Hob.* 268. Allen 32. * Pierſon *v.* Dawſon, S. P.

10. Caſe, *&c. Thou art a Whore, and a baſe burnt Arſe Whore*; actionable. 2 *Sid.* 5. *Margaret Comming's* Caſe.

11. Caſe, *&c.* in which the Plaintiff declared, that the Defendant, to ſcandalize him and his Neice, ſpoke of the ſaid Niece and her Aunt, *I hold it not fit this Girl ſhould live with her Aunt, ſhe Keeping a Bawdy-Houſe,* with an *Averment,* that ſhe did at that Time live with the *Aunt:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Words are not actionable, becauſe *ſhe Keeping* doth not imply, that ſhe did keep a Bawdy-Houſe; but adjudged, that this Speaking by a Participle in the preſent Tenſe, doth imply, that ſhe did keep a Bawdy-Houſe. 2 *Sid.* 15. 33. *Hobſon* verſus *Blackwell.*

12. *Caſe,* &c. *He aſſaulted my Wife, with an Intent to Raviſh her*; actionable, for tho' here was only an Act *intended* and not done, yet an *Aſſault with an Intent to Raviſh,* is a Defamation, and actionable. 2 *Sid.* 76, 100. *Langley* verſus *Clerk.*

13. *Caſe, &c.* for theſe Words, *Your Daughter Bridget is a Whore, and a Pocky Arſt Whore:* After a Verdict for the Plaintiff in *C. B.* and a Writ of Error brought in *B. R.* adjudged actionable; for tho' to ſay, *Thou art a Whore,* is not actionable, nor to ſay, *Thou haſt the Pox*; but when the Word *Whore* is coupled with the *Pox,* it is intended the *French* Pox. *Sid.* 50. *Marſhall* verſus *Chickall.*

14. *Caſe,* for calling the Plaintiff *Whore,* in which ſhe declared, that ſhe lived in the Borough of *Southwark,* and that *omnes exercitantes artem meretricii & conſervatores lupanar' & communes Lenones per conſuetudinem uſitatam & approbatam* within the ſaid Borough were impriſoned and carted; adjudged, that ſince this Preſcription is in the Conjunctive, and the Plaintiff had not alledged, that ſhe was *ſtill an Inhabitant* there, and ſo was not capable to be puniſhed within the Preſcription, that the Action did not lie. *Sid.* 97. *Roberts* verſus *Herbert.* 1 Lev. 64.

15. *Caſe, &c.* in which the Plaintiff declared, that ſhe was poſſeſſed of a Copyhold *dum ſola & caſta vixerit,* and that the Defendant, intending to endanger the Looſing her Copyhold, ſaid, *Thou art a Whore, and I will throw thee out of thy Living:* After a Verdict for the Plaintiff, it was adjudged in Arreſt of Judgment, that the Words are actionable, becauſe accoupled with Words which imported Special Damages. *Sid.* 214. *Boys* verſus *Boys.* 1 Lev. 134.

16. *Caſe, &c.* for theſe Words, *Thou art a Whore, and my Husband's Whore*; the Cauſe was tried in the *Sheriffs Court in London,* and the Proof was, that the Words were ſpoken in *Clerkenwell, out of the City,* and thereupon the Counſel for the Defendant *demurred on the Evidence,* for tho' the Words are actionable in *London,* they are not out of it; the Judge overuled the Demurrer, whereupon a *Bill of Exceptions* was tendered to him to ſeal, but the Parties being Poor, the Plaintiff had a Verdict, and ſmall Damages. The Defendant, inſtead of pleading Not guilty, ſhould have pleaded, that the Words were ſpoken *in Clerkenwell,* and traverſed, that they were ſpoke *in London.* 1 *Lev.* 116. *Wheeler* verſus *Welch.* Ray. 81.

17. *Caſe,* by Husband and Wife, for theſe Words ſpoken of her, (*viz.*) *She is a Strumpet and a Bawd, and kept a* * *Bawdy-Houſe:* After a Verdict for the Plaintiff, it was objected, that the laſt Words being only actionable; and that it being the *Præter Tenſe,* (viz.) *kept a Bawdy-Houſe* * W. Jon. 44. S. P.

Houſe, it ſhall be intended before the General Pardon; but adjudged, that the Scandal remains, and that it ſhall not be ſo intended, unleſs it appear, that the Defendant ſpoke in that Senſe. 2 *Lev.* 233. *Newton* verſus *Maſters.*

Sid. 85. 1 Lev. 69. 18. *Caſe, &c.* for theſe Words, *You are a Whore*, and the Plaintiff declared, that by Reaſon of ſpeaking the Words, *ſhe loſt her Marriage:* Upon Nor guilty pleaded, there was a Verdict for the Plaintiff, and Judgment, and upon a *Writ of Error* brought, *Error* aſſigned was, that *the Loſs of Marriage*, was the Cauſe of this Action, and it doth not appear, that it was within the Juriſdiction of the Court, (*viz.*) the Court of *Marſhalſea*, where the Action was brought, and the Judgment was reverſed. *Raym.* 63. *Littleboy* verſus *Wright.* See *Ireland* verſus *Blackwell, contra.*

Sid. 241. 19. *Caſe, &c.* for theſe Words, *You are a Bawd, and I will prove you a Bawd, and you took* 5 *s. for a clean Pair of Sheets for two Whores and two Rogues*, and at another Time for theſe Words, *You are a Bawd, and I will prove you a Bawd, and have you carted:* Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; and upon a Motion in Arreſt of Judgment, the Words were held actionable, becauſe a Bawd is puniſhable in the Spiritual Court. *Raym.* 115. *Ward* verſus *Marſh.*

20. *Caſe, &c.* for theſe Words ſpoken of a *Midwife*, (viz.) *She is an ignorant Woman, and of ſmall Practiſe, and very unfortunate in her Way; there are few that ſhe goes to, but lie deſperately ill, or die under her Hands*; actionable. 1 *Vent. Wharton* verſus *Brook.*

21. *Husband and Wife* brought an Action on the Caſe, for theſe Words ſpoke of the Wife, *She is a Whore, ſhe is my Whore*, and concluded *ad damnum ipſorum:* After a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that the Words were not actionable without ſpecial Damages laid; and that the Concluſion *ad damnum ipſorum* was ill: *Sed per Curiam*, the Words are actionable, and the the Concluſion is well; for if ſhe ſurvive, the Damages will go to her. 3 *Mod.* 120. *Baldwin* verſus *Flower.*

(m)

Where it will not lie for Words ſpoken of Women. See (l) pl. 14.

1. CASE for the Words ſpoken to the *Servant*, ſſ. *Thy Miſtreſs is a Whore, and would have lain with me ſeven Years ſince, and I would not, unleſs ſhe would go to the Hedge:* Now, tho' it was laid in the Declaration, that ſhe was in Communication with *W. R.* of a Marriage between them, who was ſeiſed of Lands of 200 *l. per Annum*, and that by Reaſon of ſpeaking theſe Words ſhe loſt her *Marriage*; yet the Words were adjudged not actionable, becauſe they were a * *Spiritual Defamation*, and puniſhable in thoſe Courts; but if the Words had been ſpoken *to the Man*, who who was in Communication of Marriage with her, ſo as the Purpoſe was to hinder the Marriage, the Action would lie for the Loſs. *Mich.* 42 *Eliz. Cro. Eliz.* 786. *Holwood* verſus *Hopkins.*

* Antea (l) 8. contra. Poſt. 12.

2. ſſ. *Thou art a Whore, for R. B. the Goldſmith had the Uſe of thy Body, and the Cart is two good for thee*; not actionable, for the Common Law cannot define who is a Whore. *Goldſ.* 172. *Pollard* verſus *Armſhaw.*

3. ſſ. *Thou are Luſcomb's Hackney Whore, and a thieviſh Whore, and I will prove thee ſo*; not actionable, *quia verba accipienda ſunt in mitiori ſenſu. Godb.* 278. *Clliford's* Caſe. 2 *Cro.* 514. *S. C.*

4. *Slander* by a Feme ſole for theſe Words, *You are a Whore, and a forſworn Jade, and I will prove you one*, by Reaſon whereof ſeveral Perſons who courted her before, did now avoid her Company; the Plaintiff had a Verdict, but could never get Judgment, becauſe ſhe did not alledge the Loſs of Marriage with any particular Perſon. 2 *Lutw.* 1295. *Witherald* verſus *Clarkſon. Cro. Car.* 155, 404. *S. P. Latch.* 218. *S. C.*

5. *Caſe, &c.* for theſe Words, brought againſt the Defendant by the Husband and Wife, ſſ. *Thou bold Calabine's Baſtard-bearing Whore, thou didſt throw thy Baſtard into the Dock, innuendo quandam ſocam* vocat' *le Armitage, &c.* adjudged not actionable. *W. Jones* 356. *Colabine & Ux'* verſus *Viner.*

1 Mod. 31. Sid. 438. * Palm. 375. 6. *Caſe, &c. You are a Pimp, and a Bawd, and fetch young Gentlewomen to young Gentlemen*; the Court inclined, that the Action would not lie, for a * *Bawd* is not puniſhable by our Law, unleſs ſhe keep a *Bawdy-Houſe*, for the other is a Crime of Eccleſiaſtical Cogniſance. 1 *Vent.* 53. *Gavell & Ux'* verſus *Burker.* 1 *Mod.* 31. The Action lies. *Cro. Car.* 286, 392. *Dimmock* verſus *Fawcett, S. P.* She is a Whore, and I will prove her a Whore; not actionable. 2 *Sid.* 34. *Colſwood* verſus *Chandler. See* Prohibition, (B) 4.

7. *Caſe* for ſpeaking theſe Words, *(viz.) This is the Whore that my Man W. R. got a Baſtard on, and ſpent all my Money upon, and the Quean hath been too long in Town for my Eaſe:* After a Verdict for the Plaintiff, the Judgment was arreſted, becauſe no ſpecial Damage was laid. *Style* 274. *Owen* verſus *Jevon.*

8. *Caſe, &c.* for theſe Words, *She hath married the Husband of another Woman*; and the Plaintiff averred in his Declaration, that he had no other Wife; he had a Verdict, but the Judgment was arreſted, becauſe it might be that his firſt Wife was dead, or that ſhe was beyond Sea for ſeven Years; and then the Caſe is out of the Statute 1 *Jac. cap.* 11. and probably the Defendant

dant might mean, that the Plaintiff was contracted to another Woman, and ſo in Conſcience he was her Husband. *Allen* 37. *Eales* verſus *Smith*.

9. *Caſe*, &c. *She is with Child by T. S. whereof ſhe miſcarried*, by Reaſon whereof her Father turned her out of Doors; and that ſhe was brought within the Penalty of *the Statute* 18 *Eliz.* it was inſiſted for the Plaintiff, that *ſince that Statute* it is actionable to ſay, that a Woman *had a Baſtard*, and ſo it was held in * *Anne Davis*'s Caſe; but adjudged, that an Action would not lie without Special Damage alledged, as that ſhe had loſt her Marriage; and *per Twiſden*, the Statute was not mentioned in * *Anne Davis*'s Caſe, that was put in by my Lord *Coke* himſelf, in the Report of that Caſe. 1 *Vent.* 4. *Barnes* verſus *Bruddle*. Sid. 396. 1 Lev. 261. * Antea (l) 1. * Poſtea 13.

10. *Caſe*, &c. for that the Defendant *falſe & malitioſe*, *wrote* a * Letter to a Man who intended to marry the Plaintiff, in which he tells him, that *He ought not to marry her, for before God ſhe is my Wife, and therefore if you do, you will live in Adultery with her, and your Children will be Baſtards*; and ſets forth, that this Letter was *delivered at Exceſter*, by which ſhe loſt her Marriage; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Words were not actionable, becauſe the Defendant claimed nothing but his own, which was lawful for him to do; and of this Opinion were three Judges at firſt, againſt the Opinion of *Twiſden*, but afterwards they all agreed with him, that the Words were actionable, for admitting that the Contract was private, he ought not to publiſh it unleſs he could prove it; but to acquaint the Woman herſelf with it; but this was done to ſcandalize her, and being found to be *falſe & malitioſe*, the Plaintiff had her Judgment. *Sid.* 79. *Sheppard* verſus *Wakeman*. 1 *Lev.* 53. *S. C.* Antea (a 10.

11. *Caſe*, &c. for theſe Words, in which the Plaintiff declared, that ſhe was about to marry *T. S.* and that the Defendant ſaid, *She is a Whore, a common Whore, and R. N.'s Whore, per quod Maritagium amiſit*, the Jury found, that the Defendant ſpoke the Words, but that the Plaintiff did not loſe her Marriage thereby: *Et per Curiam*, in Arreſt of Judgment, the Words are not actionable, being only Scolding. 2 *Mod.* 296. *Osborn* verſus *Wright*.

12. *Caſe*, &c. for theſe Words, *She is a Whore, and had a Baſtard by her Father's Apprentice*; after a Verdict for the Plaintiff, the Judgment was arreſted, becauſe *Fornication is a* * *ſpiritual Offence*, and no Action lay for it at *Common Law* without *ſpecial Damage*. 2 *Salk.* 696. *Graves* verſus *Blanchett*. *Per Holt* Ch. Juſt. if this was *Res nova*, it would be actionable. Mod Caſes 148. * Antea (l) 8. (m) 1. Poſtea 14. S. P.

13. *Caſe*, &c. for theſe Words ſpoken of the Plaintiff, *She had a* * *Baſtard-Child*; after a Verdict for the Plaintiff, the Judgment was arreſted according to † *Salter* and *Brown*'s Caſe, for ſhe is not puniſhable at Common Law for having a Baſtard, nor by the Statute 18 *Eliz.* unleſs 'tis chargeable to the Pariſh. 2 *Salk* 694. *Ann Davis*'s Caſe denied to be Law. * Antea (l) 8. † Poſtea (o) 15. S. C.

14. *Caſe*, &c. in which the Plaintiff declared, that ſhe being a young Woman, the Defendant, to hinder her Marriage, ſaid, *What did you go to London for but to drop your Slink, She went to London laſt Winter to lie in, and to my Knowledge ſeveral People have lain with her*; adjudged not actionable without ſpecial Damages laid, becauſe Fornication is only a * ſpiritual Offence. 2 *Salk.* 693. *Byron* verſus *Elmes*. * Antea 12. S. P.

(n)

Of adjective and negative Words, and of Words ſpoken by Way of Interrogation; and adjectively. See Antea (X) 30.

1. WHere adjective Words ſcandalize a Man in his Profeſſion; they are actionable, as to ſay of a Batchelor of Divinity, (*viz.*) *Thou haſt made a ſeditious Sermon.* *Philips* verſus *Bradbury*, cited in 419, *Britteridge*'s Caſe; and to ſay of a Merchant, that he is a *bankruptly* Knave; actionable. *Mitton*'s Caſe cited there.

2. ſſ. *Bankruptly Knave*; not actionable, becauſe adjective. 2 *Cro.* 345. *Selby* verſus *Carrier*. *Antea* (e) 4. *Sid.* 103. *Booth* verſus *Seel*, *contra*. 1 *Lev.* 90. *S. C. Poph.* 184. *S. P.* *Antea* (W) *pl.* 37. *S. P.*

3. ſſ. There was a Treaty of Marriage between the Plaintiff and one *Mary Syvedale*, with whom he was to have 600 *l.* and the Defendant ſaid, *Hath that Baſtard Brian Nelſon* cauſed you to be arreſted, &c. by which he loſt his Marriage; actionable, tho' ſpoke by Way of * Interrogation. 2 *Cro.* 422. *Nelſon* verſus *Staff*. *Antea* (Y) 23. *S. C.* * Antea (W) 42, 52.

4. ſſ. *Have you brought home the forty Yards you ſtole*; the Judgment for the Plaintiff affirmed in Error. 2 *Cro.* 568. *May* verſus *Gibbons*.

5. ſſ. *Thou art a long ſhag-haired murthering Rogue*; actionable, tho' *adjective Words*. *Cro. Car.* 232, 318. *Green* verſus *Lincoln*. W. Jones 326.

6. Caſe, &c. for that the Defendant having a *Colloquium* of the Plaintiff, ſpoke theſe Words of him, *I know what I am, and I know what Snell is, I never buggered a Mare*; after a Verdict for the Plaintiff, it was objected, that theſe Words do not charge the Plaintiff with Buggery; adjudged a Charge of Buggery by Implication, and that it might be ſo underſtood by thoſe who heard it. 2 *Lev.* 150. *Snell* verſus *Webling*. 1 Vent. 276.

(o)

Action on the Caſe for Slandring a Title, and calling one Baſtard.

1. *ſſ.* THE Defendant ſaid, that *Lands were lawfully aſſured to John Talbot for* 1600 *Years, and that he was lawfully poſſeſſed thereof*, whereas in Truth they were not lawfully aſſured; it was adjuded, that tho' *John Talbot* had a Limitation of the Land by a Will; yet becauſe the Defendant took upon him to take Notice of the Law, and to meddle in a Matter which did not concern him, the Plaintiff had Judgment. 4 *Rep.* 175. *Mildmay's* Caſe. See 2 *Leon.* 111. *Williams* verſus *Linford. S. P.*

2. *ſſ.* The Plaintiff was in Treaty with *R. B.* to demiſe to him the Manor of *D.* and the Defendant *præmiſſorum non ignarus* ſaid, *I have a Leaſe* of the ſaid Manor for ninety-nine Years, and ſhewed a *counterfeit Leaſe*, knowing it to be counterfeit, by Reaſon whereof *R. B.* did not proceed; adjudged, that ſince the Defendant knew of the Treaty, and that the Leaſe he produced was *forged*, and yet he publiſhed it, and by that Means the Plaintiff loſt his Bargain, the Action would lie. 4 *Rep.* 18. *Sir Gilb. Gerard* verſus *Dickenſon.*

3. *ſſ.* The *Earl of Arundel* gave a *Manor* to the Plaintiff *in Tail*; the Defendant was a Copyhold Tenant of an Houſe and Lands held of the ſaid Manor for his Life, and the Plaintiff being in Treaty with *R. B.* to make him a Leaſe of the ſaid Houſe and Lands, to commence after the Defendant's Death, for which *R. B.* was to give 500 *l.* the Defendant ſaid, *The late Earl of Arundel made a Leaſe of my Tenement to one R. W. for ſixty Years, to begin after my Eſtate is ended, and the ſame is a good Leaſe*, by Reaſon whereof *R. B.* would not give him 10 *l.* to make him a Leaſe; actionable. 2 *Cro.* 163. *Northumberland Earle* verſus *Birt.*

1 Roll. Rep. 244. * Yel. 88. Co. Entr. 55.

4. The Plaintiff had Lands *by Deſcent*, Part whereof he *intended* to ſettle on his Son, and to make a Leaſe of other Part; and to fruſtrate his Intent, the Defendant ſaid, *That he* (the Plaintiff) *had no more Right to the Land than a Stranger*; not actionable, becauſe he had an * *Intent* to ſettle the Land, which might be ſecret. 2 *Cro.* 397. *Smead* verſus *Badley.*

2 Roll. Rep. 248. Palm. 299.

5. *ſſ.* The Plaintiff and his Wife had both Lands by *Deſcent*, the Defendant ſpeaking of them, ſaid, *(viz.) ſhall Elborow's Wife ſit above my Wife? He is but a Baſtard*; by Reaſon whereof the Plaintiff was at great Expence to defend his Title; actionable, tho' the Plaintiff had not laid that there was any Speech about his Eſtate, or that he was about Selling or Leaſing it. 2 *Cro.* 642. *Elborow* verſus *Allen.*

6. Error to reverſe a Judgment in an Action on the Caſe for calling the Plaintiff *Baſtard*, wherein the Plaintiff ſet forth, that his Grandfather was Tenant in Tail of ſuch Lands, with divers Remainders over, that his Father was the Iſſue in Tail, and that he was his youngeſt Son, and that *W. R.* was about purchaſing the Land, and offered him a Sum of Money for his Title, and to join in the Conveyance; but afterwards, by Reaſon of Speaking thoſe Words, he refuſed to give him any Thing; the Error aſſigned was, that the Plaintiff hath not aſſigned any *ſpecial Loſs*, for upon his own ſhewing he had no Title, being a remote Remainder to the Eſtate; but adjudged, that tho' he had not a preſent Title, yet it appears, that by *Poſſibility* he might inherit the *Eſtate-tail*, and being offered Money for that *Poſſibility* to join in the Conveyance, he had a preſent Loſs and Damage by Speaking thoſe Words, ſo the Judgment was affirmed. 2 *Cro.* 213. *Vaughan* verſus *Ellis.*

7. *Suit* was brought in the Spiritual Court againſt the Defendant, for ſaying, that the Plaintiff *had a Baſtard*; the Defendant pleaded, that the Plaintiff was adjudged the reputed Father of a Baſtard by two Juſtices of the Peace, according to the Statute, by Reaſon whereof *he ſpoke thoſe Words*; this was a plain Confeſſion of the Libel, but that Court would not allow the Juſtification, and therefore the Defendant moved for a Prohibition, which was granted. 2 *Cro.* 535, 625. *Webb* verſus *Cook.*

8. In a *ſpecial Action on the Caſe*, the Plaintiff declared, that the Defendant did *endeavour to queſtion him, and to charge him at the Quarter-Seſſions, to be the reputed Father of a Baſtard Child*; adjudged, that the Action doth not lie, becauſe 'tis only an *Eccleſiaſtical Slander*, and to be puniſhed in the Spiritual Court; but if he had declared, that the Defendant had procured on Order to be made at the Seſſions againſt him to be the reputed Father, and ſo to keep the Child; in ſuch Caſe the Action would lie, becauſe of the *temporal Loſs* and Damage. 2 *Bulſt.* 343. *Bower* verſus *Painter.*

9. *Caſe* againſt the Defendant being an *Attorney*, for that the Plaintiff being ſeiſed of Lands in Fee, which he had by Deſcent from his Father; and having agreed with one *W. R.* who was to purchaſe them, the ſaid *W. R.* came to the Defendant deſiring his Advice in the Conveyance, who told him, that *he had heard* that the Plaintiff's Father had granted a Rent-charge in Fee out of the Lands, by Reaſon whereof the ſaid *W. R.* refuſed to purchaſe; and all other Perſons were afraid of Incumbrances *ad damnum, &c.* the Defendant pleaded in Abatement, that he was an *Attorney at Law*, and that *W. R.* came to him for his Counſel, and that he privately ſpoke the Words; and upon Demurrer, the Defendant had Judgment. *Moor* 187. * *Johnſon* verſus *Smith.*

* 2 Leon. 111. S. C.

10. The Defendant, who *pretended a Title to the Lands*, ſpoke publickly, that he had a better Title, *&c.* than the Tenant in Poſſeſſion, for which Words the Tenant brought an Action; and adjudged that it did not lie, becauſe *the Defendant claimed a Right to the Lands*, but if another

Man had ſpoke the ſame without any Pretence to a Title, it had been otherwiſe. *Moor* 188. *Wildgooſe's* Caſe.

11. *Caſe* for theſe Words, the Plaintiff being about the Sale of his Lands, *I would not wiſh any Man to deal with the Land, for I know one who hath a good Title to it, and will not depart with their Intereſt for any Reaſon*; the Defendant juſtified, for that he had a Leaſe in Reverſion of Part, *&c.* adjudged, that if he * claimed a Title himſelf, 'tis not actionable; but here he ſaid, *he knowed one who had*, which he ſhall not ſalve by applying it to himſelf. *Moor* 410. *Penniman* verſus *Rawbanks.* * Poſtea 12. S. P.

12. *Caſe, &c.* in which the Plaintiff declared, that he was ſeiſed of Lands, and had a Diſcourſe with *T. S.* about ſelling the ſame, and the Defendant knowing thereof, ſaid to *T. S. Take Heed how you buy it, for 'tis mine; if every Man had his own: And I will ſpend* 20 *l. but I will have it*, by Reaſon whereof he loſt the Sale, *&c.* after a Verdict for the Plaintiff the Judgment was arreſted, for that the Words are not actionable, becauſe he * *claimed the Lands to himſelf*; but it had been otherwiſe if he had affirmed, that a third Perſon had a Title. 1 *Roll. Rep.* 409. *Lovett* verſus *Weller.* * Antea 10, 11. S. P.

13. *Caſe, &c.* in which the Plaintiff declared, that he was ſeiſed of ſeveral Parcels of Land, and that the Defendant being Tenant at Will of one Parcel, and there being a Diſcourſe between him and *T. S.* of the Sale of theſe Lands, he (the Defendant) ſaid to *T. S.* that he, the Defendant, would keep the Poſſeſſion till the 17*th Day of Auguſt*, and that after that Day the Plaintiff had no Title to it, *but that one G. D. had*, by Reaſon whereof he loſt the Sale; adjudged, that tho' the Words were ſpoken of a Parcel of the Land, yet the Plaintiff ſhall recover Damages for the Loſs of the Sale of the Whole. 2 *Roll. Rep.* 447. *Egerton* verſus *Whittington.*

14. This Action will not lie without ſhewing ſome Loſs, as for Inſtance, the Plaintiff was *ſeiſed in Fee of Copyhold-Lands* within the Juriſdiction of the Defendant's Court, who ſaid, *He had not any Title to the Lands*; the Judgment for the Plaintiff was reverſed by *Error*, becauſe he did not ſhew that he had any Loſs by ſpeaking the Words. *Law* verſus *Harewood*, *Cro. Car.* 99, 140. Palm. 529. Ley 81. W. Jones 196.

15. *Error* of a Judgment in an Action on the Caſe, wherein the Plaintiff declared, that one *I. D.* was delivered of a Baſtard-Child, and that the Defendant diſcourſing with her concerning the Plaintiff and the ſaid Child, ſaid, *He* (meaning the Plaintiff) *is the reputed Father of that Baſtard-Child*; the *Error* aſſigned was, that theſe Words are not actionable, and ſo it was adjudged, unleſs the Plaintiff had alledged ſome *temporal Loſs*, as Marriage, or the like; or that by Reaſon of the Speaking theſe Words, he was ordered to maintain the Baſtard. *Cro. Car.* 315. *Salter* verſus *Brown.*

16. The Plaintiff declared, that he was of good Fame, *&c.* and that the Defendant, to the Intent that he (the Plaintiff) might be puniſhed for Fornication, by the Statute, *&c.* ſaid, *He hath got M. N. with Child, and would lay it to my Son*; adjudged, that the Words are actionable. 2 *Sid.* 7. *Marſton* verſus *Dennis.*

(p)

Scandalum Magnatum.

1. THE *Earl of Lincoln's Man, did, by his Command, take the Goods of one Hoskins by a forged Warrant*; after a Verdict for the Plaintiff and great Damages, the Judgment was arreſted, becauſe it was not *averred*, that the Earl *knew* the Warrant to be forged. *Goldſ.* 115. *Earl of Lincoln* verſus *Bowes.*

2. The *Archbiſhop of York* brought a *Scandalum Magnatum* againſt the Defendant, for exhibiting a ſlanderous Libel againſt him before the Preſident of the Council of the *North*, ſuggeſting that he was *a covetous and malitious Biſhop*; adjudged, that the Words were not actionable. *Trin.* 4 *Eliz. Moor* 38. *Archbiſhop of York's* Caſe.

3. *Scandalum Magnatum* for theſe Words written in a Letter to the Plaintiff himſelf, *I have heard that your Lordſhip hath ſought by uncharitable Means to bereave me of my Life, Lands, and Liberty*; actionable. *Moor* 142. *Lord Lumley* verſus *Fox.* See *Broughton's* Caſe.

4. *Scandalum Magnatum*, for that the Defendant hearing that his Father's Barns were burn'd, ſaid, *I cannot imagine who ſhould do it, but the Lord Sturton*; actionable. *Moor* 142. *Lord Sturton* verſus *Chaffin.*

5. *Scandalum Magnatum* for theſe Words ſpoken in open Seſſions, *You have perverted Juſtice, and to your Shame and Diſhonour I will prove it*; actionable. *Moor* 409. *Lord La Warr* verſus *Pawlet.*

6. *Scandalum Magnatum* for theſe Words, *The Lord Mordant did know, that Proud robbed Shotbolt, and at ſuch Time as Proud ſhould be arraigned for it, he willed Bridges to compound with Shotbolt for the ſame Robbery, and told Bridges that he would ſee him ſatisfied thereof, if it coſt him* 100 *l.* upon Not guilty pleaded, the Plaintiff had a Verdict and 1000 *l.* Damages; and on a Writ of *Error* brought in the *Exchequer-Chamber* it was argued, that the *Lord Mordant* was not charged with doing any Thing that was ill; for in ſome Caſes 'tis lawful to compound for a *Robbery*, but not for a *Felony*; as for Inſtance, by the Statute of *Winton*, *the Hundred ſhall have forty Days after the Robbery to agree for the Robbery, or elſe they ſhall Anſwer for the Bodies of the Offenders*; it doth not appear, whether the Judgment was reverſed or affirm'd. *Moor* 686. *Lord Mordant* verſus *Bridges.*

7. For theſe Words, *My Lord of Leiceſter is a cruel Man, an Oppreſſor, and an Enemy to the Reformation.* 1 *Leon.* 33. *Earl of Leiceſter*'s Caſe.

8. For theſe Words, The *Lord Abergavenny ſent for us, and put ſome of us into the Stocks, ſome to the Coal-houſe, and ſome to the Priſon in his own Houſe, called Little Eaſe.* 1 *Leon.* 336. *Lord Abergavenny*'s Caſe. See 9 *Eliz. Dyer S. P.*

9. *My Lord* (meaning the *Earl of Lincoln) is a baſe Earl and a paultry Lord, and keepeth none but Rogues and Raſcals about him*; tho' the Words were ſpoken chiefly concerning his Servants, yet they are in Contempt of his Honour and Dignity, and actionable. 2 *Cro.* 196. *Earl of Lincoln* verſus *Broughton.*

10. The *Lord Cromwell* brought an Action *de Scandalo Magnatum* upon the Statute 2 *R.* 2. *cap.* 2. againſt the *Vicar of D.* for theſe Words, (*viz.*). *You like of thoſe that maintain Sedition againſt the Queen's Proceedings*; the Defendant juſtified, for that the Plaintiff procured two Perſons to preach in his Church, who inveighed in their Sermons againſt the Book of Common Prayer; and becauſe the Defendant did reprove them for ſo doing, the Plaintiff ſaid to the Defendant, *Thou art a falſe Varlet, I like not of thee*; to whom the Defendant replied, *'tis no Marvel, tho' you like not of me, for you like of thoſe* (meaning the two Preachers) *that maintain Sedition* (meaning *Seditioſam iſtam doctrinam) againſt the Queen's Proceedings*; adjudged a good Juſtification, for the Senſe of the Words muſt be collected from the Cauſe and Occaſion of Speaking them; ſo that in this Caſe, by the Word *Sedition*, the Defendant did intend the ſeditious Diſcourſe and Doctrine againſt the Queen's Proceedings in the Act 1 *Eliz.* by which the Common-Prayer Book is eſtabliſhed, and not any ſuch publick and violent Sedition as was alledged by the Plaintiff. 5 *Rep. Lord Cromwell*'s Caſe. See *Lord Say*'s Caſe, *Palm.* 565.

(Palm. 565.) * Poſtea 16.

11. The Defendant diſcourſing with *T. S.* the Servant of the *Lord Say*, ſpoke theſe Words of him, *Thy Lord is a Traitor, and I will prove it*; upon Not guilty pleaded the *Lord Say* had a Verdict and 2000 *l.* Damages; it was objected in Arreſt of Judgment, that the Statute was * miſrecited, for the Word *Lies* was mentioned inſtead of *Slander*: *Sed per Curiam*, this is a Miſrecital in a Word not material, and not in any Subſtance of the Statute, and therefore well enough; 'tis not averred, that the Plaintiff was a Peer when the Words were ſpoken: *Sed per Curiam*, 'tis that the Defendant *dixit de eodem Vicecomite*, which is a ſufficient Averment. *W. Jones* 194. *Lord Say* verſus *Stephens.*

1 Lev. 277. Sid. 434. 2 Mod. 150.

12. Scandalous Words ſpoken of a common Perſon ſhall be taken *in mitiori ſenſu*, in Behalf of the Speaker; but in the Caſe of a Nobleman they ſhall be taken in the worſt Senſe againſt him who ſpoke them; therefore in an Action of *Scandalum Magnatum* for theſe Words, *I do not know but my Lord of Peterborough ſent Gibbs to take my Purſe*; actionable, tho' no poſitive Charge. 1 *Vent.* 59. *Earl of Peterborough* verſus *Sir John Mordant.*

13. The Defendant being a *Parſon*, ſpoke theſe Words in the Pulpit, *The Lord of Leiceſter is a wicked and cruel Man, and an Enemy to the Reformation in England*; after a Verdict for the Plaintiff, and 500 *l.* Damages, it was moved in Arreſt of Judgment, that this Action being brought on the Statute, it ſhould have concluded *contra formam Statuti*; which not being done, it ſhall be intended an Action at *Common Law*, and if ſo, then at Common Law theſe Words are not actionable; but adjudged, that where a general Statute is made in Affirmance of the Common Law, and an Action is brought on that Statute, without concluding *contra formam Statuti*, it ſhall be intended an Action at Common Law; but where the Statute gives a new Action, as in this Caſe, and 'tis brought on that Statute without mentioning it, the Action is good. 2 *Sid.* 21, 30. *Leiceſter Earl* verſus *Mandy.* See *Indictment* (Cc) 4. See 4 *Rep.* 16. *b. Lord Lumley*'s Caſe.

14. *Scandalum Magnatum*, the Action was laid in *Middleſex*, and a Motion was made to change the *Venue* upon the common Affidavit; but adjudged, this Action is not within the common Rule of changing the *Venues*; but becauſe the Plaintiff, who was the *Lord Gerard*, lived in *Middleſex*, they ordered it to be tried in * *Kent*, which was an indifferent County. *Sid.* 185. *Lord Gerrard* verſus *Floyd. T. Jones* 198. *Lord Shaftsbury* verſus *Graham. S. P. T. Jones* 192. *Lord Shaftsbury* verſus *Craddock. S. P.*

* 2 Mod. 215. T. Jones 192.

1 Lev. 148.

15. *Error* in *B. R.* to reverſe a Judgment in *C. B.* for a *Scandalum Magnatum*, upon the Statute *R.* 1. where there was a Verdict for the Plaintiff and 1000 Marks Damages, the Words were, *My Lord is no more to be valued than the Dog that lies there*; and the Error aſſigned was, that there was not any Averment that a Dog did lie there; beſides, the Judgment was, *quod ſit in miſericordia*, when it ſhould be *quod capiatur*, being founded on a Statute; but adjudged in an Action founded on a Statute as for Tithes or ſuch like, the Judgment ſhall be, that the Defendant *ſit in miſericordia. Sid.* 233. *Proby* verſus *Lord Dorcheſter*; *Proby* was killed and his Executors paid the Money.

2 Mod. 150.

16. Action on the Statute *de Scandalis Magnatum* for theſe Words, *My Lord Townſend is an unworthy Perſon, and does Things againſt Law and Reaſon*; upon Not guilty pleaded, the Plaintiff had a Verdict, and four Thouſand Pounds Damages; and upon a Motion for a new Trial, becauſe of the exceſſive Damages, it was denied by three Judges, againſt *Juſtice Atkins*, becauſe the Jury are the ſole Judges of the Damages; the ſaid Juſtice *Atkyns* alſo held againſt the other Three, that an Action would not lie for theſe Words. 1 *Mod.* 232. *Lord Townſend* verſus *Hughes.*

Jones 49. * Antea 10.

17. *Scandalum Magnatum* for theſe Words, *You are not for the King, but for Sedition and a Commonwealth, and by God we will have your Head the next Seſſions of Parliament*; after a Verdict for the Plaintiff and 1000 *l.* Damages, it was objected, that the Statute was * miſrecited,

 which

which is, That none ſhall ſpeake any ſcandalous Words of *Dukes, Earls, &c. nor of* any other Great Officer, *&c.* but thoſe Words, *nor of*, were omitted in the Declaration, ſo that it muſt be conſtrued thus, *(viz.) none ſhall ſpeak any ſcandalous Words of Dukes, Earles, being great Officers, &c.* ſo that the Plaintiff muſt not only be an *Earl, but a great Officer*, which is not averred. *Sed per Curiam*, this is a general Law, and need not be recited; 'tis true, if the Plaintiff will recite a Statute, and miſtakes it in a material Part, 'tis an incurable fault; but if he recites ſo much as will maintain his Action, tho' he miſtakes the Reſt, it will not make his Declaration ill; and here the Plaintiff recites, that none ſhall ſpeak any ſcandalous Words of an *Earl*, which is enough (he being an *Earl*) to entitle him to an Action. 2 *Mod.* 98. *Lord Shafts-bury* verſus *Lord Digby.*

18. *Scandalum magnatum* againſt *Sir Tho. Groſvenor*, for that he being Foreman of a Grand Jury in *Cheſhire*, ſpoke theſe Words of the Plaintiff, *that he was a tedious Man, and a Promoter of Sedition and tedious Addreſſes*; and upon a Motion for ſpecial *Bail*, it was denied, and ſo it was to the *Duke of Norfolk*, unleſs Oath made of the Words ſpoken. 3 *Mod.* 41. *Earl of Macclesfeild*'s Caſe.

(q)

In what Counties this and other Actions ſhall be brought, &c.

See *Debt.* (D) 7. *Act. Caſe.* (A) 1.

1. THE Defendant committed *Adultery* with a Woman in *Southwark*, ſhe went to *Ratcliff* in *Middleſex*, and he brought her from thence to *Richmond* in *Surrey*; the Husband brought Treſpaſs *de muliere capta & abducta cum bonis viri*, and laid it in *London*; it was very Doubtful, whether upon all this Matter given in Evidence, the Defendant could be found guilty in *London*; yet the Jury found him guilty generally, and gave the Husband 300 *l.* Damages. *Dyer* 256.

2. The Plaintiff declared, that *B. G.* recovered a Debt againſt him in the Common Pleas, and died before Execution, and that the Defendant knowing him to be dead, did malitiouſly, in the Name of the dead Man, outlaw the Plaintiff in *Middleſex*, and that upon a *Capias Utlagatum* he was taken and impriſoned in *Norfolk*, and there he laid his Action: It was objected upon a Demurrer to the Declaration, that the Action ought to be laid in *Middleſex*, where the Wrong firſt began by the *Outlary*; but adjudged, that the viſible Wrong was in *Norfolk*, (*viz.*) the Impriſonment, and *where Matter of Fact is mixed with Matter of Record*, and a Thing done in *one County* depends upon ſome Matter done in *another County*, there the Plaintiff hath his *Election* to bring the Action in either County; if an Annuity be granted in one County to be paid in another, the Action ſhall be brought where the Grant was made; ſo where a Leaſe for Years is made in one County of Lands lying in another, Debt ſhall be brought where the Leaſe was made, becauſe of the Contract, but Waſte muſt be brought where the Lands lie; ſo in every Iſſue which ariſeth upon an Action wherein *Lands are to be recovered*, the Action ſhall be brought *in that County where the Land lieth*; but where a Man is *robbed*, he may have an *Appeal* of Felony in every *County* where the Goods ſtolen were brought, but he ſhall have an *Appeal of Robbery* only in that County where they were taken from him, 7 *Rep.* 4. *Bulwer*'s Caſe.

3. The Plaintiff brought a Writ of *Raviſhment of his Ward* in the County of *York*, and ſuppoſed by his Writ, that it was done in *Durham*, and that the Defendant brought the Ward to *York*: adjudged, that the Writ ought to be brought in *Durham*, where the Wrong began. *Dyer* 289. *Fitzherbert*'s Caſe.

4. *Caſe, &c.* for that he lent his Mare at *Chippenham* to plough the Defendant's Ground at *Pickwick*, and the Defendant promiſed to deliver her ſafe in two Days, and that during that Time he exceſſively *laboured her*, (*but did not ſay where*) that ſhe died: The Plaintiff had a Verdict, but could never get Judgment for that Reaſon; but if the Promiſe had been made at *Chippenham*, and the Labouring at *Pickwick*, the Plaintiff might have laid his Action in other Place. *Hob.* 187. *Reeves* verſus *Moxham.* *Moor* 887. *S. C.*

5. *A Biſhop* being Patron of two Prebends, granted the next Avoidance of either of them, which ſhould be firſt vacant; the Biſhop died, then one of the Prebends became void, and the ſucceeding Biſhop granted it to another; adjudged, that the firſt Grantee ſhall bring the *Quare Impedit* where the Church is, and not where the Body of the Prebend lies. *Dyer* 194.

6. A Recogniſance was taken before the Chief Juſtice of the Common Pleas at *Serjeants-Inn in Fleet-ſtreet*, which was recorded *in Middleſex*, and an Action of Debt was brought upon this Recogniſance, and laid in *London*; it was objected, that it ought to be brought in *Middleſex*, becauſe it was not a perfect Record upon the Acknowledgment, but upon the Recording it and entring it on the Roll; but adjudged, that the Action is well brought in *London*, becauſe the Acknowledgment was the firſt and moſt worthy Act. *Hob.* 195. *Moor* 883. *S. C. Hall* verſus *Wingfeild.* Execution. (F) 9. *S. C.*

7. *Caſe, &c.* The Plaintiff laid his Action in *Dorſetſhire*, and afterwards proceeded in *London*, and had a Verdict: It was moved in Arreſt of Judgment, that this was a Miſ-trial; but adjudged, that ſince the Original, which is the Beginning of the Action, is in another County, it ſhall now 2 Roll. Rep. 382.

be taken after a Verdict to be no Original at all, and ſo 'tis amendable by the Statutes of *Jeofailes*. *Palm.* 394. *Cotterell* verſus *Furnivall.*

8. The Plaintiff ſued the Defendant (being a *Spaniard*) in the Court of *Almiralty*, upon a Promiſe to ſail from *S. in Barbery* to *R.* in *Braſill*, and it was ſuggeſted for a Prohibition, that the Contract was made at *London*: It was objected againſt the Prohibition, that by the Statute 32 *H.* 8. 'tis eſpecially provided, that the Suit ſhall be in the Admiralty in favour of Mariners, and that the Voyage might not be hindred, becauſe they cannot ſtay two Terms; beſides, all was done *beyond Sea*, therefore this Court hath no Juriſdiction; 'tis true, where Part is to be done beyond Sea, and Part in *England*, *B. R.* ſhall have Cognizance. *Sed per Curiam*, tho' the Contract was made * beyond Sea, yet an *Aſſumpſit* may be brought here, ſuppoſing the Contract to be made in ſuch a Place in *England*, and in ſuch a County. 2 *Roll. Rep.* 483. *Slarry & Cloberrie* verſus *Maldonado.*

* 2 Roll. Rep. 492. Capp's

9. In *Trover and Converſion*, for ſeveral Quarters of Corn; the Converſion was laid *in Middleſex*, and the Corn did grow *in Wales*, and upon a Motion, that the Plaintiff might be compelled, by a Rule of Court, to lay his Action in the next adjoining County to *Wales*, for that the Title of the Lands, on which the Corn did grow, might come in Queſtion, upon this Action, the Court would not compel him to change the County, becauſe the Action was brought in *B. R.* by Original, and not by Bill, for in ſuch Caſe the Suit may be commenced in any County, unleſs the Defendant by his Plea can make the Title of the Land to come in Queſtion. 2 *Roll. Rep.* 141. *Loyd* verſus *Bethell.*

10. *Bail* was taken before a *Commiſſioner in Yorkſhire*, and the Recogniſance was tranſmitted to a Judge of the Common Pleas, and it was made a Record of that Court; afterwards a *Sci. fa.* was brought againſt the *Bail*, directed to the *Sheriff of Middleſex*; and upon Demurrer it was adjudged, that the *Sci. fa.* was well brought in *Middleſex*, tho' the Recogniſance was taken *in Yorkſhire*; 'tis true, 'tis a Record as ſoon as 'tis taken, but 'tis not compleat till filed in Court; and therefore, both theſe Acts concurring to make it a perfect Record, the *Sci. fa.* may be brought in either County. 2 *Lutw.* 1282. *Redman* verſus *Idle.* *Allen* 12. *S. P.*

11. *In Treſpaſs*, for Taking his Cattle, *&c.* The Action was laid in *Suſſex*; the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that at another Time he brought an Original in *London*, in Battery, *&c.* intending, when the Defendant appeared, to have declared for this Treſpaſs, and that the Defendant was *outlawed in London*, and that within ſuch a Time after the *Reverſal of the Outlary*, the Plaintiff declared here, *&c.* And upon a Demurrer to this Plea, it was inſiſted for the Defendant, that the Original being laid in *London*, the Plaintiff could not declare in another *County*, tho' the Cauſe of Action was Tranſitory; but adjudged, that tho' the Original is laid in *London* for expediting the Outlary, yet, when the Defendant appears, the Plaintiff may declare againſt him in any other County; and the Statute of Limitations gives the Plaintiff a general Power to commence a new Action within a Year after the Outlary reverſed. 3 *Lev.* 245. *Whitwick* verſus *Hovenden.* *See* Sci. fa. (B) 2. *S. P.*

2 Mod. 23.

12. *Debt* againſt the Sheriff of the *County-Palatine of Lancaſter*, and being ſued to an *Outlary* on *meſne Proceſs*, the Plaintiff had a Writ directed to the Chancery there, who made a Precept to the *Coroners* to apprehend the Sheriff, and to have him before the Judges of *C. B.* at *Weſtminſter* on ſuch a Day; one of the Coroners being in Sight of the Sheriff, might eaſily have arreſted him, but did not, and they all return *Non eſt inventus*, tho' he might be found and arreſted at any Time, whereupon the Plaintiff brought this Action in *Middleſex* againſt all the Coroners, and had a Verdict, and 100 *l.* Damages: It was moved in Arreſt of Judgment, that this Action was laid in an improper County, becauſe the Wrong was done in *Lancaſhire*; 'tis true, where the Cauſe of Action ariſes indifferently in two Counties, there the Plaintiff may bring it in * either, but here is all to be done in one County; beſides, all the Coroners cannot be ſued for the Injury done by one of them; for tho' two Sheriffs make but one Officer, yet Coroners are not reſponſible for the Acts of each other; but the Court inclined, that the Action was well brought in *Middleſex*, becauſe the Plaintiff's Damage did ariſe there, by not having the Body of the Sheriff there (as the Defendants might) but neglected it; that the Ground of this Action was the Return of *Non eſt inventus*, which is the Act of all the Coroners, and that an Action would not lie againſt one Coroner, no more than againſt one Sheriff, where there are two; but admitting the Action is brought in a wrong County, yet, after Verdict, 'tis cured by the Statute 16 & 17 *Car.* 2. *cap.* 8. (*viz.*) *That where the Venue comes from any Place of the County where the Action is laid*; but the Court ſaid, that muſt be intended where the Action is laid in the proper County where it ought to be laid. 1 *Mod.* 198. *Naylor* verſus *Sharpley.* See *Dyer* 38, 39, 40. *Huſſey* verſus *Gibbs.*

* Bulwer's *Caſe.*

13. In a *ſpecial Verdict in Treſpaſs and Falſe Impriſonment* againſt five Defendants: Upon Not guilty pleaded, the Jury found *two of them Not guilty*, and as to the Reſt they find a *Warrant* under the Hand and Seal of a Juſtice of Peace, directed to *S. W.* Conſtable of *D.* in the County of *Glouceſter*, to bring the Plaintiff before him the ſaid Juſtice, to anſwer ſuch Matters of Miſdemeanor which ſhould be objected againſt him *by Sir Richard Cox Baronet*, then High Sheriff of the ſaid County; they find, that the Plaintiff was arreſted, by Vertue of that Warrant, at *D. in Glouceſterſhire*; that the Conſtable required one of the Defendants to aſſiſt him in conveying the Plaintiff before a Juſtice of Peace, but that the Conſtable, and another Defendant, *conveyed him to the Conſtables Houſe at D.* and then the *aforeſaid Richard Cox Miles*, *ſent for the Conſtable*, and commanded him to put the Plaintiff in the Stocks, and thereupon they conveyed

the Plaintiff *not towards the Juſtices Houſe*, but another Way, and put him in the Stocks, for which this Action was brought and laid in *London*, the Fact being done in *Glouceſterſhire*; they find the Act 21 *Jac. cap.* 12. by which 'tis enacted, That *if any Action on the Caſe, Treſpaſs, or Falſe Impriſonment ſhall be brought againſt any Juſtice of Peace, Mayor,* &c. *Conſtable or Tythingmen, or any other, who in their Aſſiſtance ſhall be commanded and do any Thing concerning his Office, that the ſame ſhall be laid in the County where the Fact was committed, and not elſewhere*; and that it *ſhall be lawful to plead the General Iſſue, and to give the Special Matter in Evidence, as by the Act* 7 *Jac. cap.* 5. *and if upon the Trial the Plaintiff ſhall not prove, that the Fact or Cauſe of Action did ariſe in the County where he laid the Action, then the Jury ſhall find for the Defendant, without any Regard to the Evidence given by the Plaintiff, and in ſuch Caſe, or if the Plaintiff be Nonſuit or Diſcontinue, the Defendant ſhall have Double Coſts:* The Queſtion was, if a Perſon is ſued for a Thing done, not *concerning his Office*, or by Colour of his *Office*, and which is not *ſtrictly done* by Vertue of his *Office*, but is a *Misfeaſance in Law*, whether he ſhall have the Benefit of this Act, and adjudged, that he might; for by Intention of Law, whether an Officer doth a Thing juſtifiable or not, if he is ſued for doing it, and if this Act had not been made, the Action ought to be laid where the Fact was done; now the Act was to enforce the Doing of that *where an Officer was concerned*, which ought to have been done before; but if it was done, *factum valet*; but ſince it was made, *non valet*. The next Queſtion was, upon the Concluſion of this Verdict, (*viz.*) That if the Action might be brought in *London*, then they find the Defendants guilty; but if the Court be of Opinion, that it muſt be brought *only in Glouceſterſhire*, then they find them Not guilty; ſo that the Queſtion is, whether this Action brought jointly againſt *all the Defendants might be laid in London?* and adjudged it could not: 'Tis plain, it could not againſt all by the Statute, excepting *Sir Richard Cox*, becauſe all but he were aiding and aſſiſting the Conſtable, tho' in an undue Execution of his Office: Now *Sir Richard Cox* only ſent for the Conſtable, and commanded him to put the Plaintiff in the Stocks, and if the Court ſhould be of Opinion, that the Action is well laid, as to him, for he was neither aiding or aſſiſting the Conſtable, yet the Jury have not found him guilty, for they have found all equally Guilty or Not guilty: Now, if the Action fails againſt them who did actually put him in the Stocks, becauſe not laid in the proper County, and for that Reaſon they are found Not guilty, (*i. e.*) they did not commit the Treſpaſs; it will be abſurd to ſay, that *Sir Richard Cox* is guilty of a Treſpaſs in commanding them to do a Treſpaſs, which the Jury found was not done. *Vaugh.* 111, 116. *Style* verſus *Cox.*

(r)

Where Declarations and Pleadings in this Action are good and not good.

1. *CASE, &c.* in which the Plaintiff declared, that in Conſideration he on ſuch a Day, *&c.* had contracted with the Defendant, to ſell unto him and his Heirs, one Meſſuage, and by a Writing under his Hand, had ſold unto the Defendant the ſaid Meſſuage, he, the Defendant, promiſed to pay the Plaintiff 300 *l.* on ſuch a Day, which he had not paid; and upon Demurrer to this Declaration it was adjudged, that this Action would not lie, but an Action of *Debt*; for wherever a Man may have an Action at *Common Law* (as Debt is) an Action framed *upon the Caſe* will not lie. 2 *And.* 53. *Wade* verſus *Branch.* *Action of Debt, and not Caſe.*

2. *Error in B. R.* on a Judgment given in the Court of *Pie-powders* in *Glouceſter*, where the Plaintiff declared againſt the Defendant, for ſpeaking theſe Words, (*viz.*) *Mr. Jones and his Clerks have, by Colour of their Office, extorted, gotten, and taken* 300 *l. per Annum by unlawful Means, &c.* The Errors aſſigned were, that the ſaid Words did not concern any Thing done in the *Market or Fair*; beſides, they were ſpoken *before*, and not *in* the Market, for tho' the *Court of Pie-powders* hath Juriſdiction of Things concerning the Market, yet they muſt be done *in the Market. Mich.* 42 *Eliz. Moor* 623. *Hall* verſus *Jones.* 10 *Rep.* 73. *Caſe of Marſhalſea, S. P.* *Juriſdiction of Pie-powders.*

3. *Indebitatus Aſſumpſit, tam pro depaſtura & diverſis aliis mercimoniis quam pro tritico.* After a Verdict for the Plaintiff, a Writ of *Error* was brought, and the Error aſſigned was, that *pro diverſis mercimoniis* was incertain; 'tis true, an *Indebitatus Aſſumpſit & inſimul computaſſet*, is ill, becauſe too general, but *inſimul computaſſet de diverſis denarior' ſummis*, is good: Now the Reaſon why a general *Indebitatus Aſſumpſit* is not good, is, becauſe it may be as well in *Debt for Rent*, which favours of the *Reality*, as in *perſonal Things*; but in the principal Caſe 'tis plain all are in the Perſonalty, for the Word *Mercimonia* implies as much, but *pro diverſis aliis rebus* had been ill; the Judgment was affirmed. 1 *Roll. Rep.* 24. *Bellinger* verſus *Gardner.* *General* Indebitatus Aſſumpſit. Poſtea 10, 37. Poſtea 31.

4. *Caſe, &c.* in which the Plaintiff declared, that he had ſold to the Defendant ſixty *Combs* of Malt for ſo much Money, to be paid on ſuch a Day, and that afterwards, in Conſideration the Plaintiff *would diſcharge* the Defendant of the Money due for the ſaid Malt, he (the Defendant) promiſed, *&c.* and the Plaintiff alledged, that *he did diſcharge* the Defendant, but that he had not performed his Promiſe; and upon Demurrer this Declaration was adjudged ill, becauſe the Plaintiff did not ſet forth, *how he had diſcharged him*, for he could not *diſcharge* him by 1 Roll. Rep. 372. *Declaration incertain.*

by Parol, becauſe the Promiſe was to pay Money at a Day to come. 1 *Roll. Rep.* 43. *Blackhead* verſus *Cock.*

2 Bluſt. 276. *Declaration incer-* * 1 Roll. Rep. 53. *Declaration incertain.*

5. *Caſe, &c.* in which the Plaintiff declared, that he *intendebat & conatus eſt* to marry one *Watts*, and that the Defendant ſpoke theſe Words, *&c.* * *per quod* the ſaid *Watts* refuſed to marry him; After a Verdict for the Plaintiff, the Judgment was ſet aſide, becauſe *intendebat & conatus fuit* is very *incertain*, and therefore void. 1 Roll. Rep. 79. *Sell* verſus *Fair.*

6. *Caſe*, in which the Plaintiff declared, that the Uncle of the Defendant being ſick in his (the Plaintiff's) Houſe, he being an *Inn-keeper*, the Defendant told him, that in Conſideration he wou'd *provide and find all Neceſſaries* for his Uncle, he promiſed to pay for them; and the Plaintiff ſet forth, that the Uncle lay ſick at his Houſe two Months, during which Time he provided all *Neceſſaries for him*, which amounted to the Value of 14 *l.* Upon *Non Aſſumpſit*, the Plaintiff had Verdict; it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſhew the * *Particulars of thoſe Neceſſaries*, that the Court might judge whether his Demand was reaſonable: *Sed per Curiam*, the Declaration is good, for every Action of the Caſe ought to purſue the Caſe of the Plaintiff, and here the Promiſe was directly purſued; but to recite every Particular, would make the Declaration too long, and to no Purpoſe. 1 *Roll. Rep.* 173. 3 *Bulſt.* 31. 2 *Cro.* 304. 2 *Saund.* 373. *S. P.*

* Poſtea 14.

Declaration to pay Money at a Day to come.

7. *Caſe, &c.* in which the Plaintiff declared upon a Promiſe made *in Civitate Eborum*, and did not ſet forth, that it was a County, or *in what County* it was, and it was in Conſideration of Payment of 6 *d.* in Hand, and of an incertain Sum on a Day to come, he promiſed to deliver ſo many Quarters of Barley to the Plaintiff, and did not alledge, that he had paid that Sum, for when a future Conſideration is to be performed, it ought to be alledged that it was done; and the Promiſe was, to deliver ſo many Quarters of Barley on Ship-board, on ſuch a Day, at *Barton Haven*, and that he (the Plaintiff) brought the Ship thither, and the Defendant did not bring his Barley, *&c.* but did not alledge, that he gave Notice to the Defendant which was his Ship, for there were many in that *Haven*; beſides, he did not ſet forth in what Pariſh that *Haven* was; *Sed per Curiam*, the Declaration well enough, for the Court may judicially take Notice of *Cities* and *Counties*; and as to the Non-payment of the future Sum, there was a *Tender and Refuſal* of it, which amounts to a *Payment*; and as to the not giving *Notice* which was his Ship, if there were more in the Haven, that ſhould be alledged on the other Side; and as the not ſetting forth in what Pariſh *Barton Haven* is, it ſhall be intended in the *Pariſh of Barton.* 1 *Roll. Rep.* 312. *Atkinſon* verſus *Buckle.*

Declaration, that he was indebted, but did not ſay for what. * *See* Slade's Caſe.

8. *Caſe, &c.* in which the Plaintiff declared, that whereas the Defendant was indebted to him (the Plaintiff) in ſo much Money, (but did not ſay for what). After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſhew, for * what the Defendant was indebted to him. *Sed per Curiam*, the *Indebitatus exiſtit* is only Inducement to the Action, which in this Caſe was founded upon a *Collateral Promiſe*, in Conſideration the Plaintiff would diſcontinue his Suit. 1 *Roll. Rep.* 379. *Thorne* verſus *Fuller.*

See Pinchion's Caſe.

9. *Caſe, &c.* in which the Plaintiff declared, that in Conſideration he would deliver *all the Corn* in ſuch a Barn to the Defendant, he promiſed, *&c.* and he alledged, that he did deliver all the Corn in the Barn: Upon *Non Aſſumpſit* pleaded, there was a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſet forth, that there was any Corn in the Barn, or how much there was. *Sed per Curiam*, this is remedied by the Verdict, and by pleading *Non Aſſumpſit*, the Defendant had admitted, that there was Corn there; but it had been ill upon a Demurrer. 1 *Roll. Rep.* 382. *White's* Caſe.

Cured by a Verdict, but ill upon a Demurrer.

General Indebitatus Aſſumpſit, *not good.* Antea 3. Poſtea 37.

10. In Arreſt of Juſtgment, it was held *per Curiam*, that a general *Indebitatus Aſſumpſit* is not good; but that an *Indebitatus Aſſumpſit pro diverſis denarioru' ſummis* received by the Defendant, by the Hands *of ſeveral Perſons*, to the Plaintiff's Uſe, is good, without naming the Perſons, becauſe 'tis not traverſable. 1 *Roll. Rep.* 391. *Beckingham* verſus *Lambert.*

Declaration incertain.

11. *Caſe, &c.* in which the Plaintiff declared, that in Conſideration of 40 *l.* paid by him to the Defendant, he *promiſed to take his Son to be his Apprentice, &c.* and to inſtruſt him in his Trade and to find Meat and Drink, *&c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not alledge, that the Defendant had *taken his Son to be an Apprentice*, and it might be that the Son never came to the Defendant to be his *Apprentice*, and if ſo, then he could not take him, or inſtruct him, or find him in Meat and drink; 'tis true, this Promiſe conſiſts of thoſe three Parts, but each depends on the other, and the whole is no more than a Promiſe to find him in Meat, Drink, *&c.* when he became his Apprentice, and that implies, that the Plaintiff ought to have offered his Son before the other was bound to accept him; the Judgment was reverſed. 1 *Roll. Rep.* 414. *Towlcarne* verſus *Wright.*

Declaration repugnant.

12. *Caſe* againſt two Defendants, in which the Plaintiff declared, that he was ſeiſed *Et adhuc ſeiſitus exſtit* of a Houſe newly built, and that one of the Defendants was ſeiſed of an Houſe adjoining, *&c.* and that *the other Defendant* in digging a Cellar under that Houſe, did dig ſo near the Foundation of the Plaintiff's Houſe, that *they undermined it*, by Reaſon whereof *half of the Houſe* fell into the Hole ſo digged by *one of them*: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was repugnant, for the Plaintiff declared, that he was ſeiſed *& adhuc ſeiſitus exſtit* of an Houſe, when by his own Shewing half of it was *fallen down*; beſides, the Action was brought againſt *two*, and the digging was by *one.* *Sed per Curiam*, tho'

tho' one half of the Houſe fell down, yet the other half might properly be called an Houſe, and would paſs by the Grant of an Houſe; and as to the other Objection, 'tis expreſly alledged, that they undermined the Houſe, ſo that the Digging muſt be by Two. 1 *Roll. Rep.* 430. *Slingsby* verſus *Barnard.*

13. *Caſe, &c.* in which the Plaintiff declared, that he had ſold a Plot of Ground to the Defendant, containing by Eſtimation eight Acres, and that the Defendant promiſed, that if it was more than eight Acres, he would allow to the Plaintiff for every Acre exceeding eight Acres *pro Rata*, as he had paid for the eight Acres, and alledged that it was four Acres more than the eight Acres: The Defendant pleaded, that it did not exceed eight Acres *modo & forma*, upon which they were at Iſſue, and the Jury found that it was twelve Acres; it was objected in Arreſt of Judgment, that the Plaintiff did not alledge, that the Land was meaſured: *Sed per Curiam*, it was not the Agreement that it ſhould be meaſured, and the Jury having found that it was twelve Acres, it ſhall be intended to be ſo much by *Meaſure*. 2 *Roll. Rep.* 22. *Burnell* verſus *Wood.* 2 Cro. 472. *Cured by a Verdict.*

14. *Caſe, &c.* in which the Plaintiff declared, that he, at the Requeſt of the Defendant, had made ſeveral *Suits of Clothes* for him, and that he promiſed to pay for the ſame *quantum ea Bona ſeparalia Valerent*; and averred, that *all the ſaid* Goods were worth ſo much; upon a Demurrer to the Declaration it was objected, that it was ill, becauſe the Plaintiff did not ſhew how much every * Parcel was worth: *Sed per Curiam*, In *Detinue* the *Value of every Parcel ought to be ſet forth*, becauſe the Thing it ſelf is to be recovered, but in the principal Caſe 'tis only Damages to be recovered, and therefore not neceſſary. 2 *Roll. Rep.* 96. *Sir John Sanders*'s Caſe. *Declaration incertain.* *Antea 6. Poſtea 25.

15. In an Action on the Caſe the Plaintiff declared, that he had a Meadow, *&c.* and that the Defendant *Vi & Armis*, erected a Bank on his own Land, *per quod* the Water did overflow and drown his (the Plaintiff's) Meadow; and upon a Demurrer to this Declaration it was objected, that it was ill, becauſe he had declared *Vi & Armis* in an Action on the Caſe; beſides, he could not erect a Bank *Vi & Armis* on his own Land: *Sed per Curiam*, the *Vi & Armis* goes to the erecting the Bank, which was only an *Inducement* to the Action, for that was the Overflowing the Meadow. 2 *Roll. Rep.* 248. *Whiting* verſus *Greenway.* *Declared* Vi & Armis *in Caſe.*

16. *The Defendant* promiſed to give the Plaintiff 40 *l.* to cure him of the Pox; however, he promiſed to give him 10 *l.* for his *Endeavour* to cure him; and in an Action brought for this 10 *l.* the Plaintiff ſet forth, that *he endeavoured* to cure the Defendant; there was a Traverſe to the Endeavour, upon which they were at Iſſue, and the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe the Plaintiff did not ſet forth the * *Place* where he endeavoured, *&c.* 2 *Roll. Rep.* 311. *Paine* verſus *Colledge.* *Declaration, not ſetting forth the Place, &c.* * 2 Roll. Rep. 373. Taylor's *Caſe.* S. P.

17. Error of a Judgment in an *inferior Court*, wherein the Plaintiff declared, that he lent the Defendant a Horſe to ride from *B.* to *York*, who, in Conſideration thereof, promiſed to pay 3 *l.* for the Horſe *per viam emptionis*, more than he was worth, within three Weeks or a Month after his Return, and did not ſhew that either Man or Horſe returned: *Sed per Curiam*, the Judgment was affirmed, for he might have ſold the Horſe at *York*, therefore the Plaintiff ſhall be entituled to the Money if the Horſe carried the Defendant thither. 2 *Roll. Rep.* 465. *Allenſon* verſus *Elliot.* *Declaration incertain.*

18. Caſe, *&c.* in which the Plaintiff declared, that there was a Diſcourſe of a Marriage between his Wife and the Son of the Defendant (her firſt Husband) on ſuch a Day and Place, and that the Defendant promiſed in Conſideration her Father would give 120 *l.* in Marriage with his Son, and if he married her, that he (the Defendant) would ſettle 20 *l. per Annum* on her for her Jointure, upon Requeſt; and avers, that on ſuch a Day and Place he did marry her, and that her Father gave her 120 *l. in Marriage* (but did not ſay *Poſtea*, nor the Time when he gave it) and this was objected in Arreſt of Judgment after a Verdict for the Plaintiff, (*viz.*) that there were three Things precedent to the Settling the Jointure, *(viz.) Marriage, Payment of the* 120 *l.* and the *Requeſt* to ſettle the Jointure; and 'tis not ſufficient to alledge, that the Money was given *in maritagio*, becauſe 'tis incertain; for Money given before, or at the Time, or after the Marriage, may properly be ſaid to be given *in maritagio*; therefore he ſhould have ſet forth *the Time* when the Money was given, for in this Caſe it was Parcel of the *Contract*, and for this Reaſon the Judgment was ſet aſide. 2 *Roll. Rep.* 488. *Willet* verſus *Mold.* *Declaration not ſetting forth the* Time, &c.

19. *Caſe, &c.* in which the Plaintiff declared, that his *Teſtator* was poſſeſſed of an Houſe in *D.* for Years, and of ſeveral Goods in the ſaid Houſe, and that one *Hele* and *Crook* were poſſeſſed of other Lands in *D.* and that on ſuch a Day there was a Diſcourſe between the Plaintiff and the Defendant concerning the Houſe, Lands, and Goods, and for the Intereſt of the Plaintiff therein; and that the Defendant, in Conſideration that the *Teſtator* of the Plaintiff had promiſed to grant his Intereſt in the Houſe and Goods to him (the Defendant) and to relinquiſh the Poſſeſſion of Part thereof at *Lady-day*, and the other Part at *Michaelmas following*, he promiſed to pay the Plaintiff 500 *l.* (*viz.*) one Moiety at *Michaelmas*, and the other a Year afterwards, *If he could agree with Hele and Crook for their Lands*; and tho' the Teſtator in his Life, and the Plaintiff ſince his Death, was ready to aſſure the ſaid Houſe and Goods to the Defendant, yet he had not paid the Money; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but it was ſet aſide, becauſe the Defendant by this Agreement was to pay the Money, if he could agree with *Hele* and *Crook*, and not otherwiſe, ſo that the Agreement goes to the whole Bargain, which being *conditional*, and the *Teſtator* dying before it was perfected, the Bargain was diſſolved; for after he was dead, he could not grant his Intereſt, either in the Houſe or Goods. *W. Jones* 218. *Ruſſel* verſus *Ward.* *Conditional Agreement made by the Teſtator, who died before it was performed.*

20. The

Cro. Car. 202. *Expoſition of the Words,* (viz.) make it good.

20. The Plaintiff diſcourſing with the Defendant about his Marriage with *F. Fawtroy*, and the Plaintiff ſaying ſhe had 600 *l.* Portion, the Defendant replied, that if he (the Plaintiff) would marry her, *he would make it good*, and thereupon he married her; and the Defendant had not paid the 600 *l.* nor *made it good*; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that the Declaration was ill, for the Plaintiff ſets forth, that the Defendant had not paid the 600 *l. nor made it good*, when it ſhould be, that he had not made the *Portion of* 600 *l. good: Sed per Curiam*, the Words *Make it good* ſhall be expounded, that ſhe had a good Portion of 600 *l.* and if ſhe had not, he would pay it, but if ſhe had, then the Defendant might plead it; Judgment for the Plaintiff. *W. Jones* 228. *Puncher* verſus *Kingſton.*

Declaration not purſuing the Promiſe.

21. *Caſe, &c.* in which the Plaintiff declared, that he became bound for *T. S.* who died Inteſtate, and Adminiſtration of his Goods was granted to one *Clerke*, and the Defendant, who was the Widow of *T. S.* promiſed the ſaid *Clerke*, that if he, at the Inſtance of the Defendant, would renounce the Adminiſtration, and conſent that the Defendant might have it, ſhe would ſave him harmleſs from the ſaid Bond; after a Verdict for the Plaintiff in *C. B.* and a Writ of Error brought in *B. R.* it was adjudged, that the Declaration was ill, becauſe the Plaintiff *did not ſet forth that at the Inſtance* of the Defendant, (he the Plaintiff) did renounce the Adminiſtration; but generally, that he had renounced it, which he might do, and not at the *Inſtance of the Plaintiff*, and for this Reaſon the Judgment was reverſed. *W. Jones* 441. *Leat*'s Caſe.

Action brought before Cauſe of Action.

22. Error of a Judgment *in Aſſumpſit* for the Plaintiff in an inferior Court, and the Error aſſigned was, that he declared that the Defendant *on the 23d of December*, 13 *Car.* in Conſideration of ſo much paid to him, *&c.* promiſed, that he *on the 23d of January*, would pay ſo much to the Plaintiff, ſo that here, upon his *own ſhewing*, he brought this Action before there was any Cauſe of Action. *Cro. Car.* 415. *Smith* verſus *James.* *Antea* (T) 10. *S. P.*

Stile of an inferior Court.

23. Caſe, *&c.* the Declaration was, that whereas in ſuch a *Court of Piepowders* held at *Glouceſter*, *ſecundum conſuetudinem Civitatis*, *&c.* he brought an Action of Debt againſt *W. R. &c.* who was thereupon *arreſted*, and in Cuſtody of the Defendant the Sheriff of *Glouceſter*, *&c.* who ſuffered him to *eſcape*, *&c.* upon Not guilty pleaded the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Declaration was ill, for tho' the Court is ſtiled a *Court of Piepowders* (which is incident to Fairs and Markets, for Cauſes only ariſing in them) yet it ſhall not be intended a *Court*, unleſs 'tis ſhewed that it was held by *Charter or Preſcription*, and therefore the Plaintiff not having ſhewed how the ſaid Court was held, the Omiſſion thereof is a juſt Cauſe to reverſe all the Proceedings; which is very true, and ſo adjudged if the Plaintiff had been an *Officer of the Court*, but in the principal Caſe he was a *Stranger*; and in ſuch Caſe the *Stile of the Court* is but an *Inducement to the Action*, and ſo it was adjudged for the Plaintiff. *Cro. Car.* 43, 46. *Hodges* verſus *Moyſes.*

Mod. Caſes 72. Nicholſon *v.* Cawſey.

Winch 2. *Plaintiff indebted to himſelf.* * Poſtea, 35.

24. *Aſſumpſit, &c.* in which the Plaintiff declared, that whereas the Defendant was indebted to * him (the Plaintiff) in 20 *l.* (but did not ſay for what) in Conſideration whereof he (the Defendant) promiſed *to pay*, *&c.* after a Verdict and Judgment for the Plaintiff it was reverſed upon a Writ of *Error*, for the Reaſon before-mentioned, tho it might be otherwiſe if the Promiſe had been to pay on a *certain Day*. *Palm.* 171. *Barker* verſus *Barker.*

* 2 Cro. 606. *Declaration incertain.* Antea 14.

25. *An Adminiſtrator* brought an Action of Debt, in which he declared, that the Defendant had employed the Inteſtate at *H.* to make Clothes, and promiſed to pay for every Suit he ſhould make for him (the Defendant) as much as it was worth; and averred, that he made a Suit, *&c.* and that it was worth ſo much; after a Verdict and Judgment for the Plaintiff, a Writ of Error was brought in *B. R.* and it was objected, that the Plaintiff had not ſet forth *where the Suit was made*, nor that it was *delivered* to the Defendant; but adjudged, that 'tis not material to alledge the Place, becauſe 'tis not traverſable in this Action in which *Nil debet* is the General Iſſue, neither is it material to alledge, that the Suit was *delivered* to the Defendant, becauſe the Taylor might have kept it till he had been paid, therefore it ſhould have been alledged on the other Side, that it was not delivered. *Palm.* 223. *Warren* verſus *Perkins.*

Latch 218. 2 Roll. Rep. 373. *No Place alledged.*

26. *Caſe, &c.* in which the Plaintiff declared, that the Father of *F.* offered to him the Daughter in Marriage, and to give her 300 *l.* as her Portion; and the Father and the Defendant having a *Colloquium at H. ſuper quod Colloquium*, the Defendant ſaid, will you caſt away your Daughter on *T.* 'tis as true as any Thing can be, *that T. raviſhed Hawkes's Wife*, and thereupon the Daughter refuſed to marry him; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that *no Place was laid where the Words were ſpoken*; 'tis true, the *Colloquium* was at *H.* but the Words which follow *ſuper quod Colloquium*, do not ſhew that the Words were ſpoken at *H.* for the *Colloquium* may be at one Place, and the Words ſpoken at another; the Judgment was arreſted for this Reaſon, and becauſe the Plaintiff did not alledge that he was a Suitor to the Daughter. *Palm.* 385. *Taylor* verſus *Tally.*

Latch 200. 2 Roll. Rep. 390. * Virtute, &c. præd' *when it was not mentioned before.*

27. *Caſe, &c.* in which the Plaintiff declared, that one *Brown* was indebted to him, and that he gave Authority to one *Tucke*, his Attorney, to ask, receive, and recover the Money, and that *Tucke* * *Virtute literarum præd. per debitum legis proceſſum*, did cauſe *Brown* to be arreſted; and that the Defendant, in Conſideration that *Brown* ſhould be ſet at Liberty, promiſed to pay the Money, if *Brown* did not, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe the Plaintiff had declared, that *Tucke*, *Virtute literarum prædict'*, had cauſed *Brown* to be arreſted, when he had not mentioned any *Letters* before, and that the Words *per debitum legis proceſſum*, do not imply that there was any Letter of Attorney to make

the Arreſt, but only that there was a Writ to the Sheriff for that Purpoſe. *Palm.* 394. *Randall* verſus *Harvey*.

28. *Aſſumpſit* to pay for certain Barrels of Beer delivered to the Defendant *on ſuch a Day*; he pleaded ſpecially *Non Aſſumpſit, as the Plaintiff had declared*; and upon Demurrer to this Plea it was held ill, becauſe by this Pleading the Plaintiff is tied up to a *particular Day*, whereas he might give Evidence of any other Barrels of Bear delivered at any other Time before the Action brought. *Style* 195. *Cook* verſus *Moor*. *Non Aſſumpſit, as the Plaintiff had declared, ill.*

29. *Caſe, &c.* in which the Plaintiff declared, that the Defendant plundered him *de Viginti fardellis, Anglice* Packs; adjudged, that the Declaration was void for the Incertainty, he ought to have ſet forth what was in the Packs, tho' he was a common Carrier. *Mich.* 1652. *Heath* verſus *Udall*. *Style* 348 and 370. *Herbert* verſus *Lane*. *Void for Incertainty.*

30. *Caſe, &c.* for killing Cattle infected with a mortal Diſtemper called the *Murrain*, and flinging the Entrails into the Plaintiff's Field, *per quod diverſa averia* of the Plaintiff died; upon Not guilty pleaded the Plaintiff had a Verdict; but it was objected in Arreſt of Judgment, that the Declaration was too *incertain*, becauſe it did not ſet forth *how many* of the Plaintiff's Cattle died; but adjudged, that there needs no ſuch Certainty in an *Action on the Caſe* where *Damages* are only to be recovered, as in an Action brought for the Cattle themſelves, or for the Value. *Allen* 22. *Lodge* verſus *Weedon*. *Declaration incertain.*

31. In a *ſpecial Verdict in an Action on the Caſe*, it was found, that one *Gode* had 41 *l.* owing to him by the Defendant, which he promiſed to pay; and that *Gode* owed the Plaintiff 43 *l.* and became a *Bankrupt*, and that the Commiſſioners aſſigned the Debts due to *Gode* mentioned in a Schedule containing the ſaid *Sum of* 43 *l.* to the Plaintiff, for which the Action was now brought; and the Queſtion was, whether it was the ſame Promiſe, ſince the Defendant only promiſed to pay 41 *l.* and the Action was brought upon a Promiſe to pay 43 *l.* beſides, a greater Sum was aſſigned than was really due; and adjudged that it was, for if *Gode* himſelf had brought the Action, he would have recovered upon this Verdict, there being a Difference between an Action which is founded on the *Contract* it ſelf, and an Action founded on a *Promiſe* in Law; for in the one Caſe, if the Plaintiff fails in the Sum agreed on, he fails in the Action, but in the other Caſe, tho' he Miſtakes the Sum he ſhall recover, becauſe the Promiſe in Law ariſes from the Debt. *Allen* 21. *Baker* verſus *Edmonds*. Poſtea Verdict. (G) 13. *Action founded on a Promiſe, and an Action founded on a Contract in Law.*

32. *Aſſumpſit, &c.* upon two Promiſes, one whereof was *pro opere facto*; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and entire Damages; it was objected in Arreſt of Judgment, that a Promiſe to pay, *&c. pro opere facto, was too general and incertain*, but the Plaintiff had Judgment, for 'tis as certain as a Promiſe to pay * *pro mercimoniis Venditis* and *pro ſervitio*, without mentioning the Goods or Service in particular. 1 *Mod.* 8. *Ruſſel* verſus *Collins*. Antea (M) 98. *Declaration incertain.* *Antea 3.

33. *Caſe, &c.* for ſo many Pounds of Money, in Conſideration of a like Sum before that Time *due* and unpaid to the Plaintiff; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe it did not appear by the Declaration *how it became due*, for it might be by Bond or other Specialty, and if ſo, then an *Aſſumpſit* will not lie. *Sid.* 182. *Cook* verſus *Samburne*. *Declaration incertain.*

34. *Aſſumpſit, &c.* wherein the Plaintiff declared, that in Conſideration he would procure *W. R.* to ſurrender ſuch an Houſe, the Defendant *would pay* 10 *l.* when he ſhould be required, but did not ſay *ſuper ſe Aſſumpſit* to pay, nor to whom to pay it; after a Verdict for the Plaintiff, the Judgment was ſet aſide for this Reaſon. *Sid.* 246. *Buckler* verſus *Angell*. *Declaration incertain.* 1 Lev. 164. Raym. 123.

35. *Aſſumpſit* brought by *W. R.* wherein he declared, that the Defendant was indebted to him in ſo much, which the aforeſaid *W.* (who was the Plaintiff himſelf) promiſed to pay; after a Verdict for the Plaintiff this was moved in Arreſt of Judgment, that the Plaintiff had declared on a Promiſe made by * himſelf; but adjudged, that after a *Verdict* the Name ſhall be mended, eſpecially ſince the Plaintiff had declared, that the Defendant was indebted to him (the Plaintiff); then it was objected, that the Declaration was upon a *Promiſe*, and alſo upon an *Accompt*, and that the Defendant was found in Arrear ſo much, *which he had not paid*, without ſaying *Aſſumpſit ſolvere*, ſo that it being *he owed the Plaintiff ſo much upon Accompt, which he had not paid*, the proper Remedy had been an *Action* * *of Debt*, and not an Action *on the Caſe*, and of that Opinion was the Court. *Sid.* 306. *Bedford* verſus *Uffington*. *Helped by a Verdict.* * Antea 24. * *Debt, and not, Caſe.*

36. *Aſſumpſit, &c.* for ſo many *pictas pellices*, Anglice *Guilt Skins*; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that *Pellices* ſignified *Whores*, it ought to be *Pelles*, the Judgment was arreſted. *Sid.* 318. *Milton* verſus *Johnſon*, in 1 *Lev.* by the Name of *Gardner* verſus *Fulford*. 1 Lev. 204. *Inſenſible* Latin.

37. An Executor brought an *Aſſumpſit*, for that the Defendant being indebted to his Teſtator in 20 *l.* which he ought to pay *ſecundum agreamentum inter eos habitum*, and which he promiſed to pay, *&c.* after a Verdict for the Plaintiff the Judgment was ſtayed, becauſe this is no more than a general *Indebitatus Aſſumpſit*, for it doth not appear whether it was by *Deed* or without it. 2 *Lev.* 152. *Wife* verſus *Wife*. *General* Indebitatus Aſſumpſit. Antea 3. S. P.

38. *Aſſumpſit, &c.* for that the Defendant was indebted to him in 20 *l. pro præmio* on a Policy of Aſſurance, *&c.* and upon a Demurrer to the Declaration it was objected, that the Plaintiff ought to ſhew a certain Conſideration what the *Præmium* was, but adjudged 'tis as good as an *Indebitatus Aſſumpſit, pro quodam ſalario*. 2 *Lev.* 153. *Fowk* verſus *Pinſack*. *Declaration incertain.*

Declaration incertain.

39. *Caſe, &c.* for *obſtructing a Water-courſe*, and turning it into the Plaintiff's Ground, whereby it was overflowed, and twenty Loads of Hay (but did not ſay *ipſius querentis*) were thereby ſpoiled, and for this Reaſon it was held ill after a Verdict. 2 *Lev.* 156. *Terry* verſus *Stredwick.* See *Property.* (C) per totum.

Cumq; etiam *no Affirmative.*

40. *Caſe, &c.* for Speaking ſuch Words, *Cumque etiam* the Defendant *Poſtea* ſuch a Day *ex ulteriori malitia*, ſpoke other Words which were actionable; after a Verdict for the Plaintiff and entire Damages, it was objected, that the laſt Declaration was not Affirmative, that the Defendant ſpoke the Words; but under a * *Cumque etiam*, which is always ruled ill *in Treſpaſs*; this is very true, but not ſo in an Action *on the Caſe.* 2 *Lev.* 193. *Mors* verſus *Thacker.* 3 *Lev.* 338. *Cotterell* verſus *Matthews. S. P.*

* Hardres 1. 103. Ernly *v.* Ld. Falkland. S.P.

Entire Damages.

41. *Aſſumpſit* on *three ſeveral* Promiſes, *two of them* were well laid, but the third was, whereas the Defendant on ſuch Day, Year and Place, was indebted to the Plaintiff in 13 *l.* for ſo much Money, then, before *and afterwards* had and received to the Plaintiff's Uſe, promiſed to pay; after a Verdict for the Plaintiff, the Judgment was ſet aſide, becauſe Damages being entire, the Plaintiff could not have Judgment for any Part, ſince he could have none for what was done *after the Day laid* in the Declaration. 3 *Lev.* 335. *Noble* verſus *Holland.*

Cured by Verdict.

42. *Caſe, &c.* for that the Defendant, in Conſideration of ſix Pence paid to him by the Plaintiff on the 17*th Day of January*, 17 *Car.* and that the Plaintiff would pay him 20 *s. per* Month, he promiſed to ſerve him in his Glaſs-houſe, *after the firſt Journey of Glaſs*; and alledged, that the firſt Journey of Glaſs, after the ſaid Agreement, was *on the* 21*ſt Day of February*, 17 *Car.* which muſt be the Year *before*, becauſe the 17*th Year* began on the 30*th Day of January*, ſo that he had not ſufficiently ſet forth any Journey *after the Agreement*, but this being after a Verdict, was held good. 1 *Vent.* 14. *Norris* verſus *Cuſſell.*

1 Lev. 297. 1 Mod. 70. *Certain Penalty of Bond not ſet forth.*

43. *Aſſumpſit, &c.* for that he being ſued in *B. R.* retained the Defendant to be his Attorney, who, in Conſideration of 30 *s.* paid to him, and that the Plaintiff would enter into a Bond *with ſufficient Penalty*, to ſave the Defendant harmleſs, promiſed to get Bail filed for him, *&c.* and averred, that he did give the Defendant a Bond *with ſufficient Penalty, &c.* upon *Non Aſſumpſit* pleaded the Plaintiff had a Verdict; it was objected, upon a Writ of Error in *B. R.* for that the Plaintiff did not ſet forth any *certain Penalty of the Bond*, that it might appear to the Court to be ſufficient. 1 *Vent.* 99. *Catterell* verſus *Marſhall. Hob.* 69, 77. *Auſtin* verſus *Gervas. S. P.* not allowed after Verdict.

Indebitatus Aſſumpſit *will not lie on a Specialty.*

44. *Indebitatus Aſſumpſit* was brought by the Plaintiff *pro naulo*; upon *Non Aſſumpſit* pleaded the Plaintiff had Judgment, and it was objected on a Writ of *Error*, that Freight was uſually contracted by a Charter-Party, which being a *Specialty*, a general *Indebitatus Aſſumpſit* would not lie, but Judgment was affirmed, for it doth not appear that there was any *Deed* in the Caſe, and it ſhall not be intended that there was. 1 *Vent.* 101. *Prior* verſus *Sheares.*

Declaration incertain.

45. *Aſſumpſit*, upon a *Quantum meruit* for ſeveral Things, and amongſt the reſt *pro un' par Chirothecarum*; after a Verdict for the Plaintiff, it was inſiſted on a Writ of Error, that the Declaration was ill, becauſe the Plaintiff did not ſet forth *what Sort of Gloves*, of which there are ſeveral Prices, according to the different Leather of which they are made, but the Plaintiff had Judgment, for this Action is much of the ſame Nature, with an *Indebitatus pro diverſis mercimoniis, &c.* 1 *Vent.* 105. *Jemey* verſus *Norris.* 1 *Mod.* 295. *S. C.* 1 *Lev.* 303. *S. C.* See *Trover.* (C) *pl.* 10, 11. it has been held good *de Coriis*, without ſaying *Bovinis* and *de libris*, without ſaying what Books. 2 *Saund.* 374.

Payment after the Day, not good.

46. *Indebitatus Aſſumpſit* on a Note for Payment of Money on ſuch a Day: The Defendant pleaded, that *after the Day of Payment* he paid ſo much Money *in Satisfaction* of what was due on the Note; and upon Demurrer this was held an ill Plea, becauſe after the Action is veſted, he cannot plead Payment by Way of *Satisfaction*, tho' 'tis good by Way of Diſcharge. 4 *Mod.* 250. *Perry* verſus *Odingſell.*

Ad quod damnum.

(A)

1. IF an old Ditch, which came from the Sea to any Town with Boats, *&c.* be ſtopped by the Violence of the Sea, or by any other Means, there can be no new Ditch made without the Writ of *Ad quod damnum* firſt ſued out, and an Inquiſition returned, and thereupon the Leave of the King obtained. 10 *Rep.* 142. *Iſle of Ely's* Caſe.

2. Information for Stopping a *Highway*, the Defendants confeſs the *old Way*, but ſay it was ſo full of Water and Dirt, that People could not paſs, and that for their Eaſe, *R. B.* who was ſeiſed of a Cloſe adjoining, laid out another Way more commodious; and that before the laying it out, he brought a Writ of *Ad quod damnum*, to enquire, whether it was to the Damage of, *&c.* and upon an Inquiſition taken it was found, that it was not to the Damage, *&c.* Adjudged, this was no

no good Plea, becauſe it did not appear by what Authority *R. B.* laid out the Way, and the Pleading the *Ad quod damnum* is to no Purpoſe, when he doth not plead, he obtained the King's Licenſe upon it. *Cro. Car.* 193. *The King* verſus *Ward.*

3. Upon a *Scire facias* to repeal a Patent granted to *Sir Oliver Butler*, for a *Market* to be held at *Chatham*, reciting, that there was an *antient Market* kept at *Rocheſter*, within half a Mile of *Chatham*; and that there was a Writ *Ad quod damnum* taken out before this Patent was granted, and by the Inqueſt thereupon taken it was found, that it was *ad damnum nullius*, which Inqueſt was executed by Surpriſe, and without Notice, when in Truth, 'tis of great Damage to the Market at *Rocheſter*: To this *Scire facias Sir Oliver Butler* demurred, and it was argued for him, that this Patent could not be repealed, becauſe the Finding, that the Market newly granted was to the Damage of no Body, was concluſive to all; beſides, the King cannot bring a *Scire facias* to repeal his own Grant: But *Fynch*, *Lord Chancellor*, aſſiſted by the Lord Chief Juſtice *North*, and others, decreed, that the Patent ſhould be repealed, and that the Return of the Writ *Ad quod damnum* was not concluſive; for by the Demurrer there is a Confeſſion, that it is to the Damage of the other Market, and that upon a Petition to the King by the Party grieved, he of Right is to permit him to make uſe of his Name to bring a *Scire facias* to repeal the Patent. 2 *Vent.* 344. *Sir Oliver Butler*'s Caſe. *See* Scire facias, (G) 14. *S. C.* 3 Lev. 220.

Addition.

(A)

See *Appeal.* (B) 1.

1. INdictment for the Murder of the Wife, *(viz.) Quod Eliz. fuit in pace quouſque, &c. præd' R. B. vir præfat' Eliz. de H. in Com. præd. Yeoman*; here, tho' *Eliz.* doth next precede the Addition of *Yeoman*, yet it ſhall not be referred to her, but to the Huſband. *Dyer* 47.

2. *ſſ.* The Statue 1 *Ed.* 5. requires, that it ſhould be named of what *Town*, *Hamlet*, *or Place* the Party is; yet, if an Action is brought againſt the Defendant, *Chancellor of the Univerſity of Oxford*, without naming the *Town*, 'tis well enough. *Poph.* 56. *Burton* verſus *Wrightman.*

3. *ſſ.* The Error aſſigned in a Judgment in *Aſſumpſit* was, that the Defendant was ſued by the Name of *Sir Francis Forteſcue Knight of the Bath* only, when he was both * *Knight of the Bath and Baronet*; but becauſe he appeared to that Name and pleaded, the Judgment was affirmed. 2 *Cro.* 582, 610. *Sir Francis Forteſcue* verſus *Markham.* 1 Roll. Rep. 450. Miſnomer (B) 3.

4. *ſſ.* The Statute 1 *H.* 5. *cap.* 5. requires in Proceſs of *Outlary* the *Addition of the County* where the Party dwelt, and for that Reaſon (there being an Omiſſion of the County) an Indictment for a Forcible Entry was quaſhed. *Style* 26.

5. An Indictment for refuſing to ſerve the Office of a Conſtable was quaſhed, becauſe the Party indicted wanted an Addition. *Style* 394.

6. The Defendant was indicted at the Seſſions for keeping *Nine-pinns*, and it being removed into *B. R.* by *Certiorari*, it was moved to quaſh it, for that he was indicted by the Name of *W. R. Hoſpes*, without an *Anglice*, which is not a good *Addition*; and if it had been *Anglice* an *Hoſt*, it had been ill, becauſe it might be either a Man or Woman, which is the Reaſon that *Spinſter* is not a good Addition, which is very true; but a bad Addition, or no Addition at all, is cured by an *Appearance.* 1 *Sid.* 247. *In the King and Ward*'s Caſe. *See Dyer* 46. *b.*

7. In a *Homine Replegiando*, the Defendant pleaded in Abatement, that there was no Addition of *Place*, *Vill or Hamlet* in the *Pluries*; and to this Plea the Plaintiff demurred, becauſe *Addition* is neceſſary only where *Proceſs of Outlary* lay in Actions *Vi & armis*; but *Replevin* is not an Action *Vi & armis*, and therefore no Addition is neceſſary; and the Statute 25 *Ed.* 3. *cap.* 17. doth not extend to *Replevin*; adjudged, that tho' at Common Law *Proceſs of Outlary* did not lie in *Replevin*, yet by that Statute the *Exigent* is given, and that is upon the *Pluries* returned; now the Statute *of* 1 *H.* 5. *cap.* 5. *of Additions*, ſays, *in every Original in Actions perſonal, whereupon Proceſs of Exigent lies, there ſhall be an Addition, &c.* which muſt be intended ſuch an *Original* on which the Court proceeds; but they do not proceed upon the *Original Replevin*, becauſe that is *Vicontiel* and determined, but upon the *Pluries*; therefore, ſince the firſt Replevin needs no Addition, the *Pluries*, which is founded upon it, needs none. 1 *Salk.* 5. *Earl of Banbury* verſus *Wood.* Mod. Ca. 84.

8. The Defendant being brought up by *Habeas Corpus*, the Plaintiff declared againſt him by the Name of *T. S. de H. in Cuſtod' Mar', &c.* He pleaded in *Abatement*, that his Father lived likewiſe in *H.* and that his Name was *T. S.* and ſo becauſe there was no Addition *petit judiciu' de Billa*: And upon Demurrer to this Plea, it was adjudged, that where Father and Son are both called *T. S.* if an Action is brought againſt *T. S.* without any Addition, the Father ſhall be intend- Mod. Ca. 198.

ed; but in ſuch Caſe, if a Deviſe was to *T. S.* and the Teſtator did not know the Father, it would go to the Son; that if this had been an Original, and the Father and Son had lived in different Counties, there needed no Addition; but it being brought againſt the Defendant *in Cuſtodia Mar'*, *&c.* he muſt ſhew, that *T. S.* the Father is likewiſe *in Cuſtody*, otherwiſe his Plea will be nought. 1 *Salk.* 7. *Lepiott* verſus *Brown.*

9. The Defendant was indicted for a Treſpaſs done by him, at the Command of his Maſter, by the Name of *W. R. Servant* to *R. H.* and this was adjudged a good Addition, and as certain as the Addition of *Gentlemen.* *Mod. Caſes.* 58. *The Queen* verſus *Hoskins.*

10. The Defendant was indicted for Speaking ſcandalous Words of a Juſtice of Peace, and being convicted, it was objected againſt the Form of the Indictment (*viz.*) That there was no Addition of the Place of Abode of the Defendant, which is expreſly required by the Statute 1 *H.* 5. *cap.* 5. (viz.) That in Indictment, there ſhall be the Addition of the *Eſtate*, *Degree*, *Miſtery*, *and of the Town*, *Hamlet*, *Place and County*, *where the Defendant dwells*, and by the Statute *of H.* 6. which gives the Court Power to amend Records, the Defects named in the Statute 1 *H.* 5. are excepted, therefore where a Writ of Error was brought to reverſe an Outlary for Perjury, the Defendant was indicted by the Name of *N. L. de Parochia de Aldgate*, and did not ſhew in what County *Aldgate* was, and for that Reaſon it was reverſed: *Sed per Curiam*, in the principal Caſe the Indictment was againſt the Defendant *de Almonbury* in the *Weſt Riding of Yorkſhire*, which is well enough. 3 *Mod.* 129. *The King* verſus *Darby.*

8 H. 6. c. 12.

2 Cro. 167.

Adjournment.

(A)

1. WHERE the the Whole or Part of the Term ſhall be adjourned, and the Manner thereof. *Dyer* 186, 225. *Cro. Car.* 19.

2. The Statute 1 *Mariæ cap.* 7. enacts, That all Fines levied before the Juſtices in the Common Pleas, *&c.* ſhall ſtand good upon the *Adjournment of a Term*; now, if *Part of the Term* is only adjourned, 'tis helped by this Statute, which is general, and ſhall be taken by *Equity.* *Dyer* 186.

3. In *Michaelmas* Term, 6 *Car.* there were three Returns adjourned, and the Manner of the Adjournment is in 2 *Cro.* 145. and *Trinity* Term was adjourned from *Tres Trin.* to *Octabis Trin.* by Reaſon of the Plague. *Cro. Car.* 331, 335.

Admi-

Adminiſtration.

To whom grantable. (A)
To whom not grantable. (B)
By whom grantable. (C)
Of Deſtribution amongſt Lineals. (D)
Amongſt Collaterals. (E)
Adminiſtrator Plaintiff, and where he may retain. (F)
Adminiſtrator Defendant. (G)
Adminiſtrator *De bonis non.* (H)
Of his Bond to the Ordinary. (I)
Of *Bona notabilia.* (K)
Adminiſtrator *Durante minore ætate.* (L)
What Acts amount to Adminiſtration. (M)
What Acts do not amount to it. (N)
Of Repleading and revoking Adminiſtration. (O)
Of *plene Adminiſtravit*, good. (P)
Plene Adminiſtravit, not good. (Q)
Of Judgment on *Plene Adminiſtravit.* (R)
Pleading Bonds good, and not good. (S)
Pleading Judgments by Confeſſion, not good. (T)
Pleading other Judgments and Executions, good. (V)
Pleading other Judgments, not good. (W)
Replications to Pleas on Judgments, good, and not good. (X)
Where Judgment ſhall be *De bonis propriis.* (Y)
Where Judgment ſhall be *De bonis Teſtatoris.* (Z)

(A)

Of Adminiſtration, and to whom grantable, and in what Caſes good.

1. AT Common Law, whoever poſſeſſed himſelf of the Goods of the Inteſtate was chargeable by the Name of *Executor*; for before the Statute 31 *Ed.* 3. there was no ſuch Perſon as an Adminiſtrator; but by that Statute 'tis enacted, that *the Ordinary ſhall depute the next and moſt lawful Friends of the Inteſtate to adminiſter, and they ſhall incur the Charge, and be accountable to the Ordinaries as Executors.* And ever ſince this Statute the Name hath been changed from Executor to Adminiſtrator. 5 *Rep.* 82. *In Snelling's* Caſe.

2. *After the Statute* before-mentioned, the Ordinary could not grant Adminiſtration to whom he pleaſed, as he might before, for now he was bound to grant it to the * *next and moſt lawful Friend of the Inteſtate*; and if there was any Doubt or Controverſy *who that Friend was*, it was to be decided by the *Common Law*, according to the Order of Succeſſion uſed in that Law, that is, if the Wife ſurvived her Husband, or he his Wife, the Survivor was accompted *the next and moſt lawful Friend*; and if there was neither Husband or Wife living, then Adminiſtration was granted to the Sons and Daughters of the Inteſtate, and for Default of ſuch Sons and Daughters, then to the Children of ſuch Sons and Daughters. * Poſtea 7.

3. But notwithſtanding this Statute, the Widows of Inteſtates were often excluded, upon Pretence, that they had no Right to adminiſter, therefore, by a Statute *Anno* 21 *H.* 8. *cap.* 5. *it was enacted*, that *Adminiſtration ſhould be granted to the Widow, or next of Kin to the Inteſtate, or to both, as the Ordinary ſhould think fit, taking* Security *for the true Adminiſtration of the Goods, and that where ſeveral Perſons claim the Adminiſtration, as the next of Kin in equal Degree, he may grant it to which he will.*

Now this Statute being penned in the Disjunctive, (*viz.*) *To the Widow, or next of Kin, &c.* ſhe was uſually excluded, as ſhe was before the making that Law. *Raym.* 93. *Sir G. Sands's* Caſe. *Sid.* 179. 403. *S. C. Shore* 351. *Fortree* verſus *Fortree. Salk.* 36. *S. C.*

4. But if the Husband ſurvive the Wife, Adminiſtration of her Eſtate ought to be granted to him *de jure*, tho' once it was granted from him to her Niece; but upon the Appeal of the Husband, that Adminiſtration was repealed. *Cro. Car.* 106. *Johns* verſus *Row.* 1 *Salk.* 36. *S. P. Sid.* 409. *S. P.* W. Jones 175.

5. The Caſe before the Delegates was, ſi. *Sir Thomas Hinſon* was poſſeſſed of Lands for Years under ſeveral Leaſes, and having Iſſue *William and Thomas*, he, by his laſt Will, made *William* his Executor, and *Reſiduary Legatee*, after Debts and Legacies paid; *William* married and proved the Will, but died Inteſtate before the Debts and Legacies were paid, the Judge of the Prerogative Court granted Adminiſtration of the Goods of *Sir Thomas* to his other Son *Thomas*, which he afterwards revoked, and granted it to the *Widow of William the Inteſtate*, from which Sentence

Thomas.

Thomas appealed, but was not relieved; for *per Curiam*, the Adminiſtration was rightly granted to the Widow. 2 *Roll. Rep.* 158. *Hinſon* verſus *Button.*

6. The Inteſtate's Eſtate conſiſted in Leaſes for Years, and other perſonal Things, and after his Deceaſe Adminiſtration was granted to an *Alien*, and adjudged good, becauſe he hath not the Eſtate in his own Right, but in the Right of the Inteſtate. *Cro. Car.* 8. *Sir Upwell Caroon's* Caſe.

Latch 67. *Antea 2. 7. Prohibition to the Spiritual Court upon a Suggeſtion, that they refuſed to grant the Adminiſtration to the * *next of Kin* to the Inteſtate, but to another, but the Prohibition was denied, becauſe they are Judges, who is next of Kin. *Palm.* 416. *Mayhoe* verſus *Strumpling.*

8. Prohibition was granted, for that the Spiritual Court would have granted Adminiſtration of the Goods of the *Wife to her Brother*, when her Husband was living, to whom of Right it doth belong. *Palm.* 521. *Dixe's* Caſe.

9. The *Niece and the Nephew* are in equal Degree to the Inteſtate, but where the *Niece* got Adminiſtration, the *Nephew* could not get it repealed; for when the Ordinary hath executed his Power according to the Statute, he cannot afterwards revoke it. *Allen* 56. *Hill* verſus *Bird. Style* 102. *S. C.*

10. The Teſtator made two Executors, who both died in his Life-time, then he died, leaving two Siſters, and the eldeſt got Adminiſtration, afterwards the youngeſt moved *B. R.* for a Prohibition to repeal it, becauſe ſhe being in equal Degree, ought to have an equal Share; but it was denied, becauſe, if the Adminiſtration was not duly granted, ſhe might bring an *Appeal. Mich.* 24 *Car.* 2. *Style* 147. *Brown* verſus *Poynes.*

11. The Plaintiff *Davis*, as Adminiſtrator to a *Feme Covert* brought an Action of Debt upon a Bond due, *&c.* The Defendant pleaded, that Adminiſtration of the Goods of the Wife ought *de jure* to be granted to the Husband, who was then alive; and upon a Demurrer to this Plea, it was adjudged ill, for the Plaintiff is rightful Adminiſtrator till 'tis repealed. 1 *Mod.* 231. *Davis* verſus *Cutts.*

12. Where *Adminiſtration is granted to a Legatee* he may *retain* his Legacy, tho' the Adminiſtration is afterwards repealed upon a *Citation*; but not upon an *Appeal*, becauſe in ſuch Caſe it was void *ab initio.* 1 *Vent.* 219.

Sid. 179. 13. The eldeſt Son of Sir *George Sands* died Inteſtate, Adminiſtration was granted by the Prerogative Court to the Father, as next of Kin, his Son's Widow libelled to have it repealed, and Sir *George* moved for a Prohibition, and it was granted, becauſe the Statute 21 *H.* 8. gives the Ordinary Power to grant it as well to the next of Blood, as to the Widow, and here he hath executed that Power, therefore he cannot repeal it, and grant it to another; and ſo is * *Fotherbie's* Caſe. *Raym.* 93. *Sir Geo. Sands's* Caſe. *Sid.* 280. *Peirce* verſus *Perks. S. P.*

Poſtea (D) 2.

14. But leaſt any Thing in the Statute 22 *Car.* 2. *Of Diſtribution of Inteſtates Eſtates*, ſhould be conſtrued to extend to a *Feme Covert dying Inteſtate*, 'tis enacted by another Statute, 29 *Car.* 2. *cap.* 9. that it ſhall not; but that the Husband ſhall have Adminiſtration to her perſonal Eſtate, as he had before.

15. Adjudged, that neither Adminiſtration or Probate of a Will ſhall be granted to a *Popiſh Recuſant convict*, for they are diſabled by the Statute 35 *Eliz. cap.* 4. and therefore where the Spiritual Court would have granted it to ſuch a Recuſant, a Prohibition was granted. *Mod. Caſe* 239. *Ride* verſus *Ride.*

16. Since the making this Statute 22 *&* 23 *Car.* 2. a Man died Inteſtate leaving one Son, who likewiſe died Inteſtate, and Adminiſtration of his Goods was granted to the *next of Kin of the Father*, becauſe there being but *one Child*, there can be no *Diſtribution*; and ſo this is a Caſe out of the Statute, and therefore the Son is to have the Whole at Common Law; but it hath been otherwiſe adjudged ſince that Time, (*viz.*) That by this Statute of Diſtribution of Inteſtates Eſtates, a Right is veſted in one Child, where there is one and no more, (*viz.*) a Right to ſue for the Eſtate, and by Conſequence, if he die, before the Eſtate is recovered and actually in his Poſſeſſion, it muſt go to his Adminiſtrator, and not to the Adminiſtrator of the Father. *Bunhill* verſus *Newton*, *Anno* 35 *Car.* 2. *Palmer* verſus *Allicock.* 3 *Mod.* 58.

17. So where a Perſon died Inteſtate, leaving two, who were next of Kin in equal Degree to him, one of them died Inteſtate within the Year, and before Diſtribution; adjudged, that an *Intereſt was veſted in him*, and his next of Kin ſhall have Adminiſtration, like the Caſe of a *Reſiduary Legatee* dying before Probate of the Will, (*viz.*) His next of Kin ſhall have the Adminiſtration, and not the next of Kin of the Teſtator. *Shore* 25. *Brown* verſus *Shower.*

18. It was granted to the *Grandmother*, and the *Aunt* moved for a *Mandamus*, but it was denied; for ſhe is as near of King as the *Aunt*, or rather nearer, becauſe ſhe is in the Right Line aſcending. 1 *Salk.* 38, 39.

19. So where 'tis granted to a *wrong Perſon*, 'tis not void, (as 'tis where 'tis granted in a *wrong Dioceſe*) but voidable only, for if it was void, there would be a Nullity in all the Acts of the Adminiſtrator; but the Law is otherwiſe; ſo if 'tis granted to a *Creditor of the Inteſtate*, and afterwards repealed at the Suit of the *next of Kin*, and granted to him, in ſuch Caſe the Creditor may *retain* againſt the rightful Adminiſtrator, and his Diſpoſal of the Goods, even after a Citation, and till the Sentence of Repeal, ſhall be good. 1 *Salk.* 38. *Blackborough* verſus *Davis.* See 1 *And.* 303. *Owen.* 50. *Cro. Eliz.* 460. *Sid.* 371.

20. *T. S.* died Inteſtate, without Child or Kindred, the Plaintiff *procured Letters Patents*, and Adminiſtration was committed to the Patentee, which is the uſual Courſe in ſuch Caſes; the De-

fendant entered *Caveats* by Reaſon thereof, putting the Plaintiff to Charges, he brought an Action on the Caſe againſt the Defendant; and upon Demurrer to the Declaration it was adjudged, that till Adminiſtration granted the Property of the Goods was in the Ordinary, and that the Plaintiff had neither *jus in re, nec ad rem*, that the Appointment by *Letters Patents* was but a Recommendation, and that the granting Adminiſtration to the Patentee was rather of reſpect to the King, than of Right; for notwithſtanding the Opinion in *Henſloe's* Caſe, Adminiſtrations generally belonged to the *Biſhop*, and the Inſtances of ſome Lords of Manors granting them, is not a Proof to the contrary. 1 *Salk.* 37. *Manning* verſus *Knapp.*

21. An Adminiſtrator, *during the Abſence of T. S. (who is Executor)* brought an Action of Debt on a Bond, but did not aver in his Declaration, that *T. S.* was *abſent*; 'tis true, he need not aver *where* he was *abſent*, for it ſhall be intended to be beyond Sea, but he muſt aver, that he is abſent, which being omitted, the Declaration was held ill. 1 *Salk.* 42. *Slaughter* verſus *May.* See 2 *Salk.* 751. *the Pleadings.* See *Clare* verſus *Hodges.* 1 *Lutw.* 342. 4 *Mod.* 14. *S. C.* not Law. Mod Caſes 304.

22. A *Feme Sole* had divers Debts owing to her by *Specialty*, ſhe marries, and the *Bonds not being put in Suit during the Coverture*, ſhe died, and her Husband was ſued in the Spiritual Court by her Brother, to make a Diſtribution by Vertue of the Statute 29 *Car.* 2. *cap.* 35. and the Queſtion was, whether a *Feme Covert* was intended by that Act, which provides only where the *Husband dies Inteſtate*, and a married Woman can never die Inteſtate within the Meaning of this Statute, becauſe it provides, that the Ordinary ſhall take a Bond of the Adminiſtrator, if it appear that the Deceaſed made any Will, which a *Feme Covert* cannot do without the Conſent of her Husband, therefore Adminiſtration of the Wife's Eſtate ſhall go to him. 2 *Mod.* 20. *Wilſon* verſus *Drake.*

23. In a *Prohibition* the Caſe was, the Brother died Inteſtate, leaving one Siſter, an Infant, whoſe *Great Grandmother* was aſſigned her * *Guardian*, and thereupon ſhe obtained Adminiſtration *durante minori ætate*; and now the Plaintiff in the Prohibition, who was the Grandfather to the Infant, ſuggeſted, that the Adminiſtration was granted by Surprize, and that he being near of Kin, Adminiſtration ought to be granted to him: *Sed per Curiam*, 'tis not material who ſhall be Adminiſtrator, for it being *durante minori ætate*, he hath no Power over the Eſtate; but ſince the Ordinary hath an original Power in this Caſe, and this being a ſpecial Adminiſtration, when he hath once executed that Power, he ſhall not repeal it. 3 *Mod.* 23. *Lord Grandiſon* verſus *Counteſs of Dover.*

* *By the Stat.* 4 & 5 Annæ, *An Action of Accompt lies againſt the Executor or Adminiſtrator of a Guardian.*

(B)

To whom 'tis not grantable, and where, if granted, 'tis not good.

1. IT ought not to be granted to an *Executor of an Executor*, where the *firſt Executor died before Probate of the Will*, for in ſuch Caſe it ſhould be granted to the next of Kin of *the firſt Teſtator, cum teſtamento annex'*, except where the *firſt Executor* was alſo *Reſiduary Legatee*; but if the firſt Executor had *proved the Will*, and afterwards died Inteſtate, the Ordinary may grant Adminiſtration of his Goods, and ſuch Adminiſtrator might adminiſter the Goods of the firſt Teſtator. *Dyer* 372. *Iſted* verſus *Stanley.* See *Poſtea* (H), *pl.* 2. *S. P. Executor of Executor.* (E), *pl.* 1. *S. C.*

2. So where an *Adminiſtrator makes an Executor* and dies, that Executor ſhall not adminiſter to the Goods which the Adminiſtrator had of the Inteſtate, but in ſuch Caſe the Ordinary may grant a new Adminiſtration. *Ibid.*

3. The Caſe was, the Teſtator deviſed a Houſe to *Ralph and John*, for the Term of twenty-one Years, to commence after the Death of *Joan Leech*; and if they die in her Life-time, or afterwards, and before the Term of twenty-one Years, expired after the *Death of Joan*; then he deviſed the Reſidue of the ſaid Term to *Katharine in the ſame Manner as he had deviſed it before to Ralph and John*; and immediately after the Death of *Joan*, and the Expiration of the ſaid twenty-one Years of *Ralph and John*, or of *Katharine*, if ſhe ſurvive, that the ſaid Meſſuage ſhould be and remain to *T. S. Ralph and John* died within the twenty-one Years, *Katharine* ſurvived, but died alſo within that Term; the Queſtion was, if her Adminiſtrator ſhall have the Reſidue, and adjudged that he ſhould not, becauſe the Term was gone by her Death, for ſhe was not to have it during the Lives of *Ralph and John*, and ſhe could not have it for twenty-one *Years* abſolutely, becauſe it was deviſed to her in the ſame Manner as to *Ralph and John*, and that was, if they *ſurvived Joan*, ſo that *Katharine* was not to have the Reſidue of the Term of twenty-one Years, unleſs ſhe ſurvived *Joan.* 2 *And.* 17. *Henning* verſus *Blake.*

4. Two Executors contending which of them was the rightful Executor, the Ordinary *pendente lite* granted Adminiſtration to *W. R.* adjudged, that it was not well granted. *Moor* 636. *Robbins's* Caſe.

5. Sentence was given in the Eccleſiaſtical Court for a Will, from which Sentence there was an Appeal to the *Delegates*, and thereupon it was repealed, and that *Court granted Adminiſtration to the Appellant*; afterwards, upon a Suggeſtion of *Bona notabilia*, the Prerogative Court granted Adminiſtration to one, and the Archbiſhop of *York* (in whoſe Province the Inteſtate died) granted Adminiſtration to another, and this laſt Adminiſtrator releaſed a Debt due to the Inteſtate, and afterwards, he to whom Adminiſtration was granted by the *Delegates*, brought an Action againſt

the Debtor, who pleaded this Releaſe; and adjudged, that the Plaintiff had no Right to this Action, becauſe the Adminiſtration granted by the *Delegates* was void, they having a Power *corrigere* only, and not * *exequi*. 2 *Bulſt.* 23. *Stephenſon* verſus *Wood*.

* Poſtea (C) 8.

6. *Husband and Wife as Adminiſtratrix*, brought an Action of Debt againſt *W. R.* in which they declared, *that the Inteſtate was Adminiſtrator* to *T. S.* who lent the Money to the Defendant; the Plaintiffs had a Verdict and Judgment, but it was reverſed on a Writ of *Error*, becauſe the Action was brought by an *Adminiſtratrix of an Adminiſtrator*, whereas the Adminiſtration of the firſt Inteſtate's Eſtate ought not to have been granted to *her*, but to *his next of Kin*. *Hill.* 43 *Eliz. Goldsb.* 182. *Thorne*'s Caſe.

7. The Husband died Inteſtate, and one who was Debtor to him paid the Money to his Widow, to whom the Right of Adminiſtration did belong, but afterwards it was granted to a Stranger, who ſued the Debtor in the Lord Mayor's Court; and there it was decreed, that he ſhould pay the Money to the Adminiſtrator; but in the Court of Conſcience it was decreed, that he ſhould not have it, becauſe it was already paid to the Widow, who had the Right of Adminiſtration, thereupon the Adminiſtrator ſued out a *Procedendo ad judicium*; adjudged, that *B. R.* could not examine whether the Decree was equitable, or not, ſo long as the Court below had not tranſgreſſed any Rule of the Common Law. *Hill.* 2 *Car. Latch* 190. *Cripps*'s Caſe.

Cro. Car. 115.

8. Upon an *Appeal to the Delegates*, the Caſe was, *John Denn*, the Teſtator, deviſed ſeveral Money Legacies to ſeveral Perſons, and the *Reſidue of all his moveable Goods and Chattels to his Wife*, and made her Executrix, and died, having ſeveral Debts due to him *on Bonds*: The Widow died *before Probate of the Will*, and then Adminiſtration of the Goods of the Teſtator *cum teſtamento annex'* was granted to the *Siſter* of the Widow, who was married to *Sparkes*; and *Tho. Denn*, the Brother of the Teſtator, appealed; and the Sentence was, that the Adminiſtration ſhould be revoked, and a new Adminiſtration granted to the Appellant; for by the Deviſe of all the Teſtator's *moveable Goods and Chattels*, the Debts on Bond which are *Jura*, are not deviſed, therefore there being ſomething which was not deviſed, Adminiſtration ſhall be granted to the next of Kin of the Teſtator, but if all had been deviſed, then Adminiſtration had belonged (in this Caſe) to the Wife, for ſhe had the whole Eſtate. *W. Jones* 225. *Sparkes* verſus *Denn*.

9. Adjudged, that ſeveral Adminiſtrations cannot be granted of an entire Thing, as where the Inteſtate had a Bond of 200 *l.* due to him, the Ordinary ought not to grant Adminiſtration of 100 *l.* Part of the Bond, to one, and the Reſidue to another, if he does, 'tis void; neither ought he to grant ſeveral Adminiſtrations of Goods in one County to one, and of Goods in another County to another. *Sid.* 100. *Hamond* verſus *More*. 1 *Salk.* 36. *S. P.*

10. Adminiſtration was granted to a *Reſiduary Legatee*, who was not the next of Kin to the Inteſtate, as where the Teſtator gave a Portion to his *Daughter*, and made his *Wife Reſiduary Legatee*, and *W. R.* Executor, and died, and afterwards the Executor died Inteſtate, and then the *Daughter* got Adminiſtration, and the Widow, who was the *Reſiduary Legatee* ſued to repeal it; thereupon the Daughter moved for a Prohibition, ſuggeſting that there was no *Reſiduum* for the Widow, but it was denied, becauſe it would be to no Purpoſe, that Adminiſtration ſhould be granted to the Daughter (tho' ſhe was next of Kin) when ſhe could have no Benefit by it, for the *Reſiduum* was deviſed to the Wife, therefore 'tis reaſonable that ſhe ſhould have the Care and Adminiſtration of the Eſtate to whom the *Reſiduum* was deviſed. 1 *Vent.* 217. *Thomas* verſus *Butler*. 2 *Lev.* 55. *S. C.* by the Name of *Thompſon* verſus *Butler*.

(C)

By whom grantable.

1. A Bond was made in *Ireland* to *R. B.* of *London*, who died Inteſtate in *London*, and there the Bond remained at his Death; a *Biſhop of Ireland* granted Adminiſtration to the Son of the Inteſtate, who releaſed the Debt, afterwards Adminiſtration was granted by the *Prerogative Court* here to the Widow, who brought an Action of Debt againſt the Obligor, and recover'd the Debt, becauſe the firſt was a wrong Adminiſtration, for it ought to be committed by the * *Ordinary where the Bond was at the Inteſtate's Death*, and not by the Ordinary where the Debt did at firſt ariſe. *Dyer* 303. *Lukar*'s Caſe.

Poſtea 26.

2. So where he declared on an Adminiſtration committed by the Archbiſhop, without ſaying how, either as *Ordinary*, or by Vertue of his Prerogative. *Cro. Eliz.* 6. *Dorrell* verſus *Collins*, and 456. *S. P.*

3. The granting Adminiſtration is a Power annexed to the Perſon of a Biſhop, and is not local, for a Biſhop of * *Ireland* being in *England*, may grant Adminiſtration here of any Thing within his Dioceſe in *Ireland*. *Godb.* 33. *Carter* verſus *Crofts*. *Leon.* 33. *S. C.* *Poſtea, pl.* 11. *S. P.*

* Poſtea 10, 11.

4. The Plaintiff declared on an Adminiſtration committed to him by the *Dean of Litchfield*, and did not ſay by what Authority, or that he was *loci Ordinarius*, and this was held ill. *Cro. Eliz.* 791. *Temple* verſus *Temple*. *Poſtea* Rent. (B) 6. *S. C.*

Moor 367.

5. An Adminiſtrator declared on an Adminiſtration *per Andrew Vane ſacræ Theologiæ doctorem*, and did not ſay, *loci iſtius Ordinarium*, or *cui de jure pertinuit*, *&c.* this was held ill after a Verdict. *Cro. Eliz.* 431. *Morgan* verſus *Williams*. See *pl.* 26.

6. An Adminiſtrator declared on an Adminiſtration *de Bonis non* granted to him by the *Steward of the Manor of Mansfield*, &c. *cui commiſſio Adminiſtrationis illius de jure pertinuit*, and concludes with a *profert hic in Curia*, and this was held good. *Cro. Eliz.* 102. *Lucy* verſus *Smith*. 1 *Lutw.* 406. *Burbridge* verſus *Clayton*. *S. P.* This might have been a good Objection to a Plea, but not to a Declaration.

7. *Leſſee for Years* died poſſeſſed of ſeveral Leaſes of ſeveral Lands in the Dioceſe of *York*, and in a *Peculiar* in the ſame Dioceſe, having deviſed thoſe Leaſes to his Son, and made his Daughter an Infant *Executrix*; the Mother took out Adminiſtration in the *Peculiar* where her Husband died, and this was *durante minore ætate* of the Infant *Executrix*; adjudged, that there ought to be two Adminiſtrations granted, one by the *Peculiar*, and the other by the *Archbiſhop of York*, and he ſhall not have a Prerogative in both Places, becauſe this * *Peculiar* was derived out of his Juriſdiction, but hath now a proper Juriſdiction by it ſelf. *Cro. Eliz.* 718. *Price* verſus *Simpſon*. See *Poſtea*, *pl.* 31. *S. P.* 2 And. 132. Cro. Eliz. 718. 5 Rep. 29. * Poſtea 30, 31, 32.

8. It hath been held, that *Adminiſtration* may be granted by the *Delegates*, in *Godbolt*, but the later Reſolutions are otherwiſe, for that Court hath only Authority * *corrigere & non exequi*. 2 *Bulſt.* 2. *Stephenſon* verſus *Wood*. * Antea (B) 5.

9. Adminiſtration was granted by the Biſhop of *Briſtol*, when in Truth the Inteſtate had *Bona notabilia*; and afterwards the Prerogative Court granted Adminiſtration to another, who brought Treſpaſs againſt the firſt Adminiſtrator for taking the Goods; it was objected, that it would be hard to make him a Treſpaſſer, becauſe the granting Adminiſtration doth belong to the Ordinary *mero jure*, and 'tis probable, that neither he nor the Party did know, that the Inteſtate had *Bona notabilia*; but the Court held, that, becauſe the firſt Adminiſtration was *void*, therefore the Adminiſtrator was a Treſpaſſor. 2 *Leon.* 155. *Dunn*'s Caſe.

10. A *Biſhop of Ireland* being in *England*, granted Adminiſtration here of Goods in *Ireland*, and held good. *Godb.* 34. Antea 3.

11. The Commiſſary of the Biſhop of *Norwich* being in *London*, granted Adminiſtration there; and it was held good, becauſe that Power is not * local, but follows his Perſon. *Godbolt* 342. *Knolls* verſus *Dobbins*. *Leon.* 342. *S. C.* *Hob.* 15. *Hutton*'s Caſe. *S. P.* *Antea pl.* 3. *S. P.* Palm. 366. * Antea 3, 10.

12. *Aſſumpſit* by an Adminiſtrator, and upon *Oyer* of the Letters of Adminiſtration, it appeared they were granted by *Tho. Taylor, Batchelor of Divinity, and Commiſſary of the Biſhop of London*; the Defendant pleaded, that Adminiſtration was granted to him under the Seal of the *Vicar General*, and alſo pleaded the Statute 37 *H.* 8. by which 'tis enacted, that a *Doctor of Law* may be a *Commiſſary*, but that *Tho. Taylor* was a meer Lay-man, and not *Doctor legis civilis*, *&c.* but adjudged, that the Adminiſtration granted to the Plaintiff was good, until avoided by Sentence. *Poph.* 37. *Stoake*'s Caſe. Poſtea 28.

13. Where an Adminiſtration granted by the Spiritual Court is affirmed upon an Appeal to the Arches, the ſame is uſually remitted to the Spiritual Court; but if the Adminiſtration is repealed upon the *Appeal*, in ſuch Caſe, that Court where the Repeal was, ſhall grant Adminiſtration *de novo*, and not the Spiritual Court, becauſe by the Repeal their Juriſdiction is gone as to this Caſe, ſo likewiſe upon an Appeal to the *Delegates*, if the Adminiſtration is repealed, they may grant Adminiſtration *de novo*. *Latch* 85. *Reeve* verſus *Denny*. Appeal. (H) 6. S. C.

14. An Adminiſtrator declared on an Adminiſtration granted by *King Charles*, without ſaying, *debito modo*, and held good. *Allen* 53. *Hobſon* verſus *Wills*.

15. It regularly muſt be granted by the Biſhop of the Dioceſe where the Party dies, and in ſuch Caſe 'tis ſufficient for the Plaintiff to ſay, that it was granted to him by the Biſhop, *loci iſtius Ordinarium*, if he doth not ſay by whom it was granted, but only, that *Debito modo commiſſa fuit*, this is naught upon a *Demurrer*, but good after a *Verdict*. *Style* 282. *Marſhall* verſus *Ledſham*, and *Mich.* 6 *W.* 3. *B. R. Cheesborough* verſus *Lintot*. *S. P.* *Wade* verſus *Atkinſon*. 2 *Cro.* 10. *contra*.

16. The Authority of an *Archdeacon* need not be ſet forth, becauſe he is *oculus Epiſcopi*, and is to grant Adminiſtration *jure ordinario*. *Style* 54.

17. An Adminiſtrator declared on an Adminiſtration committed to him by *R. B. Archdeacon of Norfolk*, and did not ſay *loci iſtius Ordinarium*, and held good. *Sid.* 302. *Dring* verſus *Reſpaſs*. *Chiberton* verſus *Trudgeon*. 2 *Roll. Rep.* 124, 150. *S. C.* 2 *Cro.* 556. and *Palm.* 97. *S. C.* 1 Lev. 193.

18. The Defendant ſet forth, that Adminiſtration was granted to her by the *Commiſſary* of the Biſhop of *Litchfield*, *legitime conſtitutum*, and held good. 1 *Lutw.* 9. *Walford* verſus *Savill*.

19. An Adminiſtrator declared on an Adminiſtration granted to him *per W. Lewen, Vicarium generalem in ſpiritualibus Epiſcopi Roffen'*, without ſaying, *loci iſtius Ordinarium*, and held well, for ſuch a *Vicar* amounts to a *Chancellor*. 1 *Lutw.* 408. *Burbridge* verſus *Cleyton*. 1 *Leon.* 312. *Gillam* verſus *Lovelace*. *Style* 106. *Clementſon* verſus *Montford*. *S. P.*

20. *Covenant* againſt Husband and Wife, *Adminiſtratrix* of her firſt Husband, upon a Leaſe made to him, wherein he covenanted *not to aſſign it without Leave* of the Leſſor; and the Breach was, that he did aſſign it without Leave, ſo that the Inteſtate in his Life-time did break the Covenant, and the Defendant alſo after his Deceaſe *dum ſola fuit*, *to whom Adminiſtration of her Husband's Goods was committed*, and likewiſe the Husband and Wife did the like after their Marriage; upon Demurrer to this Declaration it was objected, that the Plaintiff ought to ſhew *by whom Adminiſtration was committed to the Widow, and by what Authority*; 'tis true, if the *Adminiſtratrix had been Plaintiff*, this had been a reaſonable Objection, but as ſhe was a *Defendant*

in this Action, 'tis unreaſonable, that the Plaintiff, who was a meer Stranger to the Proceedings, ſhould ſhew by *whom, and by what Authority* it was granted. 1 *Lutw.* 297. *Knight* verſus *Green.*

Poſtea 31. 21. Ruled by three Judges, that where a Man dies Inteſtate, having Goods in ſeveral *Peculiars*, the granting of Adminiſtration is in the *Metropolitan*, and not in the *Ordinary*. 1 *Lev.* 78.

22. If granted by a *Peculiar*, the Plaintiff muſt ſhew by whom, and muſt add *cui commiſſio Adminiſtrationis præd' de jure pertinet.* 1 *Salk.* 38. *See pl.* 27.

23. An Adminiſtrator declared on an Adminiſtration by the *Official of the Biſhop of Carliſle*, without ſaying *loci iſtius Ordinarium* ; and upon Demurrer this was held good. 2 *Mod.* 65. *Daves* verſus *Harriſon.* *Cro. Eliz.* 102. *Smith* verſus *Lacy. S. P.* *Cro. Eliz.* 838. *Chard* verſus *Bird.* *Woodward* verſus *Thompſon*, 907. *Skidmore* verſus *Winſton*, 879.

* *By the Stat.* 4 & 5 Ann. *No Advantage ſhall be taken for for cauſe* 24. *Adminiſtrator, durante ætate cum Teſtamento annexo*, was Plaintiff, but did not ſet forth, that Adminiſtration was committed to him, and yet he concluded with a * *profert hic in Curia literas Teſtamentarias* ; this was held ill, and not cured by a Verdict. *Mich. 6 Will. Cheeſman* verſus *Lintot.* *T. Jones* 193. *Lake* verſus *Thacker.*

Default of Profert hic in Curia literas Teſtamentarias, *or* Adminiſtrationis, *except ſpecially ſet down of Demurrer.*

25. Adminiſtration granted by an *Official of a Peculiar debito modo commiſſa*, without averring *cui de jure commiſſio Adminiſtrationis in hac parte pertinet*, held good, and affirmed in *Error* upon this Difference, (*viz.*) where the Power of Granting Adminiſtration is by ſpecial * Commiſſion from the Ordinary, as by his *Chancellor, &c.* there it muſt be *averred*, he had Juriſdiction; but where the Power is by *Office or Privilege*, as by a *Commiſſary* or *Official*, it need not be averred, becauſe the Office imports the Power as incident to it, and the Law takes Notice of the *Office.* 1 *Salk.* 41.

* Poſt. 30.

*Antea 5. 26. It ought to be granted by the *Biſhop of the Dioceſe where the* * *Party dies*, and therefore where the Plaintiff declared on an Adminiſtration granted by the *Biſhop of London*, the Defendant pleaded in Bar, that the Inteſtate at the Time of his Death, was Reſident in the Dioceſe of *W.* and this was held a good Plea. 1 *Salk.* 37. *Poſtea* 39.

27. By the Statute 16 & 17 *Car.* 2. *cap.* 8. the Omiſſion of ſetting forth by what Authority the Adminiſtration is granted, is cured by a Verdict ; as for Inſtance, an Adminiſtrator declared, that Adminiſtration was granted to him by * *W. R. Surrogate and Official of D. D. Prebendary of the Prebend* of *C.* and did not ſay, *Cui Adminiſtratio de jure pertinet* ; this was aided by a Verdict. 4 *Mod.* 113. *Maſon* verſus *Hanſon.* *Shower* 355. *S. C.* 1 *Salk.* 36. *Gidley* verſus *Williams. S. P.* See 2 *Salk.* 749. *The Pleadings.*

* See pl. 30.

28. *Debt by an Adminiſtrator, &c.* and in concluding his Declaration, he alledged, that Adminiſtration was granted to him by the Archbiſhop of *Canterbury apud Caſtrum Eborum : Upon non eſt factum* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the granting Adminiſtration was a judicial Act, and it appearing, that it was granted by the *Archbiſhop of Canterbury out of his Province*, it was therefore void ; but adjudged, that 'tis only a * miniſterial Act, becauſe the Ordinary is directed by the Statute to grant it. 1 *Lutw.* 533. in *Boſwall* and *Rawſtorne's* Caſe. *See* Variance (G) *S. C.*

* Antea 3, 10, 11.

Antea 26. 29. *Debt by an Adminiſtrator* on an Adminiſtration granted to him by the Biſhop of *L.* the Defendant pleaded in Bar, that the Inteſtate at the Time of his Death, was Reſident in another Dioceſe ; and upon a Demurrer this was held a good Plea. 1 *Salk.* 37. *Hilliard* verſus *Cox.* See *Poſtea* (K) *pl.* 15. *S. C.*

Mod. Ca. 241. 30. Debt by an Adminiſtrator, to whom Adminiſtration was committed *debito modo* by *T. C.* Maſter of Arts, *Commiſſary or Official of a Peculiar legitime fulcit:* Upon a Demurrer to this Declaration, it was objected, that the Court could not take Notice that every * *Peculiar* had a Right to grant Adminiſtration, therefore the Plaintiff ſhould have ſet forth the Power, (*viz.*) *cui de jure Commiſſio Adminiſtrationis in hac parte pertinet* ; but adjudged, that every *Peculiar* hath a Power of granting Adminiſtration, for they have a ſpecial Ordinary for that Purpoſe, and all the Caſes relating to this Matter, may be thus reconciled, (*viz.*) That where ever the Power of him who grants Adminiſtration is by *Commiſſion*, his Authority muſt be *averred, (*viz.*) *cui juriſdictio in ea parte pertinuit :* Thus Adminiſtration granted by *T. S.* (*a*) *Theologiæ Profeſſorem*, or (*b*) *per G. D. Decanum de S.* or *per* (*c*) *R. G. Chancellor of Cheſter*, is naught, becauſe all theſe are by *ſpecial* * *Commiſſion under the Biſhop* ; but where Adminiſtration is granted *virtute Officii*, there the Plaintiff need not aver the Authority of the Perſon granting, becauſe the Office it ſelf imports a Power to grant it ; thus, where the Plaintiff declared on an Adminiſtration granted to him *per Abbatem de Weſtm' loci iſtius Ordinarium* ; this is good, becauſe the Word *Ordinary* implies ſuch a Power ; the like of a *Commiſſary of a Biſhop*, becauſe the Law knows every *Commiſſary* muſt have that Power ; ſo likewiſe *per* (*d*) *R. W. Officialem Epiſcopi* ; ſo *per M. R. Archidiaconum*, good. 1 *Salk.* 40. *Denham* verſus *Stephenſon.* *Style* 282.

* Allen 53.
1 Saund. 422.
(*a*) 3 Cro. 431.
(*b*) 3 Cro. 791.
(*c*) Hetl. 68.
* Antea 20.

(*d*) Lacy v. Smith. * 2 And. 142. Croſſe v. Corbock. 31. The Plaintiff, as Adminiſtrator to *Thomas Rider*, brought an Action of Debt on a Bond for 40 *l.* and ſets forth, that the Adminiſtration of all his Goods, not exceeding 40 *l.* was granted to him by *Dr. Cartwright* * *Dean Rural of Fradſham*, within the Dioceſe of *Cheſter*, who had a peculiar Juriſdiction. The Defendant pleads, that the Inteſtate, *Thomas Rider*, had Goods above the Value of 40 *l.* (*viz.*) of the Value of 50 *l.* at *Fradſham within the Dioceſe of Cheſter*,

and that the Official of the Biſhop had granted Adminiſtration to *S. D.* and traverſed, that the *Dean Rural* had any Power to grant Adminiſtration, *&c.* This Plea was held ill upon a Demurrer, becauſe the Defendant had not alledged, that *Fradſham* was within the *Peculiar*, for if it was, then the Inteſtate having above 40 *l.* there the Dean Rural had no Power to grant Adminiſtration; now it not appearing, whether *Fradſham* was within the Peculiar or not, but only, that it was in the Dioceſe of *Cheſter*, then the Dean Rural may grant Adminiſtration in his Peculiar, where the Value doth not exceed 40 *l.* and where it doth exceed that Value out of the Peculiar, the Biſhop may grant another Adminiſtration, and both may ſtand. 5 *Mod.* 423. *Okell* verſus *Sudlow.* See *antea pl.* 7. *S. P.*

(D)

Of Diſtribution of the Surplus amongſt Lineals.

2. BY the Statute 21 *H.* 8. the Ordinary, upon granting Adminiſtration, is to *take Security, that the Adminiſtrator ſhall truly adminiſter the Goods*; and this was uſually done by a Bond, in which this Clauſe was inſerted, (*viz.*) *That after Debts paid, the Surplus ſhould be diſtributed as the Ordinary ſhould direct*; and accordingly they directed the Diſtribution according to the Courſe of the Imperial Law, with which the Common Law agreeth in this Matter (*i e.*) To the *Wife* and *Children, and where there were none, then to the next of Kin in a natural Order of Succeſſion*; and when they began to break that Order, then this Clauſe was conteſted, firſt in the Caſe of * *Tooker* and *Loan*, where my *Lord Hobart* was of Opinion, that after Adminiſtration was granted, the Adminiſtrator had a Property in the Surplus, after Debts paid; and this was alſo the better Opinion in *Slawney*'s Caſe. *Hob.* 83. *Moor* 864. *S. C.* 1 *Brownl* 31. *Brierſly*'s Caſe. S. P. *Style* 456. *Davis* verſus *Matthew*, and *Hill* verſus *Bird. S. P.* See (A) *pl.* 6. *S. C.* Hob. 191.

2. But in *Levan*'s Caſe it was adjudged, that after Adminiſtration granted the Adminiſtrator had an abſolute Property in the Goods, and that the Ordinary having executed his Power, he had nothing farther to do. *Cro. Car.* 62. *Fotherbie*'s Caſe. *Litt. Rep.* 21. *S. C. Cro. Car.* 201. *Levann*'s Caſe. * *Jones* 228. *S. C. Style* 439. *Cook* verſus *Chambers. S. P.* * Hob. 191.

3. But now, by the Statute 22, 23 *Car.* 2. *cap.* 10. made *Anno* 1670. The Ordinary is to take a Bond, with Sureties, in his own Name, with a Condition particularly mentioned in this Statute, the Subſtance whereof is, *(viz.) To exhibite a true Inventory of the Goods, and truly to adminiſter the ſame according to Law*, to accompt before the Ordinary, and *to pay the Reſidue as he ſhall direct*, but purſuant to the true Meaning of the Statute, *(viz.)* after Debts, Funerals and juſt Expences allowed, then to diſtribute the Surplus. * *By the Name of* Vandam *v.* Deconell.

ſſ. *One third Part to the Wife of the Inteſtate, the Reſidue amongſt his Children, anſuch as legally repreſent them, if any are dead*, other than *ſuch Children who ſhall have any Eſtate by Settlement of the Inteſtate in his Life-time, equal to the Shares of the other Children.*

But thoſe Children who have been advanced by Settlements or Portions by the Inteſtate, not equal to the Shares of the other Children, they ſhall have ſo much of the Surplus as will make all equal.

But the Heir at Law ſhall have an equal Share, in the Diſtribution, with the other Children, without any Conſideration of what he had by Deſcent, or otherwiſe, from the Inteſtate.

If there are no Children, nor legal Repreſentatives of them, in ſuch Caſe, one Moiety ſhall be allotted to the Wife, the Reſidue equally to the next of Kin of the Inteſtate in equal Degree, and to thoſe who legally repreſent them; but there ſhall be no Repreſentation amongſt Collaterals, after Brothers and Siſters Children.

If there is no Wife, then all ſhall be diſtributed amongſt the Children, and if no Child, then to the next of Kin to the Inteſtate in equal Degree, and to their Repreſentatives.

No Diſtribution ſhall be made till a Year after the Inteſtate, and every Perſon to whom any Share ſhall be allotted, ſhall give Bond, with Sureties, in the Spiritual Court, that if Debts ſhall afterwards appear, to refund his ratable Part thereof, and of the Charges of the Adminiſtration.

By the Statute 1 *Jac. c.* 17. the Act before mentioned was made *perpetual*, but with this Addition, *(viz.) That an Adminiſtrator ſhall not be cited to render an Accompt otherwiſe than by an Inventory, unleſs at the Inſtance of ſome Perſon in Behalf of a Minor, or having a Demand out of the Eſtate, as Creditor, or next of Kin.*

And that, if after the Death of the Father any of the Children die Inteſtate, without Wife or Children, living the Mother, every Brother and Siſter, and their Repreſentatives, ſhall have an equal Share with her.

4. It was granted to the *Siſter of the Half-blood, and to her Husband*; adjudged, this was wrong, becauſe the *Husband* was not of Kin to the Inteſtate, therefore he ought not to be joined becauſe if the Wife die before him, yet he would continue Adminiſtrator, which was never intended by the Statute. *Allen* 36. *Brown* verſus *Wood.* 2 Mod. 204.

5. Since this Statute a Man died Inteſtate, without any Wife or Child, and the Queſtion was, whether his *Siſter of the Half-blood* ſhould have a Diſtributive Part with the *Brother of the Whole-blood*? it was adjudged, that ſhe ſhould, for the Statute made no Alteration in ſuch Caſes, and before the Statute was made, the Common Law made no Difference between the Whole-blood Jones 93. 1 Vent. 316. 2 Lev. 173.

and the Half blood as to this Matter; 'tis true, the Surplus is to be divided *amongſt the next of Kin in equal Degree*; now, ſhe who is of the Half blood, is next of Kin to the Inteſtate, as well as he who is of the Whole blood; for tho' 'tis only the *Half*, 'tis the *ſame Blood* with the Whole, but not ſo much of it. 1 *Mod.* 209. *Smith* verſus *Tracy*, *Brown* verſus *Wood*. *Allen* 36. *S. P.* *Style* 174. *S. C.* *Watts* verſus *Crook*. 2 *Vent.* 317. *S. P.* *Caſes Adjudged* 108. *S. C.*

6. The Teſtator gave a Legacy of 5 *l. a-piece* to two Perſons *whom he made Executors*, and died without diſpoſing of the *Reſidue* of his Eſtate: The Will was proved in Common Form, and the Daughter of the Teſtator ſued for a Diſtribution of the *Reſiduary Part*, for that the Executors had no Title to it, they having each of them a ſpecifick Legacy, and the Court compelled them to exhibit an Inventory in Order to make a Diſtribution; but a Prohibition was granted upon a Suggeſtion, that the Court had not any ſuch Power, but only where the Party died Inteſtate. 5 *Mod.* 247. *Petit* verſus *Smith*.

(E)

Of Diſtribution amongſt Collaterals.

* 22, 23 Car. 2. cap. 10.

REpreſentatives amongſt Collaterals, even before the making *the* * *Statute of Diſtributions of Inteſtates Eſtates* were always rejected in thoſe of remote Degrees, becauſe the Kindred might be branched out amongſt ſo many Perſons, and the Eſtate divided into ſo many Parts, that very little Benefit would acrue to them; and tho' Repreſentations amongſt Lineals are allowed in remote Degrees, yet, even in ſuch Caſe the Diſtribution is to be made *per Stirpes*, and not *per Capita*, for the Reaſon before mentioned.

But now by the ſaid Statute 'tis expreſly enacted, that *there ſhall be no Repreſentation amongſt Collaterals after Brothers and Siſters Children*. (i. e.) The Brothers and Siſters of the Inteſtate, and not Brothers and Siſters of Children of any Collaterals.

'Tis true, it hath been otherwiſe adjudged; as for Inſtance, a Man died Inteſtate, and his next of Kin were *two Aunts*, but one of them died before him, and left *two Children*, and Adminiſtration being granted to the ſurviving Aunt, ſhe was ordered to diſtribute a Share to them, and ſuch a Share as their Mother would have, if ſhe had been living; but this was contrary to the Opinion of the *Chief Juſtice North*, who would not allow Repreſentations amongſt Collaterals ſo remote. *Raym.* 496. *Carter* verſus *Crawley*.

(F)

Of an Adminiſtrator Plaintiff, and what Acts he may do and not do, and what Actions he may have, and what not, and where he may retain for his own Debt, where not. See *Executor*. (C) 10.

1. IN *Trover by an Executor*, wherein he declared, that he was *poſſeſſed* of 40 *l.* in a Purſe *ut de bonis ſuis propriis*, which he loſt, and the Defendant found and converted *in Retardationem executionis Teſtamenti, &c.* Now, tho' this ſeems Contradictory, yet it was held good, becauſe the Executor was poſſeſſed of the Teſtator's Goods, as if they were his own; 'tis a Poſſeſſion which is caſt on him by the Law, and therefore he may declare, that the Converſion of thoſe Goods by the Defendant was *in Retardationem executionis Teſtamenti*. *Cro. Eliz.* 568. *Rivers* verſus *Godskirt*.

2. An *Annuity* was granted to *T. S.* and the Rent was arrear, then the Grantee died; adjudged, that his Executor may have an Action of Debt againſt the Grantor, or a Writ of Annuity againſt him or his Heirs, becauſe it charges only his and their Perſons; but 'tis otherwiſe, where a *Rent-charge* is granted, and the Rent is in Arrear, for if the Grantee die when the Rent is Arrear, his Executor or Adminiſtrator had no Remedy at Common Law to recover the Arrears, therefore by the Statute 32 *H.* 8. *cap.* 37. an *Action of Debt* is given to the Executor, which may be brought againſt the Grantor, or his Heirs: He may likewiſe *diſtrain* for ſuch Rent, ſo long as the Land continues in the Poſſeſſion of the Grantor, or any other Perſon claiming under him; and therefore in an Avowry for ſuch Rent the Plaintiff muſt declare, that the Lands charged with the Rent remain in the Seiſin of the Grantor, or ſome other, who claims under him by Deſcent or Purchaſe. *Cro. Eliz.* 547. *Miles* verſus *Willoughby*. *Poſtea* Averment (A) 1. *S. C.*

* Antea (C) 24.

3. The Plaintiff muſt likewiſe conclude his Declaration with a * *Profert hic in Curia literas Teſtamentarias, &c.* and this was formerly held ſo Eſſential, that a Verdict could not help it, becauſe it was Matter of Subſtance, and the very Thing which entitled the Plaintiff to the Action: 'Tis true, my Lord Chief * Juſtice *Hale* was always of a contrary Opinion; and therefore he having the Penning the Act 16 & 17 *Car.* 2. *cap.* 8. inſerted this Clauſe, (*viz.*) *After a Verdict the Judgment ſhall not be ſtaid, for not producing the Letters of Adminiſtration*; but before the Making this Statute it was otherwiſe, as may be ſeen in the Caſes following: *Cro. Eliz.* 551, 592.

* 1 Vent. 222.

Browning verſus *Fuller.* 2 *Cro.* 299. 1 *Bulſt.* 200. *S. C.* 2 *Cro.* 409. *S. C. Cutts* verſus *Bennet.* 3 *Bulſt.* 223. *S. P. Hob.* 38. *Cope* verſus *Lewin.*

4. But he need not ſhew in *what Place* Adminiſtration was granted to him; for the Declaration is good, if he declare generally as Adminiſtrator. *Cro. Eliz.* 283. *Piers* verſus *Turner.*

5. If *Rent is in Arrear to the Teſtator*, who afterwards granteth all his Eſtate to another, and the Grantee attorned, and then the Teſtator died, his Executor cannot recover thoſe Arrears by Vertue of the Statute 32 *H.* 8. becauſe they were not due to the Teſtator at the Time of his Death, for they were loſt by granting away his Eſtate; and the Statute provides, that the Executor ſhall recover *in as large and ample Manner as the Teſtator might*, who cannot recover when he granted over his Eſtate to another; and if he cannot recover ſuch *Arrears*, his Executor muſt be in the ſame Caſe. 4 *Rep.* 48. *Andrew Ognell's* Caſe. *Poſtea* Rent. (B) 3 (H) 2, *S. C.*

6. And therefore, if he bring an Action of Treſpaſs for taking Goods which were the Teſtator's Goods at the Time of his Death, he need not ſet forth, that they were taken *extra cuſtodiam ſuam*, for it ſhall be ſo intended, becauſe the Poſſeſſion is caſt on him by Law. 2 *Cro.* 113. *Adams* verſus *Cheverell.*

7. An Adminiſtrator compounded a Judgment of 100 *l.* which the Inteſtate had obtained and took only 40 *l.* of the Money; adjudged, that this ſhall not Prejudice any of the Creditors of the Inteſtate. 8 *Rep.* 132. *Turner's* Caſe.

8. Where an Adminiſtrator is Plaintiff, he muſt ſhew *by whom* Adminiſtration was granted to him, becauſe 'tis that only which entitles him to the Action; and where 'tis granted by one who hath a *peculiar Juriſdiction* exempted from the Ordinary, the Plaintiff muſt not only ſhew * *by whom* it was granted, but he muſt likewiſe declare *cui commiſſio Adminiſtrationis præd' de jure pertinet*, except where 'tis granted by a *Biſhop*, for in ſuch Caſe 'tis ſufficient for him to declare, that it was granted by the Biſhop *loci iſtius Ordinarium*; becauſe the Law takes Notice, that the Biſhop hath a general Juriſdiction and Superintendency over the whole Dioceſe in Eccleſiaſtical Affairs, and by Conſequence of all Acts done by him in Vertue of that Juriſdiction. 2 *Cro.* 10. *Wade* v. *Atkinſon.*

T. Jones 1. Thorold v. Bayly. *That it was granted* debita juris forma, *good, without ſhewing by what Ordinary.*

9. An Executor and an Adminiſtrator hath ſuch a Property in the Goods of the Teſtator and Inteſtate, immediately veſted in them upon their reſpective Deaths, that they may declare *upon their own Poſſeſſion*, tho' the Goods never came to their Hands, becauſe the Poſſeſſion is caſt on them by Law. *Godb.* 33. *Carter* verſus *Crofts.*

10. Sometimes, where there is an Executor, yet Adminiſtration hath been granted to another and by Vertue thereof the Adminiſtrator hath got the Poſſeſſion of the Goods, yet in ſuch Caſe, as ſoon as the Executor hath proved the Will, he may maintain an Action of Treſpaſs againſt the Adminiſtrator. 2 *Bulſt.* 268. *Fiſher* verſus *Young. Poſtea* Treſpaſs (A) 18. *S. C*

11. *A.* and *B.* covenanted on one Part and *H.* on the other Part; and it was agreed, that *H.* ſhould enter into a Bond to pay 100 *l.* to *B.* who ſoon after died, and his Adminiſtrator brought an Action of Covenant againſt *H.* for Non-payment of the 100 *l.* to *B.* in his Life-time; and adjudged, that the Action was not maintainable, becauſe the Adminiſtrator was no Party to the Indenture, but that it ought to be brought by *A. Yelv.* 177. *Rolls* verſus *Yate.*

12. Where a Man *granteth a Rent-Charge for Life*, and afterwards maketh a *Feoffment of the Lands*, out of which the *Rent-Charge* was iſſuing, to another, and the *Rent-Charge is in Arrear* in the Time of the Feoffee, who maketh another Feoffment of the Lands to *T. S* and the Rent-Charge is likewiſe arrear in his Time, and then the Grantee for Life of the Rent-Charge dieth, his Executor ſhall have an Action of Debt againſt the Feoffee and *T. S.* for the Rent which was in Arrear reſpectively in their Times, becauſe *qui ſentit commodum ſentire debet & onus.* 7 *Rep.* 39. *Lillington's* Caſe.

13. An Adminiſtratrix *durante minore ætate* of an Executrix gave Bond to ſeveral of the Creditors of the Teſtator, and afterwards ſhe married; adjudged, that her Husband might *retain* ſo much of the Teſtator's Goods as amounted to the Bonds given by his Wife. *Hob.* 250. *Briers* verſus *Goddard.*

14. An Adminiſtrator may *retain* for a Debt due to himſelf, becauſe he comes in by an Act of Law, (*i. e.*) by the Grant of the Ordinary. *Godb.* 216. *Bond* verſus *Green.*

15. But tho' the Executor could not have an *Action on the Caſe*, yet he was not without Remedy; for it was adjudged, that he might have an *Action of Debt*, not only againſt the Sheriff himſelf, but even againſt his Executor after his Death, becauſe that Action is grounded upon a * Contract in Law, upon the Receipt of the Money by the Sheriff, which creates a Debt by Implication of Law; and therefore an Action of Debt lies as well againſt the Executor of the Sheriff, as againſt the Sheriff himſelf. *Cro. Car.* 539. *Perkinſon* verſus *Gilford.*

W. Jones 430. March 13. * *See* 2 Cro. 514, 566. Godb. 276.

2 Roll. Rop. 57. Slie v. Finch. *See* 2 Saund. 343. Mildmay v. Smith.

16. An *Adminiſtrator* had a Verdict *in Trover*, and before the Day in Bank the *Adminiſtration was repealed*, and this was pleaded by the Defendant; but held an ill Plea, becauſe the proper Remedy had been by *Audita querela*; but this was not after Execution executed. *Yelv.* 125.

17 An Action was brought by an Adminiſtrator, and in the Declaration theſe Words were omitted *eo quod T. S. obiit inteſtatus:* Upon *Non debet* pleaded, the Plaintiff had a Verdict, it was inſiſted upon a Writ of Error, that this might be amended by the *Statute* 18 *Eliz.* beſides 'tis ſuperfluous to ſay, that *T. S. obiit inteſtatus*, when 'tis ſet forth in the Declaration *ad reſpondendum*

ſpondendum to the Plaintiff *adminiſtratori, &c. Sed per Curiam*, theſe Words are not only Matter of Form, becauſe this Matter is traverſable, and being left out in the Declaration, the Judgment was for that Reaſon reverſed. 2 *Roll. Rep.* 285. *Morton* verſus *Beſwick.*

18. At Common Law, likewiſe an *Executor* had no Remedy for *Rent arrear*, and due to the Teſtator in his Life-time, where he had a *Freehold* in the Rent; but now he may maintain an *Action of Debt* for ſuch Rent by Vertue of the Statute 32 *H.* 8. *cap.* 37. but that Statute doth not extend to a *Term for Years in ſuch Rent*, therefore where a Rent was granted to *T. S.* for a certain Term of Years, *if he ſhould ſo long live*, and it was in arrear in his Life-time, his Executor can neither bring an *Action of Debt or diſtrain* for ſuch Arrears, becauſe that Statute is Remedial only where the Teſtator died ſeiſed of the Rent, either *in Fee* or *in Tail*, or for *Life*; and tho' this Term for Years was determinable *upon the Life* of the Grantee of the Rent, yet it was adjudged, not to be within the Equity of that Statute. *Cro. Car.* 471. *Turner* verſus *Lee. See* Elegit. *Pool* verſus *Neale.*

Poph. 189. Latch 167.

19. There is a great Difference as to the Nature of the Action by an *Executor*, where an Injury is done to the *Perſon of his Teſtator*, and where 'tis done *to his Eſtate*; 'tis true, in the firſt Caſe the Executor can have no Action at all, becauſe *actio perſonalis moritur cum perſona*; but where an Injury is done *to his Eſtate*, in ſome Caſes he may have *an Action on the Caſe*, and in other Caſes *an Action of Debt*; as for Inſtance, an Executor brought an *Action on the Caſe againſt* the *Sheriff for an Eſcape* of the Debtor, who was committed upon *meſne Proceſs* in *the Life-time of his Teſtator*, the Court was divided, whether that Action would lie, becauſe it was grounded on the *Tort* of the Sheriff, who ſuffered the Perſon to Eſcape; it was agreed, that if he had been *in Execution*, and eſcaped, the Action would have been well brought by the Executor, becauſe upon ſuch an Eſcape the Sheriff had been Debtor; but not on Eſcape upon *meſne Proceſs*, for this Action is not given to the Executor by the Statute 4 *Ed.* 3. becauſe that Statute provides a Remedy only where the *Goods* of the Teſtator are taken away in his Life-time; but two Judges held, that this was a Wrong done *to his Eſtate*, and not to his Perſon, and therefore the Executor might have an Action on the Caſe againſt the Sheriff, upon the Equity of the Statute. *Jones* 173. *Maſon* verſus *Dixon. Cro. Car.* 216. *S. P. Poph.* 192. *Proby* verſus *Maine, S. P. Cro. Eliz.* 206. *Tooley* verſus *Windham contra.*

20. But where the Sheriff made *no Return at all, nor paid the Money which he had levied upon an Execution*, this was held to be a perſonal Wrong done to the Teſtator, for which his Executor could have no *Action on the Caſe. Cro. Car.* 297. *Spurſtow* verſus *Prince.*

W. Jones 385.

21. An *Executor recovered a Judgment* againſt the Defendant, and died *Inteſtate*; afterwards Adminiſtration *de bonis non, &c.* of the Goods of the Teſtator, not adminiſtred, was granted to *T. S.* adjudged, that he could not have Execution upon that Judgment, becauſe *T. S.* the Adminiſtrator claims immediately from the Inteſtate, and not from the Teſtator. *Cro. Car.* 325, 459, 459. *Cleve* verſus *Vere.*

22. But then the Defendant muſt demur to the Declaration, if 'tis not ſhewn *by whom* the Adminiſtration was committed; for if he plead, and there is a Verdict againſt him, this Omiſſion is cured by that Verdict. *Style* 282. *Cheeſeborough* verſus *Lintot.*

23. An Adminiſtrator may bring *Treſpaſs, or Trover before Adminiſtration granted to him*, for that relates to the Death of the Inteſtate, and not to the Time of the granting it. *Style* 341. *Long* verſus *Hebbs.*

24. Where the Creditor adminiſters to the Inteſtate Debtor, he may *retain* the Goods to ſatisfy his Debt; and where the Goods are taken away before Adminiſtration granted to him, ſo that he hath none to retain, in ſuch Caſe he may have *Treſpaſs or Trover* againſt the Perſon who took them, for the Action is not ſuſpended by the Adminiſtration. *Style* 384. *Aſhby* verſus *Child.*

25. If the Teſtator himſelf makes a Leaſe for Years, rendering Rent, and 'tis arrear after his Death, the Executor muſt declare *quod cum*, the Teſtator *poſſeſſionatus fuit* of a Term for Years, and being ſo poſſeſſed, did *demiſe, &c.* to the Defendant, rendring Rent, *&c.* for if he declare *quod cum* (the Teſtator) *dimiſiſſet, &c. reverſione inde* to him as Executor, this is naught, if the Defendant demurrs, becauſe it doth not appear, but that the *Reverſion* might be *in Fee*, and if ſo, then the Rent doth not belong to the Executor, but to *the Heir*; but a Verdict will help this Defect, for if the Defendant plead *Nil debet* it ſhall be *intended*, that at the Trial it appeared to be a Reverſion of a Term, and not in Fee, for otherwiſe the Jury would have found for the Defendant. *Sid.* 218. *Bickerſtaffe* verſus *Purdue.*

1 Lev. 250.

26. *Debt by an Adminiſtrator* againſt the Leſſee of his Inteſtate for Rent incurred in his Life-time, and the Action was brought in the *Debet and detinet*, when it ſhould be in the *Detinet* only, for the Inteſtate *Debet*, and the Adminiſtrator *Detinet* the Rent; adjudged, that tho' the Declaration was ill, yet this Fault was cured by a Verdict. *Sid.* 224. *Fruen* verſus *Porter.*

27. An *Executor* obtained a *Judgment*, and thereupon an *Elegit*, but before the Debt was levied *he died Inteſtate*; adjudged, that the *Adminiſtrator de Bonis non, &c.* ſhall have the Benefit of this Execution, becauſe 'tis a Thing veſted, but it had been otherwiſe if Execution had not been taken out before the Executor died. *Sid.* 29. *Harriſon* verſus *Bowden. See* Executor of Executor. (F) 6. *S. C.*

28. There

28. There was a Decree in the Exchequer againſt *T. S.* for Payment of Money, who died, and upon a *Scire facias* brought againſt his Executor, he pleaded, that the Teſtator was indebted to him by Bond, and that he had paid himſelf before the *Scire facias* brought, and before any Notice of the *Decree*; and upon a Demurrer to this Plea it was adjudged ill, and no Bar, becauſe a Decree in Equity obliges an Executor in equal Degree at leaſt, with a Judgment at Common Law. 3 *Lev.* 355. *Shaftoe* verſus *Powell.*

29. At Common Law an Executor could not have an Action of *Treſpaſs* for Goods of the Teſtator, which were wrongfully taken from him in his Life-time; but now he may maintain that Action by Vertue of the Statute 4 *Ed.* 3. *cap.* 19. and may recover Damages, as the Teſtator himſelf might if he had been living; but before that Statute he might in ſuch Caſe have an Action of *Detinue*, in which Action the Thing it ſelf was to be recovered; he might likewiſe have an Action of Debt upon the Statute 2 *Ed.* 6. *for not ſetting out Tithes* in the Life-time of the Teſtator, for tho' 'tis a wrong done to his Perſon, yet 'tis maintainable upon the Equity of the Statute 4 *Ed.* 3. but ſuch Action will not lie againſt an Executor or Adminiſtrator, and ſo it was adjudged in *Juſtice Moreton*'s Caſe. 1 *Vent.* 30. ſame Law for an Adminiſtrator. *Moor* 400. *Harris* verſus *Vandcogie.* Sid. 407.

30. *Aſſumpſit, &c.* by the Plaintiff as *Adminiſtrator* of *I. L.* wherein he ſets forth, that he had formerly left ſo much Money in the Hands of the Defendant, *for the Uſe of the Inteſtate I. L.* in Conſideration whereof he *promiſed* to pay it to the Inteſtate, or if ſhe died before eighteen Years old, then to pay it to her Executors or Adminiſtrators, *&c.* and ſhews, that ſhe *died before eighteen*, and that he had not paid it to the Plaintiff as her Adminiſtrator; upon *Non Aſſumpſit* pleaded the Plaintiff had a Verdict, and it was inſiſted in Arreſt of Judgment, that the Action ought to be brought by the Plaintiff in his own Right, and not as Adminiſtrator, becauſe the Promiſe was made to him; but adjudged, that the naming himſelf Adminiſtrator was but Surpluſage; 'tis true, he ſhould have averred, that the Defendant did not pay the Money to *I. L.* whilſt ſhe was living, but this is cured by the *Verdict.* 1 *Vent.* 119. *Horneſay* verſus *Dimmock.*

31. *Error* of a Judgment in Treſpaſs brought in *C. B.* by the Plaintiff as Executor, upon the Statute 4 *Ed.* 3. *De bonis aſportatis in Vita teſtatoris*; for that the Defendant *Blada creſcentia*, upon the Freehold of the Teſtator *meſſuit defalcavit cepit & aſportavit*; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was inſiſted for the Defendant, that no Action lay for cutting Corn, for while it ſtands 'tis Parcel of the Freehold; but adjudged, this was one entire Treſpaſs, and the Declaration deſcribes the Manner of carrying the Corn away, if it had been *Quare clauſum fregit & blada aſportavit*, it had been naught; ſo likewiſe if the *Graſs* of the Teſtator be cut and carried away at the ſame Time, becauſe the Graſs is Part of the Freehold, but Corn growing is a Chattel. 1 *Vent.* 187. *Emmerſon* verſus *Emmerſon.*

32. *Indebitatus Aſſumpſit* by the Plaintiff as Executor of *T. S.* the Defendant pleaded a *Judgment* obtained againſt him in an Action of Debt for Money borrowed by his Teſtator, *upon Intereſt*, which Debt, *with the Intereſt*, at the Time of the Action brought, amounted to ſo much, *&c.* and then he pleads three Judgments more, *ultra quæ* he had not Aſſets; and upon Demurrer it was adjudged, that this Plea was ill, becauſe an Action of Debt could not be brought againſt the Defendant by any Perſon for the *Intereſt of Money*, upon a Promiſe to pay it, for that muſt be recovered in Damages, and not reckoned with the Principal in an Action of Debt; beſides, it appears by the Plea, that Part of the *Intereſt* accrued after the Teſtator's Death, and that it is the proper Debt of the Defendant, it being his Fault to ſuffer the Intereſt to run on, ſo that the Action being brought againſt him as well for the Intereſt due in his Teſtator's Time, as ſince, it muſt be plainly erroneous, and by Conſequence the Judgment muſt be ſo too; therefore in this Caſe it was adjudged for the Plaintiff 1 *Vent.* 199. *Seaman* verſus *Dee.*

33. So where the Sheriff made a *falſe Return* in the Life-time of the Teſtator, that he had levied ſo much, when in Truth he had levied more upon *an Execution*; the Executor brought an *Action on the Caſe*; and adjudged, that it lay, for it was not an Injury to the Perſon of the Teſtator, but to his Eſtate. 4 *Mod.* 403. *Williams* verſus *Carey.* Poſtea *Sheriff.* (K) 12. S. C. 1 Salk. 12. 2 Mod. 276.

34. In a Special Verdict in Trover for a Gelding, the Caſe was, that *W. R.* was poſſeſſed of the Gelding, which he put to paſture to the Defendant, and died Inteſtate, that *before Adminiſtration was granted*, the Plaintiff deſired the Defendant to bury the ſaid Inteſtate, which he did accordingly, and laid out 23 *l.* in the Funeral, whereupon the Plaintiff agreed, that the Defendant ſhould have the Horſe at 10 *l.* and gave him a Note for the 13 *l.* Reſidue: Afterwards the *Plaintiff took out Adminiſtration*, and then he brought *Trover* for this Horſe: The Chief Juſt. *Holt* held that it did lie, becauſe the Defendant was *Executor de ſon tort* by his Intermedling with the Goods, and the Plaintiff's Conſent before he had a Right to conſent, (*viz.*) before he had *adminiſtred*, would not alter the Caſe, but the other Judges were of a contrary Opinion. 1 *Salk.* 295. *Whitehall* verſus *Squire.*

(G)

Of an Adminiſtrator and Executor, Defendant, and of his Pleading Ne unques Executor, and Miſnoſmer, and where chargeable for a Wrong done by the Teſtator, &c. where not.

1. AS to *Actions of Debt*, or *Actions on the Caſe* to be brought againſt Executors and Adminiſtrators, upon the *ſimple Contract of the Teſtator or Inteſtate*; there hath been a Diſtinction made between a Promiſe of the Teſtator to pay a *certain Sum*, and his Promiſe to do a *collateral Act*, for in the one Caſe an *Action of Debt* will lie againſt the Executor; becauſe, where the *Sum is certain*, the Promiſe to pay it is made a *Duty*, but in the other Caſe an *Action on the Caſe* will not lie againſt him; 'tis true, in * *Norwood and Read*'s Caſe it was adjudged, that the Action would lie, but becauſe there were different Opinions as to this Matter, the Chief Juſtice *Popham* made it an Exchequer-Chamber Caſe, and afterwards declared it to be the Opinion of all the Judges of *England*, that an *Action of the Caſe would not lie againſt an Executor for a Debt due upon the ſimple Contract of his Teſtator*. *Plow. Com.* 181. *Norwood* verſus *Read*. *Yelv.* 20. *Slade* verſus *Morley*. 4 *Rep.* 93. *Slade*'s Caſe. *Moor* 433. *S. C. Goldsb.* 154. *Pine* verſus *Hide*. *S. P.*

* Plowd. Com. 181.

Moor 433.

2. *Debt againſt an Executrix*, who pleaded, that *ſhe never adminiſtred as Executrix*; ſhe ought to have pleaded, that *ſhe is not Executrix, and never adminiſtred as Executrix*, for by pleading that ſhe *never adminiſtred as Executrix*, ſhe doth not deny that ſhe was Executrix; but where the Plaintiff replied to ſuch Plea, that ſhe did adminiſter as *Executrix*; and the Evidence was, that *Adminiſtration* of the Goods of the Deceaſed was granted to her, which ſhe adminiſtered as *Adminiſtratrix*; this Replication was adjudged good, tho' the Defendant might have pleaded it in Abatement to the Writ, by which ſhe was named *Executrix*. *Dyer* 305.

Poph. 120. Gouldsb. 120.

3. Leaſe for Years, rendring Rent, the Leſſee died, *his Executor aſſigned the Remainder of the Term*, and afterwards an Action of Debt was brought againſt the *Executor himſelf* for Rent incurred *after the Aſſignment*; adjudged, that it would not lie, becauſe if he had not aſſigned the Term, he could be only charged upon a *Privity of Law*, as having the Reſidue of the Term, it cannot be pretended that he could be charged upon any *Privity in Contract*, for there was none between him and the Leſſor, and the *Privity in Law* (i. e.) *the Privity of Eſtate* was removed by the Aſſignment. *Cro. Eliz.* 555. *Overton* verſus *Syddall*. *Poſtea* Aſſigns. (F) 2. *S. C.* Rent. (B) 1. *S. P. Latch* 262.

Moor 351.

4. But if the *Leſſee himſelf*, and not his Executor, had *aſſigned the Term*, the *Privity of Contract* would ſtill have continued; 'tis true, the *Privity of Eſtate* would have been removed by ſuch Aſſignment, but yet he would be always chargeable during his Life, for Rent due and incurred, as well after the Aſſignment as before; but by his Death the *Privity of Contract*, as to the Action of Debt, is gone, and therefore his Executor ſhall not be liable to any Rent afterwards becoming due. 3 *Rep.* 24. *a. Walker and Harris*'s Caſe.

Moor 600.

5. Debt againſt an Adminiſtrator for Rent arrear, upon a Leaſe made to the Inteſtate, but *incurred ſince his Death*; the Defendant pleaded, that before any Rent became due, he aſſigned the Remainder of the Term and Eſtate to *T. S.* and that the Plaintiff knowing it, had *accepted Rent of the Aſſignee*; and upon Demurrer to this Plea it was adjudged, that the Adminiſtrator was not chargeable with the Rent after the Aſſignment, becauſe the Leſſor had *accepted the Rent* afterwards of the Aſſignee, which implies, that he had accepted him to be his Tenant. *Cro. Eliz.* 715. *Marrow* verſus *Turpin*. *Poſtea* Aſſigns. (F) 1. *S. C.* Acceptance. (C) 1. *S. C.* Rent. (B) 1. *S. P.* 2 *Cro.* 398. *Whitchcott* verſus *Fox*. *S. P.* 1 *Roll. Rep.* 389. *S. C.*

* Poſtea, 42. contra.

6. There are ſome Opinions, that an * *Indebitatus Aſſumpſit* will not lie againſt *an Executor for a Debt due on the ſimple Contract of the Teſtator*, becauſe the Teſtator might have waged his Law; for where the *Demand is certain*, as it muſt always be in an *Action of Debt*, there the Defendant may *Wage his Law*, which he cannot do in *an Action on the Caſe* brought againſt him, becauſe Damages are to be recovered in that Action, which are always incertain till the Verdict, and for that Reaſon 'tis impoſſible for the Defendant to ſwear that he hath paid, when he cannot tell what he is to pay. *Cro. Eliz.* 454, and *Moor* 691. *Stubbings* verſus *Rotheram*, and 459. *Serle* verſus *Rolfe*. *S. P.* 1 *And.* 182. *S. C. Cro. Eliz.* 557. *Hampton* verſus *Boyer*. *S. P.*

* Poſtea 27, 28.

7. Where the Teſtator wrongfully took the Profits of the Land, and died, and an Action was brought againſt his Executor; adjudged, that he was not chargeable, becauſe 'tis a * Wrong which dies with his Perſon. *Cro. Eliz.* 206. *Tooley* verſus *Windham*. *Antea* (F) 18. *S. C.*

2 Cro. 293.

8. My *Lord Coke*, in his Report of *Slade*'s Caſe, tells us, that 'tis at the Election of the Plaintiff to bring an Action on the Caſe, or an *Indebitatus Aſſumpſit* againſt the Executor on a ſimple Contract of the Teſtator; and yet afterwards, in *Pinchion*'s Caſe, he tells us, that it was generally agreed, an *Action of Debt* would not lie, becauſe 'tis a Rule, that the Executor ſhall never be charged where the Teſtator might have *waged his Law*, therefore an Action *on the Caſe* muſt lie; for 'tis plain, that after the Death of the Teſtator, the *Duty or Debt* ſtill remains; and if neither of thoſe Actions would lie, the Law would be deficient in this Caſe; therefore it was adjudged, that *every Contract executory implied a Promiſe*, for where a Man *makes an Agreement* with another to pay Money, or to deliver Goods, he *promiſes* to pay it, or to deliver the Goods, and that upon ſuch

Promiſe an Action on the Caſe might be brought, in which Action the Teſtator, if he had been living, could not have waged his Law. 9 *Rep.* 86. *Pinchion's* Caſe. 1 *Roll. Rep.* 193, 266 *Sanders* verſus *Eſterbie*. *S. P.*

9. And now that Diſtinction was no longer allowed between a Promiſe of the Teſtator to pay a *Sum certain*, and a Promiſe to do a collateral Act where the Damages are incertain for Non-performance, if the Promiſe was broken in *the Life-time* of the Teſtator, for in both Caſes his Executor ſhall be charged in *an Action on the Caſe*. 2 *Cro.* 662. *Fawcett* verſus *Carter*. Palm. 329. W. Jones 16.

10. 'Tis generally agreed, as my Lord *Coke* obſerved in *Pinchion's* Caſe, that an *Action of Debt would not lie againſt an Executor, upon the ſimple Contract of his Teſtator*, but then the Defendant muſt *demur* to ſuch a Declaration; for if he plead to it, and 'tis found againſt him, then he hath admitted the Contract, and 'tis reaſonable he ſhould be charged with it. *Hughes* verſus *Robotham*, *Poph.* 31. Requeſt. (C) 2. *S. C.* and *Cro. Eliz.* 121. *Hughſon* verſus *Webb*, and *Cro. Eliz.* 415. *Germin* verſus *Rolls*. *Moor* 366. *S. C.* *Cro. Car.* 187. *Morgan* verſus *Green*. *S. P.* *Jones* 223. *S. C.* and *Sid.* 332. *Palmer* verſus *Lawſon*. *S. P.* *Poſtea* (T) 1. *S. C.* Cro. Elin. 302. 1 And. 182. 1 Leon. 165. Gouldsb. 106. S. C.

11. *Debt* againſt an Executor for *Arrears of Rent* upon a Leaſe made to his Teſtator; the Defendant pleaded, that after the Death of Teſtator, he *did not enter on the Lands demiſed*, but left the Poſſeſſion *& nulla proficua inde recepit*; and upon a Demurrer to this Plea it was adjudged not good, becauſe the Executor cannot waive the Term, for where once he agreed to be Executor, he agrees to every Thing that ſhall be incident to the Executorſhip, otherwiſe there would be an Agreement to one Thing and a Diſagreement to another Thing, which cannot be; therefore, if the Rent which he is to pay is more than the yearly Value of the Land, he ſhould have pleaded this Matter ſpecially, and might have diſcharged himſelf by ſuch Plea. 2 *Roll. Rep.* 131. *Paul* verſus *Moody*.

12. As to *Actions of Covenant* brought againſt an Executor or Adminiſtrator, 'tis to be obſerved, that *Covenants* are divided into thoſe which are expreſs, and in which the Executor himſelf is named, and into thoſe wherein he is not named, which are Covenants in Law; but in both Caſes 'tis held, that he is liable to an Action of Covenant.

13. Now as to *expreſs Covenants* which *run with the Land*, ſuch as *paying Rent or Repairing*, *&c.* the Executor is always chargeable, tho' he hath *aſſigned* his Intereſt before the Action brought, and tho' the Leſſor hath *accepted* Rent of the Aſſignee, as for Inſtance, Leſſee for Years covenanted *to Repair*, *&c.* the Leſſor aſſigned the Reverſion to *T. S.* and the Leſſee aſſigned the Term to *G. D.* afterwards the *Aſſignee of the Reverſion* brought an Action of Covenant againſt the *Executor of the Leſſee*, for a Breach *after the Aſſignment of the Term*; and adjudged, that the Action was well brought, for the Leſſee and his Executors are always chargeable with this Covenant ſo long as they have Aſſets, becauſe 'tis an expreſs Covenant which runs with the Land; 'tis true, at Common Law the *Aſſignee of a Reverſion* could not maintain this Action, becauſe he was neither a Party or Privy to the Covenant, but this Defect of the Law was remedied by the Statute 32 *H.* 8. *cap.* 34. which gave him the ſame Benefit as the Leſſor himſelf might have if he had not made any Aſſignment. 2 *Cro.* 521. *Brett* verſus *Cumberland*. *Poſtea* Repairs. (B) 4. *S. C.* 2 Roll. Rep. 63.

14. An Action of *Debt* lies againſt an Executor of a Leſſee for Years, for *Rent arrear after the Death of the Leſſee*, tho' he never enter on the Land, becauſe he repreſents the Perſon of the Teſtator. *Yel.* 103. *Howſe* verſus *Webſter*.

15. *Aſſumpſit*, *&c.* againſt an *Adminiſtratrix*, wherein the Plaintiff declared, that the Husband had bought Pearl of him in his Life-time, and was indebted to him in 200 *l.* and that ſhe likewiſe, after her Husband's Death, had bought more Pearl of him for 27 *l.* and upon Accompt was found indebted to him in both thoſe Sums, which ſhe promiſed to pay; after a Judgment for the Plaintiff a *Writ of Error* was brought, and the *Error* aſſigned was, that the Defendant ſhould be charged in two ſeveral Actions, and not in one, as in this Caſe, becauſe ſhe was charged in her own Right, and as Adminiſtratrix to her Husband, and for this Cauſe the Judgment was reverſed. *Hob.* 88. *Ferenden* verſus *Palmer*.

16. Debt againſt the Adminiſtrator of *T. S.* the Defendant pleaded, that his Inteſtate was *outlawed* at the Suit of *W. R. after Judgment*; adjudged no good Plea, becauſe it only implies, that he had no Goods, being all forfeited by the Outlary, and ſo 'tis an Argumentative and no direct Plea. *Hutt.* 53. *Bullen* verſus *Jervois*. 1 *Brownl.* 43. *Woolley* verſus *Bradwell*. *S. P.* *Cro. Eliz.* 573. *S. C.* See *Poſtea* Outlary. (E) 8. 1 Brownl. 43.

17. Where the Defendant pleads, that he *never was Executor*, and 'tis found againſt him, the Judgment muſt be *de Bonis propriis*, and general Damages, and the Plaintiff may have a *Capias ad Satisfaciend'* againſt him for the Damages; adjudged in *Mary Shipley's* Caſe.

18. Where an Action is brought againſt the *Defendant* as *Adminiſtrator*, in ſuch Caſe the Plaintiff need not ſet forth *by whom* Adminiſtration was granted, becauſe it may not be within his Knowledge, and therefore 'tis ſufficient for him to declare, that it was granted to the Defendant *Debita juris forma*, and this is abſolutely neceſſary in order to charge him with the Action. *Jones* 1. *Peto* verſus *Ruddock*. *Sid.* 228. *Ingram* verſus *Foſſet*. *Style* 463. *S. P.* *Litt. Rep.* 80. *S. P.* 1 *Lutw.* 301. *Knight* verſus *Webb*. *S. P.* 2 *Vent.* 84. * *Bracton* verſus *Liſter*. *S. P.* * Poſtea 40.

19. Leaſe of a *Stock of Cattle*, in which the Leſſee covenanted to leave them at the End of the Term in as good Condition as he found them, and afterwards he *aſſigned* both the Leaſe and Stock of Cattle to *T. S.* and died; it was adjudged, that his *Adminiſtration* was liable to this Covenant, but not the *Aſſignee* for Want of Privity. 5 *Rep.* 16. in *Spencer's* Caſe.

W. Jones 223. 20. In the following Caſe the *Executor was named in the Covenant*, but it was in a *collateral Covenant* which did not relate to the Land, (*viz.*) The Leſſee covenanted for himſelf, *his Executors* and Aſſigns, not to erect any Buildings on the Lands to the Prejudice of the Leſſor; afterwards the Leſſee built and *aſſigned* the Reſidue of the Term and died, the Leſſor accepted the Rent of the Aſſignee, and afterwards brought an Action of Covenant againſt the *Executor of the Leſſee*; it was argued for him, that this Action would not lie, becauſe by the *Aſſignment of the Term by the Leſſee, and by the Acceptance of the Rent from the Aſſignee*, the Privity of Contract between the Leſſor and Leſſee was determined; but adjudged, that neither the one or the other ſhall bar the Leſſor from this Action againſt the *Executor of the Leſſee*, upon his expreſs Covenant made in his Life-time. *Cro. Car.* 188. *Batchelour* verſus *Gage*.

21. The Plea of an Adminiſtrator muſt be certain as to the Thing; as where the Debt was brought againſt an Executor upon a *Bond* of his Teſtator, the Defendant pleaded *non eſt factum ſuum*; it was inſiſted for the Plaintiff, that this Plea was ill, becauſe the Relative *ſuum* muſt refer to the Executor, and not to the Teſtator, if ſo, then the Executor is not charged with the Bond, as entred into by him; but adjudged good, for it ſhall relate to that which may reaſonably make the Plea good, and for that Reaſon it ſhall be *intended* to relate to the Teſtator. *Latch* 125. *Baker*'s Caſe.

22. Where an Executor pleaded, he was not the *ſame Perſon named in the Writ*; this, upon a Demurrer, was held an ill Plea, becauſe he might be *Executor de ſon tort*, and therefore he ought to have pleaded, that *he was not Executor, nor ever adminiſtred as* Executor. *Style* 63. *Seaman* verſus *Edwards*.

23. Debt againſt an *Executor*, who *imparled*, and afterwards pleaded a *Miſnoſmer* in Bar, (*viz.*) that he was *Adminiſtrator* with the Will annexed, and *not Executor*, and therefore ought to be named *Adminiſtrator*; but upon a Demurrer this was adjudged an ill Plea, becauſe a * *Miſnoſmer* is never allowed to be pleaded after an *Imparlance*. *Style* 385. *Fiſher* verſus *Jefferies*.

* Poſtea 34.

24. Since the Caſe of *Marrow* and *Turpin* it hath been adjudged, that the *Privity of Contract* doth not only remain between the *Leſſor and Leſſee*, during the *Life of the Leſſee*; and after he hath *aſſigned the Term*; but it remains likewiſe between *the Leſſor and the Adminiſtrator of the Leſſee*; for in an Action of Debt for Rent brought againſt ſuch an Adminiſtrator, he pleaded, that before any Rent became due, he aſſigned the Reſidue of the Term to *T. S.* and upon a Demurrer to this Plea the Plaintiff had Judgment, for it was adjudged, that the *Privity of Contract* ſtill remained *between the Leſſor and Adminiſtrator of the Leſſee*, and that he ſhall be charged upon that Contract of his Inteſtate, in an Action of Debt for Rent to be brought in the *Detinet*, even *after the Aſſignment* of the Term, ſo far as he hath Aſſets. *Sid.* 266. *Helier* verſus *Casbard*. 1 *Lev.* 127. *S. C.*

1 Lev. 127. 3 Mod. 325. 25. The ſame Point was adjudged in the Caſe of *Coghill and Freelove*, only with this Difference, that the Defendant in this Caſe pleaded, that the Plaintiff had *Notice of the Aſſignment* before the Action brought. 2 *Vent.* 209. *Coghill* verſus *Freelove*.

2 Vent. 234. 4 Mod. 71. Shower 340. 26. Since the Caſe of *Coghill and Freelove*, the Remedy hath been extended a little farther, for the Leſſor brought an Action of Debt for Rent *againſt the Aſſignee of the Executor of the Leſſee*; the Defendant pleaded, that before any Rent became due, *he aſſigned* all his Intereſt in the Term to one *James Mott*, who by Vertue thereof entered and was ſtill poſſeſſed; and upon a Demurrer to this Plea two Judges were of Opinion, that the *Privity of Eſtate between the Leſſor and the Aſſignee* was not deſtroyed by this *Aſſignment*, becauſe it was not an abſolute Aſſignment until the Plaintiff *had Notice of it*, or had *accepted* the Rent, but that the Defendant ſtill continued Tenant as to the Payment of the Rent, until ſuch *Notice or Acceptance*; 'tis true, upon a Writ of Error brought in *B. R.* this Judgment was reverſed, becauſe the *Privity of Contract* being gone by the *Aſſignment* of the Exccutor before any Rent became due, and the *Privity of Eſtate* being likewiſe gone by *Aſſignment of the Aſſignee of the Executor*, nothing remained to ſupport this Action. 3 *Lev.* 295. *Pitcher* verſus *Tovey*.

27. In ſeveral Caſes an *Executor or Adminiſtrator cannot be charged for a Wrong done by the Teſtator, &c.* as for Inſtance, the Plaintiff delivered a Cow to *T. S.* to keep, who ſold the Cow and converted the Money to his own Uſe; afterwards he made *W. P.* his Executor and died, and an Action on the Caſe being brought againſt the Executor, the Plaintiff had a Verdict, but could never get Judgment, becauſe this was a * *Wrong done by the Teſtator in his Life-time, which died with his Perſon*. *Raym.* 71. *Bailie* verſus *Brittells*.

* Antea 7.

28. There was a Suit in the Spiritual Court for double Damages againſt the Teſtator, for not ſetting out Tithes, pending which Suit he made *T. S.* his Executor, and died, and afterwards the Executor was ſued for double Damages; but adjudged, that he was not chargeable, becauſe this was a perſonal * Wrong done by the Teſtator, and died with his Perſon. *Raym.* 95. *Weeks* verſus *Truſſell*. *Sid.* 181. *S. C.* See 1 *Brownl.* 86. *S. P. Godb.* 245. *S. P.* but a Court of Equity will make him liable ſo far as the perſonal Eſtate extends. 2 *Ch. Rep.* 217.

* Antea 7, 27. Poſtea 43.

29. Since the Caſe of *Brett* verſus *Cumberland*, Actions of Covenant which run with the Land have been extended to the *Aſſignee of the Executor of the Leſſee*, (*viz.*) the *Biſhop of Winton* made a Leaſe for twenty-one Years, and died, the Leſſee *aſſigned* the Term, and the *Aſſignee made an Executor*, and died, the Executor of the ſucceeding Biſhop brought an Action of Covenant againſt that *Executor of the Aſſignee*, and aſſigned the Breach for *not Repairing* in the Life-time of his Teſtator; and adjudged good, tho' the Covenant was made with the Predeceſſor, and tho' the Action was brought *againſt the Executor of the Aſſignee of the Leſſee*; and ſo far this Action hath pre-

prevailed; and it hath been attempted to carry it farther in *Pitcher and Tovey's* Caſe, where it was brought againſt ſuch an Executor, *after he had aſſigned the Term* to another. 2 *Vent.* 56. *Morley* verſus *Polhill.*

30. But there are ſome Caſes wherein it hath been adjudged, that an Executor and an Adminiſtrator have been charged by Covenants of the Teſtator and Inteſtate, wherein they were never named; and tho' thoſe Covenants were collateral, and did not run with the Land; as where the Teſtator covenanted to teach an *Apprentice* his Trade, and died, and in an Action of Covenant brought againſt his Executor, it was inſiſted on his Behalf after a Verdict againſt him, that this was a perſonal Covenant of his Teſtator, by which he was bound ſo long as he lived, but not his Executor after his Death; but adjudged, that the Executor was likewiſe chargeable, for he ought to take Care that the Apprentice ſhould be taught; and if he was not of the ſame Trade, then to turn him over to another, who was. 1 *Lev. Walker* verſus *Hull.* *See* Apprentice. (A) 18. *S. C.*

31. *Indebitatus Aſſumpſit* againſt an Executrix, who pleaded in *Abatement*, that her Husband died Inteſtate, but did not ſay *in what Dioceſe*, and that Adminiſtration was granted to her by the *Prerogative Court*, *&c.* And upon a ſpecial Demurrer, the Plea was held ill, becauſe the Defendant did not ſet forth in what Dioceſe her Husband died. 1 *Lutw.* 27. *Young* verſus *Caſe.* Raym. 223.

32. *Debt againſt an Adminiſtratrix* upon a *Bond*, which the Inteſtate entred into for *Performance of Covenants*, reciting, that the Plaintiff was poſſeſſed of a Leaſe, *&c.* and that he aſſigned his Intereſt to the Inteſtate, reſerving a yearly Rent, and alſo 200 Furze or Wood Faggots every Year; the Defendant pleaded Performance, the Plaintiff replied, that he had not 200 Faggots every Year of the *Inteſtate*; but that 800 Faggots were due to him *from the Inteſtate and from the Defendant*, after the Death of the Inteſtate, *for four Years*; and upon a Demurrer to this Replication, the *Adminiſtratrix* had Judgment, becauſe the Plaintiff did not ſet forth, how many Faggots were due in the *Life-time of the Inteſtate*, and how many after his Death; for if this had been ſhewn, the Adminiſtratrix might have pleaded diſtinct Matters in her Excuſe. 1 *Lutw* 334. *Tuckerman* verſus *Tuckerman.*

33. The *Plea of an Adminiſtrator* and Executor ought to be *certain*, both as to the *Perſon* and *Thing*; and firſt, as to the *Perſon*; an *Aſſumpſit* was brought againſt an *Executor*, upon a Promiſe of his Teſtator; the Defendant pleaded *Non Aſſumpſit*, and the Plaintiff had a Verdict; but it was objected in Arreſt of Judgment, that the Defendant ought to have pleaded, that *his Teſtator Non Aſſumpſit*; but adjudged, that it ſhall be ſo intended, becauſe no other Perſon is charged with the Promiſe. 1 *Lev.* 177. *Browning* verſus *Litton.* See *Latch* 125. 5 *Mod.* 306. Sid. 292.

34. A Plea *in Abatement* may be good after an *Imparlance*; as where Debt was brought againſt the Defendant as *Executrix to her late Husband*; ſhe imparled, and afterwards pleaded in *Bar*, that her Husband died *Inteſtate*, and that Adminiſtration was granted to her, *abſque hoc*, that ſhe was *Executrix*, or ever adminiſtred as Executrix: And upon a Demurrer to this Plea, it was agreed, that if ſhe had pleaded the * *Miſnoſmer of Executrix*, inſtead of Adminiſtratrix, in Abatement to the Action after an *Imparlance*, it had been good, tho' it was inſiſted, that this *Plea in Bar* was no more then a Plea in *Abatement*, becauſe it was no Bar to the Right, for ſhe admitted her ſelf to be chargeable, tho' in another Manner; but it was adjudged to be ſuch a Bar to the Plaintiff, that he ſhall never charge her as *Executrix.* 2 *Lev.* 190. *Grandvill* verſus *Sibley.* * Antea 23.

35. The Husband died Inteſtate, and an Action of Debt was brought againſt his Widow as Adminiſtratrix upon a Bond of her Husband; ſhe pleaded, in Abatement, that her Husband made a Will, and his Son Executor, who was an Infant, and that Adminiſtration, with the Will annexed, was granted to her *durante minore ætate* of the Infant Executor, *unde ex quo*, *&c.* And upon a ſpecial Demurrer to this Plea, the Plaintiff had Judgment, becauſe the Defendant did not *aver her Plea.* 1 *Lutw.* 20. *Little* verſus *Plant.*

36. *Debt againſt an Executrix, upon a Bond of her Teſtator*; ſhe craved *Oyer* of the Original, which bore Date the 17*th of April* in the ſame Year the Bond was payable, which was upon the *firſt Day of May*, *Anno* 2 *Jac.* and then ſhe pleaded in *Abatement*, that the *Teſtator* was living on the 17*th Day of April*, but did not aver her Plea, by concluding *Et hoc parat' eſt verificare unde petit judicium*, *&c.* adjudged, that this was only Matter of Form, of which no Advantage could be taken upon a general Demurrer, as this Caſe was; but that if the Plaintiff had demurred Specially, he muſt have Judgment. 1 *Lutw.* 15. *Papworth* verſus *Stacy.*

37. The Adminiſtratrix of *James Briggs* brought an Action of Debt againſt the Defendant, as *Executrix* of *Ralph Grey* upon a Bond executed by him for the Payment of 200 *l.* to *Briggs*; the Defendant pleaded in Bar, that the ſaid *Ralph Grey* died *Inteſtate*, and that Adminiſtration was granted to her, and that ſhe ought to be named *Adminiſtratrix* and not Executrix; adjudged, that this was an ill Plea, becauſe the Defendant did not * *traverſe*, that he had adminiſtred any of the Goods of the Inteſtate before Adminiſtration was granted to her. 1 *Lutw.* 889. *Grey* verſus *Thorogood.* 2 *Vent.* 179. *S. P.* * Poſtea 48.

38. *Debt againſt an Executor* in the *Debet and Detinet*, for *Rent arrear in his own Time*; the *Executor* pleaded, that the Rent is more worth than the Land; adjudged, that if the Plea had not gone further, it had been good to an Action of *Debt* in the *Debet & Detinet*, becauſe he ought to be charged in the *Detinet*; tho' where the Land is of more Value than the Rent, he

muſt be charged in the *Debet and Detinet*, for that which accrues in his Time, according to *Haregrave*'s Caſe; but here the Defendant pleaded farther, that he tendred a Surrender of the Leaſe before the Time for which the Rent was demanded, which the Plaintiff refuſed to accept, and that he (the Defendant) had fully adminiſtred, and ſo Demands Judgment of the Action; all which being frivolous Matter, and he not relying upon that Part of his Plea, which was material, Judgment was given againſt him for that very Reaſon. 1 *Vent.* 271. *Bolton* verſus *Cannon.* See *poſtea* 46. *Billinghurſt* verſus *Speerman S. P.*

39. *B.* was Executor of *A.* and *C.* was Executor of *B.* and *D.* was Executor to *C.* The Plaintiff brought an Action formerly againſt *C. as Executor of B.* who was Executor *to A.* and got Judgment againſt him in Debt; and now he brought an Action againſt *D. as Executor of C. who was Executor of B. who was Executor of A.* ſuggeſting a *Devaſtavit by C.* of the Goods of the firſt Teſtator, and ſo by the Statute 30 *Car.* 2. *D.* the now Defendant, who was Executor of *C.* was made liable, as if his Teſtator *C.* had been living: The Defendant pleaded *Plene Adminiſtravit*, and all this Matter being found Specially, and that *C.* the Executor, who had waſted, *&c.* was indebted to the now Defendant, upon a ſimple Contract, who was his Executor; the Queſtion was, whether he might *retain* for his Debt againſt the Debt of the Plaintiff, grounded upon a *Devaſtavit*, and adjudged, that he might, for 'tis not a Debt ſuperior to a Debt upon *Simple Contract.* 2 *Vent.* 40. *Bathurſt*'s Caſe.

40. *Action againſt an Adminiſtrator*, and the Plaintiff did not ſet forth, that *Adminiſtration was granted to him*; adjudged an incurable Fault, for tho' the Plaintiff need not ſhew *by whom* * *Adminiſtration* was granted, yet 'tis abſolutely neceſſary to ſhew, that Adminiſtration was granted to charge him in an Action. 2 *Vent.* 84. *Bracton* verſus *Liſter.*

* Antea 18.

41. In a ſpecial Verdict *in Aſſumpſit*, the Caſe was, The Plaintiff leaſed ſeveral Lands to one *Brady*, reſerving Rent, the Leſſee died, there being half a Year's Rent then due, his Widow promiſed, that in Conſideration the Plaintiff would permit her to enjoy the Lands till *Lady-day* next, and to remove ſome Poſts and Rails, and other Things, which her Husband had fixed on the Premiſſes, that ſhe would pay to the Plaintiff as well 160 *l.* due, and in arrear, when her Huſband died, as alſo 260 *l.* more; that after this Promiſe ſhe married the Defendant *Clerke*, that the Plaintiff did permit her to enjoy the Lands till *Lady-day*, *&c.* and to remove and carry away the Poſts and Rails, as in the Declaration ſet forth, and that ſince ſhe had paid 160 *l.* to the Plaintiff, but not the 260 *l.* They find, that the ſaid Promiſe, or any *Memorandum thereof, was not put in Writing, or ſigned by the Wife*, or by any Perſon authoriſed by her; they find, that ſhe paid the 160 *l.* before the Action brought; and they find the Statute 29 *Car.* 2. by which 'tis enacted, that *no Action ſhall be brought to charge an Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer out of his own Eſtate, or upon any Promiſe to anſwer for the Debt, Default, or Miſcarriage of another, unleſs the Agreement, or ſome Memorandum thereof be put in Writing, &c.* It was inſiſted for the Plaintiff, that tho' the Promiſe might be void, as to the Payment of the 160 *l.* it being the Debt of her late Husband, becauſe *not put in Writing*, yet the Promiſe to pay the 260 *l.* was good, and not within the Statute, for that was made upon a good Conſideration, and 'tis her proper Debt; but adjudged, that the Promiſe being void for Part, it cannot ſtand good for the other Part, becauſe 'tis an entire Agreement, and the Action is brought for both the Sums, and it could not be brought otherwiſe, without varying from the Promiſe itſelf. 2 *Vent.* 223. *Lord Lexington* verſus *Clerk & Ux'.*

42. *Error* to reverſe a Judgment given in an *Inferior Court againſt an Executor*, wherein the Plaintiff declared againſt him upon a *mutuaſſet* by his Teſtator, and the Error aſſigned was, that * *Debt* did not lie againſt an Executor upon the ſimple Contract of his Teſtator; beſides, *mutuaſſet* properly ſignifies to *lend*, ſo that the Teſtator lent and not borrowed the Money, it ſhould be, that the Teſtator *mutuatus eſſet*; but adjudged, that the Defendant having ſuffered Judgment to paſs againſt him, 'tis now too late to object, that Debt will not lie againſt him; and as for *mutuaſſet*, it may be expounded to borrow, as well as to lend. 1 *Vent.* 109. *Adams* verſus *Guy.* 2 *Saund.* 291. *S. C.*

* Antea 1, 6, 8.

Sid. 88, 407. Raym. 57. * Antea 28.

43. *Debt by an Executor*, for not ſetting forth Tithes due in the Time of his Teſtator: Upon *Non debet* pleaded the Plaintiff had a Verdict, and it was inſiſted in Arreſt of Judgment, that this being a Forfeiture for the treble Value, by the Statute 2 *Ed.* 6. and a * Wrong done to the Teſtator, the Action dies with him, and cannot be brought in this Caſe by the Executor; but adjudged, that it might be maintained upon the Equity of the Statute 4 *Ed.* 3. which gives an Executor an Action of Treſpaſs *de bonis aſportatis in vita Teſtatoris*; ſo where the Teſtator was ejected, his Executor may bring an Ejectment, and ſo he may Trover and Converſion, where the Converſion was in the Time of the Teſtator; and he may have an Action on the Caſe againſt a Sheriff for an Eſcape upon *meſne Proceſs* whilſt the Teſtator was living. 1 *Vent.* 30. *Juſtice Moreton*'s Caſe. *Latch* 167. *S. P.* 3 *Cro.* 377. *S. P.* and 384. *Jones* 173. *S. C.*

44. *Aſſumpſit by the Plaintiff as Adminiſtrator*, but at the End of the Declaration, the *profert hic in Curia literas Teſtamentarias* was omitted; there was a frivolous Plea, and thereupon a Demurrer, and the Defendant joined in Demurrer, and inſiſted on this Fault; but *Hale* adjudged it to be only Matter of Form, and that the Declaration was perfect without it; 'tis true, in many Books there is a contrary Reſolution; but of late Years the Judgments have been, that the Declaration is good without it. 2 *Saund.* 402. *Slow* verſus *Willmot. See Statute* 4 *&* 5 Anne, For the Amendment of the Law.

45. The Teſtator *Allington* deviſed a Legacy, and made *Gilham* and *Denhurſt* Executors, and died; *Gilham died Inteſtate*, and *Denhurſt* made a Will, and appointed an *Executor*, and died; then the Adminiſtrator to *Gilham* ſued the *Executor of Denhurſt*, for the Legacy due to his Inteſtate by the Will of *Allington*, and upon a Motion for a Prohibition, it was held, that he might ſue him by the Spiritual Law, as *Executor de ſon tort*, and even as Executor of *Denhurſt*, tho' by our Law, he muſt be ſued as Executor of *Allington:* Three Judges againſt the Prohibition. *Raym.* 123. *Willan* verſus *Gill.*

46. Adjudged, that where an Executor has a Term for Years in Land, which is of leſs Value than the *Rent reſerved*, and an Action is brought againſt him the *Debet and Detinet*, he may plead, that he hath no Aſſets, and that the Land is of leſs Value then the Rents, and demand Judgment, if he ought not to be charged in the *Detinet* only, becauſe he cannot waive the Executorſhip for the Term, for he muſt renounce the whole or none. 1 *Salk.* 297. *Billinghurſt* verſus *Speerman.* *See antea* 38. *Bolton* verſus *Canon. S. P.*

47. *Debt againſt the Defendant as Executor*, who pleaded in Bar, that he was *Adminiſtrator*; adjudged, that this is not Plea in *Bar*, but in *Abatement*, for if one Action is brought againſt an Adminiſtrator by the Name of Executor, and Judgment againſt him, this may be pleaded in Bar to another Action brought againſt him as Adminiſtrator. 1 *Salk.* 296. *Harding* verſus *Salkill.* Dyer 305. pl. 61.

48. *Aſſumpſit againſt an Executor*, who pleaded in Abatement, that he was *Adminiſtrator*, and ought to be ſued as ſuch, and not as Executor; and upon Demurrer to this Plea, it was objected, that it was ill without a *Traverſe*, that he adminiſtred as Executor; but adjudged well enough; for the Diſtinction is, where one is ſued as Executor (as in this Caſe) there needs no Traverſe, but where one is ſued as Adminiſtrator to *W. R.* if he plead he is Executor, he muſt proceed and *traverſe, that *W. R.* died Inteſtate, becauſe, unleſs there be a Dying Inteſtate, an Action cannot be brought againſt an Adminiſtrator, and to plead he is Executor, is only an Anſwer by Implication to the Dying Inteſtate. 1 *Salk.* 297. *Fooler* verſus *Cook.* 2 Brownl. 184. * Antea 37.

49. *Debt upon Bond againſt the Defendant, as Executor* of *W. R.* who pleaded, that *W. R.* died Inteſtate, and that Adminiſtration was granted to this Defendant, *& petit judicium ſi ipſa ad Billam præd' reſpondere debeat, &c.* And upon a Demurrer, it was inſiſted, that this Plea was ill, becauſe the Defendant ſhould have traverſed, that ſhe intermeddled before the Adminiſtration granted to her, for if ſhe did, then ſhe was *Executor de ſon tort*; but adjudged, that ſuch a *Traverſe* had been ill, becauſe there was no Intermeddling alledged in the Declaration, therefore the Defendant ought not to *traverſe* what is not alledged. 1 *Salk.* 298. *Powers* verſus *Clerke.*

(H)

Of Adminiſtrations De bonis non, &c. and of Adminiſtrators of Adminiſtrators.

1. THIS is where an Executor dies Inteſtate *before Probate, &c.* having firſt poſſeſſed himſelf of his Teſtator's Goods, in ſuch Caſe the Ordinary is to grant Adminiſtration, *De bonis non, &c.* to him who hath the legal Right, becauſe the Teſtator is by this Means dead Inteſtate.

2. But if the Executor was alſo *Reſiduary Legatee*, and died Inteſtate before *Probate* of the Will, in ſuch Caſe Adminiſtration of the Teſtator's Eſtate, ought to be granted to the *Adminiſtrator of the Executor*, with the Will annexed, if ſuch Executor die Inteſtate, or to his Executor, if he had made a Will, and appointed an Executor, but this muſt be by ſpecial Words; but where ſuch an *Executor of an Executor* dies, his Executor ſhall not have the Adminiſtration, but the Ordinary muſt grant it *de novo*; ſo that where an Adminiſtration hath been granted *de Bonis non*, and the Adminiſtrator dies, the Adminiſtration hath never been carried farther than to his Executor or Adminiſtrator. *See antea* (B) *pl.* 1. *Iſted* verſus *Stanley.*

3. *The Husband* was poſſeſſed of a Term for Years in Right of his Wife, he deviſed it to her and made her Executrix, and died; afterwards ſhe entered generally on the Land, and declared, *that her Husband had given her all that he had*, then ſhe died Inteſtate; adjudged, that by this Entry ſhe firſt had the Term *as Executrix*, but there being neither Debts or Legacies to be paid, ſhe ſhall have it as *Legatee*; for by her declaring, that her Husband *had given her all, &c.* ſhe agreed to take it as Legatee, and therefore her Adminiſtrator ſhall have it, and not the Adminiſtrator *de bonis non* of her Husband. *Trin.* 7 *Jac. C. B. Rot.* 2718. 2 *Brownl.* 132. *Hellam* verſus *Lea. S. P.*

4. *An Infant* was made *Executrix*, by one who was an *Executor* himſelf, and *Adminiſtration* of his Goods was granted to one *Ford durante minore ætate* of the Infant Executrix; the Plaintiff brought an Action againſt *Ford*, as Adminiſtrator during the Minority of the Infant Executrix; it was objected, that it ought to be brought againſt him as Adminiſtrator *de Bonis* of the Teſtator not adminiſtred by his Executrix; but adjudged well enough, becauſe the Grant of the Adminiſtration comprehends the Goods of both. *Hob.* 246. *Norton* verſus *Mollineux.*

5. *An Adminiſtrator* obtained Judgment upon a Bond of the Inteſtate, and afterwards he died Inteſtate, and Adminiſtration of his Goods was granted to *Paſchall*, who brought a *Scire facias* upon that Judgment, againſt the Obligor; and upon two *Nihils* returned, had Judgment and Exe- Latch. 140.

Execution, and the Money brought into Court; and it was moved, that it might be delivered to *Paſchall* the Adminiſtrator, which was done accordingly; for tho' the Execution ought not to be executed, yet the Judgment was good till reverſed by Writ of Error, and then, and not before, the Adminiſtrator of the Obligee may bring a new Action of Debt upon a Bond, becauſe the Judgment was ineffectual, by the firſt Adminiſtrator dying Inteſtate before it was executed, and the Execution by *Paſchall* the Adminiſtrator of the firſt Adminiſtrator, after the Judgment is reverſed, or even before, cannot be pleaded in Bar to ſuch a new Action of Debt. *Palm.* 443. *Paſchall* verſus *Ware.*

6. By the *Statute* 17 *Car.* 2. *cap.* 28. 'tis enacted, That where a Verdict and Judgment ſhall be obtained by an *Executor* or *Adminiſtrator*, and *he dies*, in ſuch Caſe an *Adminiſtrator de Bonis non, &c.* ſhall have a *Scire facias*, and take out Execution on that Judgment; but not, if 'tis had upon *Confeſſion or Nil dicit*, for that Statute extends only to Judgments on Verdicts.

7. The *Obligee* made his Wife *Executrix*, and died, and afterwards ſhe died Inteſtate, and then Adminiſtration of her Eſtate was granted to *T. S.* who brought and Action of Debt on the Bond, and had Judgment; but it was reverſed, becauſe he ought to have taken out Adminiſtration *de Bonis non* of the Obligee, and as ſuch, to have brought the Action. *Style* 225. *Ley* verſus *Anderton.*

8. The Cogniſee of a *Statute* appointed *T. S.* to be his Executor, and died, afterwards this Executor died *Inteſtate*, and *Adminiſtration de Bonis non* of the Cogniſee was granted to *W. R.* who came to an Agreement with the Cognizor to aſſign the *Statute* to another for a Sum of Money, and then that *Adminiſtrator* died; it was decreed, that his Executor ſhould have the Money, tho' the Statute was not aſſignable by Law before it was extended. 2 *Vent* 362.

9. A *Man died Inteſtate*, Adminiſtration was granted to *T. S.* who mortgaged a Leaſe which he had from the Inteſtate, and then made *W. R.* his Executor, and died; after whoſe Death *G. D.* got Adminiſtration *de Bonis non* of the Inteſtate, and by Vertue thereof claimed the Equity of Redemption of the Mortgage; but it was decreed, *that W. R. the Executor of the firſt Adminiſtrator*, ſhould have it, becauſe he was poſſeſſed of this Leaſe in his own Right. 1 *Ch. Rep.* 224 *Butler* verſus *Bernard.*

(I)

Of the Bond given by the Adminiſtrator to the Ordinary.

1. THIS Bond could not be put in Suit againſt the Adminiſtrator before the Statute to compel him to make Diſtribution of the Surplus. *Style* 456, *Matthews* verſus *Davis.*

2. Therefore, where there was a Suit in the Prerogative Court, who ſhould have the Adminiſtration; the contending Parties agreed, that one of them giving Bond to perform the Decree of the Court, the other ſhould adminiſter, which was done accordingly; afterwards the Court ordered the Adminiſtrator to *diſtribute* the *Surplus* in ſuch Manner, *&c.* and for not performing this Order, the other proceeded againſt him in that Court by Way of Attachment, and the Adminiſtrator moving for a Prohibition, it was adjudged, that the Prerogative Court could not make any Order for Diſtribution after the Bond given. *Style* 439. *Cooks* verſus *Chambers.*

3. Before the *Statute* 22 *Car.* 2. *cap.* 10. the Conditions of thoſe Bonds which the Adminiſtrator gave to the Ordinary upon granting Adminiſtration, were only *to adminiſter truly the Goods of the Inteſtate*; but afterwards this Clauſe was inſerted, (*viz.*) *That after Debts paid, the Surplus ſhould be diſtributed by him as the Ordinary ſhould direct.*

4. This Clauſe was firſt conteſted in *Tooker*'s Caſe, and about five Years after in *Slawney*'s Caſe, in which laſt Caſe my *Lord Hobart* was of Opinion, that the Ordinary had no Power to impoſe any other Condition in the Bond, then only *truly to adminiſter*; and tho' all the Judges inclined to that Opinion, yet neither of thoſe Caſes were adjudged. *Antea* (D) 1.

Carter 125. S. C.

5. But the Ordinaries perceiving which Way the Judges inclined, made Uſe of that Power which they had by the Statute 21 *H.* 8. to grant Adminiſtrations either to the *Widow or next of Kin to the Inteſtate*, and upon a Computation of the *Surplus* of his Eſtate, they would grant it to either of them, who would give Bond to pay it to whom it ſhould be diſtributed by their Appointment and Direction. 1 *Lev.* 233. *Hughes* verſus *Hughes.*

6. Debt upon a Bond of 300 *l.* wherein one *Brown* became bound to the Archbiſhop, that the Adminiſtrator of *James Morris ſhould truly adminiſter and exhibite a true Inventory of the Inteſtates Eſtate, and give a juſt Accompt of his Adminiſtration, and pay the Surplus as the Judge of the Prerogative ſhould decree:* The Defendant pleaded, that the Adminiſtrator had exhibited a true Inventory, *&c.* and given a juſt Accompt, *&c.* the Plaintiff replied, that the Inteſtate was indebted to one *J. H.* in 200 *l.* on Bond, and that Goods of the Inteſtate to that Value came to the Hands of the Adminiſtrator, and then aſſigns the Breach, *that he had not paid that Debt*, and upon Demurrer the Plaintiff had Judgment in *B. R.* but it was reverſed in the Exchequer-Chamber, becauſe the Breach was not within the Intent or Meaning of the *Condition of this Bond.* 1 *Lutw.* 882. *Brown* verſus *Archbiſhop of Canterbury.*

7. The ſame is reported in 1 *Salk.* 315. by the Name of the Archbiſhop of *Canterbury* verſus *Willis*; and there the Queſtion was, whether an Adminiſtrator by Vertue of the Bond given to the Ordinary, was bound to give in his Accompt before he was cited; and adjudged, that ſince he is a Perſon entituled to a diſtributive Part by the Statute, he may in Conſequence ſue for an Accompt as a Legatee might, (for the next of Kin is a Legatee by the Statute) therefore, as ſuch, he ſhall have the ſame Remedy as a Legatee might before the Statute; now the Condition of the Adminiſtration-Bond before the Statute, was *to accompt when required*; therefore the Obligor was not bound to accompt before he was lawfully *cited*, and by Conſequence could not be cited *ex Officio*: But ſince the Statute, the Condition of the Bond is to accompt *at a certain Day*, therefore he muſt then accompt in Court at his Peril, and without any Citation, but then this Accompt is not examinable, unleſs a Party intereſted will controvert it, and the Words in the Condition, well and truly to adminiſter, ſhall be conſtrued in bringing in his Accompt and not in paying the Debts of the Inteſtate, and therefore ſhall not take an Aſſignment of this Bond, and put it in Suit, and aſſign for Breach, the Non-payment of a Debt due to him, or a *Devaſtavit* committed by the Adminiſtrator. 1 *Salk.* 315. *Archbiſhop of Canterbury* verſus *Willis*.

(K)

Of Adminiſtrations where there are Bona notabilia. See Antea (C) 9.

1. IF a Man hath Goods to the Value of 5 *l.* in one Dioceſe, and a Leaſe in another, this is a Chattel; and tho' 'tis not properly Moveables or Goods, yet it ſhall make *Bona notabilia*. 1 *Roll. Abr.* 909. Noy 54.

2. If a Man die Inteſtate in one Dioceſe, and leave a *Bond* in another, in ſuch Caſe Adminiſtration muſt be in the *Prerogative*, becauſe the Debt doth not follow the *Perſon*, but 'tis a Debt where the Bond was at his Deceaſe. *Cro. Eliz.* 472. *Byron* verſus *Byron*. *Dyer* 305. *S. P.* 1 *Roll. Abr.* 908. *Lunn* verſus *Dodſon*. *S. P.*

3. If a Man dies in one Dioceſe without any Goods there, but hath *Bona notabilia* in another Dioceſe, in ſuch Caſe the Right to grant Adminiſtration is in the *Archbiſhop*, becauſe he hath a general Juriſdiction. *Cro. Eliz.* 457. *Bingham* verſus *Smeathwick*.

4. If the *Archbiſhop* grants Adminiſtration on a Pretence of *Bona notabilia*, when in Truth the Inteſtate had none, this is not void, becauſe of his general Juriſdiction, but 'tis voidable; but if a Biſhop grant *Adminiſtration* when the Inteſtate had *Bona notabilia*, 'tis void, becauſe he hath no Juriſdiction out of his Dioceſe. 5 *Rep.* 30. *Vere* verſus *Jefferies*. Moor 145, 193.

5. But it hath been held, that ſuch an Adminiſtration is not void, becauſe of common Right the Ordinary is to grant Adminiſtration, and that neither he or the Perſon to whom 'tis granted may know that there were *Bona notabilia*. 2 *Leon.* 155. *Dunn*'s Caſe.

6. If there are two Adminiſtrations, one by the *Metropolitan* and the other by the *Biſhop*, if there were not *Bona notabilia*, the Prerogative Adminiſtration ought to be repealed. *Cro. Eliz.* 283, 315, 457. *Allen* verſus *Andrews*.

7. *Indebitatus Aſſumpſit*, *&c.* againſt an *Executrix*, who pleaded in Abatement, that her Huſband died *Inteſtate*, but did not ſay *in what Dioceſe*, and that he had *Bona notabilia* in ſeveral Dioceſes, but did not ſet forth *where*, and that Adminiſtration was granted to her by the *Prerogative Court*, ſo that ſhe ought to be ſued as Adminiſtratrix and not as Executrix, and *averred* her Plea; upon a Special Demurrer this Plea in Abatement was held ill; for where a *Defendant Adminiſtratrix* pleads either in *Bar or Abatement*, ſhe muſt ſet forth *in what Dioceſe* her Husband died, and *where* he had *Bona notabilia*, that it may appear the Prerogative Adminiſtration was well ganted. In *Read*'s Caſe, 5 *Rep.* 33. and *Roll. Abr. Keeble* verſus *Osbaſton*. *S. P.* *Poſtea* Verdict. (C) 14. *S. C.*

8. *Debt by Husband and Wife* as *Adminiſtratrix*, ſetting forth, that Adminiſtration was granted to her by the *Biſhop of Rocheſter*; the Defendant pleaded, that Adminiſtration was granted to her by the *Dean and Chapter of Canterbury*, *ſede vacante*, for that the Inteſtate, at the Time of his Death had *Bona notabilia in diverſis diœceſibus Provinciæ Cantuar.* now in the firſt Reſolution in this Caſe it was held, that becauſe the Defendant did not ſet forth any Certainty where the Inteſtate had *Bona notabilia*, but only *in diverſis diœceſibus Provinciæ*, therefore it ſhall be taken, that Adminiſtration was granted by that Ordinary where he had not *Bona notabilia*, becauſe every Plea ſhall be taken in the ſtricteſt Senſe againſt the Pleader; however, if the Inteſtate had *Bona notabilia*, *&c.* the Adminiſtration in an inferior Dioceſe is not void, but voidable. 1 Reſol. in *Sir John Needham*'s Caſe, 8 *Rep.* 135. *Poſtea* Marriage (C) 1. *S. C.*

9. If a Man dies, leaving *Bona notabilia* in both Provinces, there muſt be ſeveral Adminiſtrations. *Hardres* 216. *Allinſon* verſus *Dickenſon*, and *Salk.* 39.

10. If the Inteſtate leaves Goods in ſeveral *Peculiars*, the Archbiſhop of the Province hath the Right to grant Adminiſtration. 2 *Lev.* 86. *Shaw* verſus *Stoughton*.

11. Debt upon a Bond to ſave the Plaintiff harmleſs, *&c.* the Defendant pleads *non damnificatus*; the Plaintiff replied, that one *Wynn* had obtained a Judgment againſt him in *London*, and that he died Inteſtate, and that Adminiſtration of his Goods was granted by the *Biſhop of Lincoln* to one *W. G.* and that he paid the Money to the Adminiſtrator; and upon a Demurrer to this Replication the Defendant had Judgment, becauſe the Plaintiff alledged he paid the Money to the

the Adminiſtrator, when in Truth he had no Authority to receive it, for the Adminiſtration granted by the *Biſhop of Lincoln* was void, becauſe the Inteſtate obtain'd the Judgment in *Weſtminſter*. 1 *Lutw.* 399. *Kegg* verſus *Horton*.

12. 'Tis more certain to plead, that the Inteſtate had *Bona notabilia in diverſis Diœceſibus* within the Province of *Canterbury*, *(viz.)* at *Weſtminſter in the County of Middleſex and Dioceſe of London*, and at *St. Edmonds-Bury* within the *Dioceſe of Norwich*; in this Caſe the Adminiſtration was granted by the *Archdeacon of Sudbury*. 2 *Lutw.* 985. *Scarpe* verſus *Young*.

13. *Debt againſt the Defendant as Executor* to *John White*; who pleaded, that *John White* did make a Will, but did not make him (the Defendant) Executor, but that he had *Bona notabilia* in ſeveral Dioceſes, and that the Archbiſhop of *Canterbury* granted Adminiſtration to him, and concluded in Bar, to which there was a Demurrer, and the Plea was adjudged ill, becauſe this was a Plea only in Abatement, and the concluding it in *Bar* made it ill; beſides, he did not expreſly alledge, that *John White* died Inteſtate; he only ſays, he made a Will, but did make him (the Defendant) Executor by that Will, which may be true, and yet he might be made Executor by a Codicil, ſo the Plaintiff had Judgment. 1 *Mod.* 239. *Juſtice* verſus *White*.

14. Where there are *Bona notabilia in ſeveral Dioceſes* but in the ſame *Province*, the Prerogative hath the Right of granting Adminiſtration. *Salk.* 39.

15. Adjudged, that *Debts upon ſimple Contract are perſonal*, and Adminiſtration thereof muſt be granted by the Ordinary where the *Inteſtate dies*; ſo if he have two Houſes in ſeveral Dioceſes, and uſually lives in one but ſometimes in the other, and being there for a few Days, he dies, Adminiſtration of his perſonal Eſtate ſhall be granted by the *Biſhop of that Dioceſe where he died*. 1 *Salk.* 37. *Hilliard* verſus *Cox*. See 2 *Salk.* 745. *the Pleadings*.

16. Adjudged, that where there are *Bona notabilia* in *two Dioceſes in the ſame Province*, there muſt be a *Prerogative Adminiſtration*; and where there are *Bona notabilia in one Dioceſe in one Province*, and in another Dioceſe *in another Province*, there muſt be two Prerogative Adminiſtrations. 1 *Salk.* 39. *Burſtone* verſus *Ridley*.

(L)

Of an Adminiſtrator durante minore ætate, what Acts he may do, what not, and when his Authority ceaſes, and of Pleadings in the Action. See *Brudnell's* Caſe.

1. SUch Adminiſtrator may ſell the Goods of the Teſtator and pay his Debts, and generally he may do any Thing which another Executor may lawfully do, ſo as 'tis for the Benefit of the *Infant Executor*, but he cannot make a Leaſe to continue any longer than till the *Infant is ſeventeen Years* of Age, neither can he ſell any Leaſe or Term for Years that was deviſed to the Infant, unleſs there is not ſufficient without it to pay the Teſtator's Debts. 5 *Rep.* 29.

2. It was the Lord Chief Juſtice *Dyer's* Opinion, that this Adminiſtrator could not maintain *an Action of Debt*, becauſe he is in Nature of a *Servant* or Bailiff to the Executor, and becauſe he hath not an abſolute, but only a ſpecial Property in the Goods of the Teſtator, therefore an Action of Debt could not be brought againſt him upon a Bond owing by the Teſtator; as for Inſtance, ſome Bonds in which the Teſtator was bound to *T. P.* were aſſigned to the Queen, who brought a *Scire facias againſt the Infant Executor*, and he pleaded, that Adminiſtration of the Goods of the Teſtator was granted to *W. C.* during his Minority; this was adjudged no good Plea, and therefore it was ruled, that the *Infant Executor* ſhould anſwer over as *Executor*. *Owen* 35. *Godb.* 104. *Miller* verſus *Gore*.

5 Rep. 29. Prince's *Caſe*. 1 Brownl. 46.

3. The Teſtator made an *Infant Executor*, the Plaintiff took out *Adminiſtration durante minore ætate*, *&c.* and brought an *Action of Debt* on a Bond due to the Teſtator, and averred, that the Infant Executor was living and within the Age of twenty-one Years; now becauſe it did appear that this Adminiſtration was granted whilſt the *Infant was under ſeventeen Years*, therefore the Plaintiff was Nonſuit. *Cro. Eliz.* 602. *Pigott* verſus *Gaſcoigne*. See *pl.* 13.

4. Adminiſtration was granted *durante minore ætate*, afterwards the *Infant Executor came of full Age*; the Queſtion was, what Remedy he had againſt the Adminiſtrator, for the Goods of which he was poſſeſſed: and adjudged, that he might bring an Action of *Detinue* or libel againſt him in the Spiritual Court. 1 *And.* 34.

5. Adminiſtration was granted to *T. P.* during the Minority of *two Infants*, who were joint Executors; now, tho' one of them afterwards came to the *Age of ſeventeen Years*, yet becauſe the other was under that Age, the Adminiſtration ſtill continued. *Brownl.* 47, 81.

6. An Adminiſtrator *durante minore ætate*, *&c.* hath not a *general Property* in the perſonal Eſtate of the Deceaſed as another Adminiſtrator hath, for 'tis reſtrained *ad proficuum Executoris*; and yet it hath been adjudged, that ſuch an Executor may maintain an Action of *Trover* againſt any one who hath the Goods of the Teſtator. 1 *Roll. Abr.* 910. *Seth* verſus *Seth*.

7. It was formerly held, that where ſuch an Adminiſtrator is Plaintiff in any Action, he ought in his Declaration to ſet forth the *Age of the Infant Executor*, and *aver* him to be *under the Age of ſeventeen Years*; but by the later Authorities 'tis now ruled otherwiſe, for it ſhall be *intended*, that the *Infant is under that Age*, without *averring* it ſpecially, where the Defendant hath pleaded, and not ſhewed in his Plea, that he was more *than ſeventeen Years old*. 1 *Roll. Rep.* 400.

Hall verſus *Salvin.* 2 *Roll. Rep.* 186, 209. * *Aldred* verſus *Walthall.* 2 *Cro.* 590. *Amy* verſus *Whiſtler. S. P.* 2 *Roll. Rep.* 466. *S. C. Cro. Car.* 240. *Wells* verſus *Soames. S. P.* 1 *Lutw.* 627. *Beale & Ux'* verſus *Simpſon. S. P. Poſtea, pl.* 18. * 2 Roll. Rep. 204. 209. 2 Cro. 588.

8. It was a Queſtion, that where ſuch an *Adminiſtrator obtained a Judgment*, and before *Execution* the *Infant Executor came to the Age of ſeventeen Years*, how that Judgment could be executed, becauſe the Power of the Adminiſtrator was now determined, and the Executor himſelf could not ſue forth Execution, becauſe he was no Party to the Record; but it was held, that he might ſue forth a *Special Scire facias* upon the Record, and take out Execution in his own Name. 2 *Brownl.* 83. *Sed Quære.*

9. The Caſe before-mentioned is not well warranted by any Authority; and therefore where ſuch an Adminiſtrator obtained *Judgment*, and brought a *Scire facias* againſt the Bail; and they pleaded, that *T. P.* the Executor was now of the *Age of ſeventeen Years* and upwards, to which Plea the Adminiſtrator demurred; this was adjudged an ill Plea, becauſe the Recognizance entered into by the Bail was to the Adminiſtrator himſelf, and in his Name; therefore the Executor being afterwards of *the Age of ſeventeen Years*, doth not prevent him from bringing this *Scire facias* againſt them. 2 *Lev.* 37. *Embrin* verſus *Mompeſſon.* 1 Brownl. 101.

10. Where one of full Age, and an Infant under the Age of *ſeventeen Years* are made Executors, and Adminiſtration is granted to him of *full Age during the Minority of the other*, in ſuch Caſe, if they are Plaintiffs, they muſt *both join in the Action*, unleſs the Executor of full Age ſets forth in his Declaration, that there is another Executor under Age, *&c.* *Yel.* 130. *Smith* verſus *Smith. Poſtea* Infant. (A) 12. *S. C.*

11. An Adminiſtrator *durante minore ætate, &c.* obtained a Judgment, and had the Defendant in Execution, and afterwards the Infant Executor came to the *Age of ſeventeen Years*; the Court was moved, that the Defendant in Execution might be diſcharged, becauſe the Power of the Adminiſtrator, at whoſe Suit he was in Execution, was now determined, and by Conſequence he could neither give a Diſcharge nor acknowledge Satisfaction upon Payment of the Debt; but adjudged, that both the Judgment and Execution were in Force, and that if the Defendant would have Relief, he muſt bring his *Audita querela*; but if Execution had been taken out after the Infant Executor came to the Age of ſeventeen Years, it had been Wrong. 1 *Mod.* 62. 2 *Saund.* 148. *S. C. Godb.* 104. 2 *Lev.* 37. *S. P.*

Where ſuch an Adminiſtrator is Defendant.

12. Where an Action is brought *againſt an Adminiſtrator durante minore ætate*, the Plaintiff need not ſet forth in his Declaration, the *Age of the Infant Executor*, at the Time of the Commencement of the Action; for tho' he may be more *than ſeventeen Years* old at that Time, yet becauſe this doth not properly fall under the Knowledge of the Plaintiff, who may be a Stranger to his Age, therefore the Defendant ſhall not take Advantage of it, eſpecially if he hath pleaded to iſſue, and ſo admitted the Plaintiff's Power to continue. *Hob.* 251. *Carver* verſus *Haſterig. Yel.* 128. *Croft* verſus *Walbrooke.* See *pl.* 18. *Antea pl.* 7. *Poſtea pl.* 13.

13. Debt againſt an Adminiſtrator *durante minore ætate* of *T. P.* the Executor, in which the Plaintiff declared, and averred, that the ſaid *T. P.* was *within the Age of twenty-one Years*, which might be very true, and yet *above the Age of ſeventeen Years*, and becauſe the Power of the Adminiſtrator ceaſes at that Age; and if Adminiſtration is afterwards granted during Minority, *&c.* 'tis void, therefore it was adjudged againſt the Plaintiff. 2 *Brownl.* 247. *Bromhead* verſus *Rogers. Cro. Eliz.* 602. *Pigott* verſus *Gaſcoigne. Antea pl.* 3. *S. C.*

14. Debt againſt an Adminiſtrator *durante minore ætate*, and pending the Action the Infant Executor came to the Age of *ſeventeen Years*; it was a Queſtion, whether the Action was abated, or not; and *Serjeant Moor*, who Reports the Caſe, tells us, the Court was in great Doubt about it. *Moor* 462. *Ford* verſus *Granvill.*

15. Adminiſtration *durante minore ætate* was granted to *T. P.* which was afterwards repealed; and the like Adminiſtration was granted to *W. C.* who compelled *T. P.* to accompt; and when it was adjuſted, and the Money due on the Balance paid, he gave *T. P.* a Releaſe; adjudged, that when the Infant Executor *is ſeventeen Years of Age*, he may bring *T. P.* to accompt again, becauſe he ſhall not be concluded by the Releaſe. 1 *Roll. Abr.* 911.

16. The Caſe was, *Aldrich* made *Talbot* his Executor, and died, leaving an *Infant*, and one *Wolfe* as Adminiſtrator *durante minore ætate* of the Infant, brought an *Action of Debt* in *C. B.* againſt the Defendant for 40 *l. De bonis teſtatoris non Adminiſtrat' per Talbot nuper Executor of Aldrich, & profert hic in Curia literas Teſtamentarias, & literas Adminiſtratorias, &c.* The Defendant pleaded, that *Aldrich* made *Talbot* Executor, who proved the Will, *&c.* and made *Roblett* his Executor, and died, and that he ought to bring the Action, *&c.* The Plaintiff replied, that *Talbot* did not prove the Will of *Aldrich*, and tho' *Roblet* had taken upon him the Executorſhip to *Talbot*, yet he had refuſed to intermeddle with the Goods of *Aldrich*; and upon a Demurrer to this Replication the Plaintiff had Judgment; and upon a Writ of *Error* brought it was objected, that the Replication was ill, for when the Plaintiff in his Declaration *profert hic in curia literas teſtamentarias*, thoſe Words imply, that the Will of *Aldrich* was proved, therefore he cannot in his Replication ſay, that it was not proved; but adjudged, that this is only Matter of Form, and that it was impertinent to alledge it, for the Plaintiff's Title is as Adminiſtrator, which is in Diſaffirmance of the Probate of the Will. *Palm.* 153. *Hedon* verſus *Wolfe.* Hutt. 30. 2 Cro. 614. Noy 30. Hetl. 59. Litt. 72.

17. Where an Executor is appointed in the Will by the Teſtator himſelf, during the Minority of an Infant Executor, and ſuch Executor waſtes the Goods, the Infant Executor, when he comes to the Age of ſeventeen Years, may charge him upon the Special Matter; but he is not liable, upon this Accompt, to any other Perſon. 1 *Mod.* 174. *Brooking* verſus *Jennings.*

18. Debt by an Adminiſtrator *durante minore ætate* of *W. R.* after a Verdict for the Plaintiff a Writ of Error was brought, and the Error aſſigned was, that the Plaintiff did not declare, that *W. R.* was under the *Age of ſeventeen Years*; for where ſuch an Adminiſtrator *is Plaintiff*, he muſt aver, that the Executor is within the Age of *ſeventeen Years*, otherwiſe where he is Defendant; beſides, the Plaintiff declared, that Adminiſtration was granted to him by the Ordinary, without ſaying, *Loci iſtius Ordinarium*; but the Judgment was affirmed, for tho' theſe are Faults, yet they are cured by the Verdict. 2 *Sid.* 40, 60. *Owen* verſus *Holden.*

What Acts the Executor may do after he is ſeventeen Years, and what not, againſt the Adminiſtrator.

19. Where an *Adminiſtrator durante minore ætate* waſtes the Goods of the Teſtator, he cannot be charged as *Executor of his own Wrong*, when the Infant Executor comes to the *Age of ſeventeen Years*, becauſe he came lawfully to the Poſſeſſion; but in ſuch Caſe the Plaintiff muſt declare againſt him upon the *Special Matter*; and if the Goods are not waſted, *but ſtill continue in the Poſſeſſion of the Adminiſtrator durante minore ætate, &c.* the Infant Executor may have an Action of *Detinue* againſt him *after the Age of ſeventeen Years.* *Latch* 160, 267. *Palmer* verſus *Litherland.* See 1 *And.* 34. but the ſafeſt Way is to charge him upon the *Special Matter* even in that Caſe. *Sid.* 57. *Lawſon* verſus *Crofts.* *Poſtea* Adminiſtration. (P) 2. *Brooking* verſus *Jennings.*

20. Debt upon Bond brought againſt the Defendant, who was Adminiſtratrix of *John Godolphin, durante minore ætate of Rebecca* his Daughter, and this was for 168 *l.* The Defendant, the Adminiſtratrix, pleaded, that *John Godolphin* became bound in a Bond of the Penalty of 6000 *l.* to one *Wallis, &c.* a Truſtee for the Defendant, upon her Marriage with *Godolphin*, conditioned to *pay to her ſelf* 3000 *l.* within fourteen Days after his Death, if ſhe ſhould ſurvive, and avers, that ſhe did ſurvive, and that ſhe had not Aſſets *ultra* 1000 *l.* to pay the ſame, which ſhe *retained* towards Satisfaction of the ſaid 3000 *l.* and upon a Demurrer this was adjudged a good Plea, for tho' the Bond was made to *Wallis*, yet the Money was to be paid to the Defendant herſelf, and ſhe is now Adminiſtratrix, and therefore cannot pay her ſelf, and by Conſequence the Payment muſt be by Way of *Retainer*; but if the Money had been to be *paid to Wallis*, tho' in Truſt for her, it ſeems ſhe could not in ſuch Caſe plead a Retainer. *Raym.* 483. *Roskelley* verſus *Godolphin.* See the Caſe of *Huiſh* verſus *Phillips.*

21. *Covenant, &c.* by an Adminiſtrator *de Bonis non, durante minore ætate of Rebecca Wood*, brought againſt the Defendants (Husband and Wife) who was Executrix of her former Husband, *&c.* and averred, that *Rebecca* was under Age; the Defendants plead in Bar, that *after the laſt Continuance Rebecca came of Age*; the Plaintiff demurred, but it was never argued, for he could not maintain it, the Plea being good, for as ſoon as *Rebecca came of Age* there was an End of the Action: So where a *Scire facias* was brought by an Adminiſtrator during the Abſence of another, to whom of Right it belonged; upon a Demurrer this Adminiſtration was held good, but that an Action brought *by ſuch an Adminiſtrator*, ſhall abate when the right Perſon comes, but Actions brought *againſt him* ſhall not. 1 *Lutw.* 338. *Major* verſus *Peck.* *Paſch.* 3 *Will.* 3. *B. R. Gouldſ.* 136.

22. And becauſe this Adminiſtration is granted *durante minore ætate cum teſtamento annexo*, 'tis not within that Statute, and therefore the Ordinary is not obliged to grant it to the next of Kin to the Infant Executor, but to whom he thinks proper. 1 *Vent.* 219. *Sir William Whitmore's* Caſe. Chattels. (C) 2. *S. C.*

23. But there is a Difference where an Adminiſtration is granted by the Ordinary *durante minore ætate* of the Infant *Executor*, and where an Executor during the *Minority of an Infant* Executor is made *by the Act of the Teſtator himſelf*; for in the one Caſe the Adminiſtration ceaſes when the Infant Executor is of the Age of * *ſeventeen Years*, and in the other Caſe not till he is of *full Age*, becauſe *by the Statute for ſettling Inteſtate's Eſtates*, the Adminiſtrator is to give Bond to the Ordinary truly to Adminiſter, *&c.* and an Infant under the Age of twenty-one Years, cannot give ſuch Bond. 1 *Salk.* 39. *Freak* verſus *Thomas.* 5 *Mod.* 395. *Atkinſon* verſus *Corniſh.* *Antea* (L) 4. *S. C.* but before this Statute was made it was otherwiſe. *Cro. Eliz.* 164. *Pemberton* verſus *Lacy.* *Cro. Car.* 516. *Davenport* verſus *Pinſent.* *S. P.*

* T. Jones 48. Joyner v. Thomas.

24. Sometimes an *Infant* is made *Executor*, but in ſuch Caſe the Execution of the Will is to be committed to one of full Age, during the Minority of the Infant, but the Power of ſuch Adminiſtrator ceaſes when the Executor comes to the Age of ſeventeen Years; and if a female Infant, under the Age of ſeventeen Years, is made Executrix, and ſhe afterwards marries with one of that Age, or upwards, her Husband ſhall have the Execution of the Will in the ſame Manner as ſhe might, if ſhe had been of that Age her ſelf. See 1 *Salk.* 39. *Freak* verſus *Thomas.*

(M)

What Acts amount to an Adminiſtration.

1. *Releaſing* a Debt due to the Inteſtate, or *Receiving a Debt*, eſpecially, if he gives an Acquittance. *Moor* 14. *Stokes* verſus *Porter*. 1 And. 11. S. C.

2. An *Executor before Probate* poſſeſſed himſelf of the Teſtator's Goods, which were appraiſed, and put into an Inventory; then he paid a Debt, and converted ſome to his own Uſe, and afterwards refuſed to prove the Will, whereupon Adminiſtration was granted to another; adjudged, that he ſhall be charged for the whole perſonal Eſtate. 1 *Mod.* 213. *Porter* verſus *Baſden*.

(N)

What Acts ſhall not amount to Adminiſtration.

1. THE taking Care of the Funeral of the Inteſtate, the Feeding and Looking after his Cattle, the Repairing his Houſes and other Buildings; neither doth the bare Poſſeſſion of any of his Goods, and delivering them to another, make an Adminiſtration. 33 *H.* 6. 31.

(O)

Of Revoking and Repealing an Adminiſtration.

1. THE Ordinary granted Adminiſtration to a *Stranger*; the *next of Kin* to the Inteſtate cited the Adminiſtrator in order to repeal it; pending the Suit, the Adminiſtrator ſold the Goods, and afterwards the Adminiſtration was repealed; adjudged, that the Sale was good againſt the new Adminiſtrator, but not againſt Creditors. *6 Rep.* 18. *Packman's* Caſe. See *pl.* 9. *S. C.* Cro. Eliz. 459. Moor 396.

2. After an Adminiſtration is repealed, the Authority of the Adminiſtrator is determined; for if he obtain Judgment on a Bond due to the Inteſtate, and then the Adminiſtration is repealed, he cannot have Execution. *Yelv.* 83. *Barnhurſt* verſus *Yelverton*. 1 *Brownl.* 91. *S. C.*

3. An Adminiſtrator *releaſed* all Actions, and afterwards the Adminiſtration was repealed; adjudged, that the Releaſe is void. 1 *Brownl.* 51. *Throgmorton* verſus *Hobby*. See *antea placito* 1.

4. The Ordinary cannot repeal an Adminiſtration at his Pleaſure; for when it is once granted, he hath executed his Power, and an Intereſt is veſted in the Adminiſtrator. *Sid.* 179. 2 *Cro.* 144.

5. Debt for Rent by an Adminiſtrator; the Defendant pleaded, that Adminiſtration granted to the Plaintiff was repealed and granted to another; adjudged, that the Ordinary having granted Adminiſtration to the Plaintiff, who was next of Kin, he had executed his Power, and could not repeal it, but for juſt Cauſe. *Sid.* 280. *Price* verſus *Parker*. 1 Lev. 157.

6. *A Brother and two Siſters*, one of them married, and the other died Inteſtate; the Ordinary granted Adminiſtration to the ſurviving Siſter, pending a *Caveat* entered by the Brother; and upon and Appeal by him, it was adjudged, that where two are in *æquali gradu*, and Adminiſtration is granted to one of them, it ſhall not be repealed, but for ſome good Cauſe. *Sid.* 293, 372. *Offley* verſus *Beſt*. 1 *Lev.* 186. *S. C. Style* 10. *Betiſworth* verſus *Betiſworth*. *S. P.*

7. An *Adminiſtrator* had Judgment in *Trover* for the Goods of the Inteſtate, the Adminiſtration was repealed and granted to another, the firſt Adminiſtrator could not have executed, tho' the Converſion was in his Time. 1 *Mod.* 62. *Turner* verſus *Davis*. 2 *Saund.* 148. *S. C. Yelv.* 83, 125. *Kitt* verſus *Life*, *contra*. *Audita querela.* (B) 16. *S. C.* 8 *Rep. Dr. Drurie's* Caſe.

8. Adminiſtration granted where it ought not, or *inverſo ordine* may be repealed in the Delegates; ſo where a Biſhop granted Adminiſtration, when the Inteſtate had *Bona notabilia*. 1 *Lev.* 305. *Ravenſcroft's* Caſe.

9. The Adminiſtrator poſſeſſed himſelf of a Term for Years, and made an Under-Leaſe; afterwards upon a Citation, the Adminiſtration was affirmed; but upon an Appeal, that Sentence was repealed, and Adminiſtration granted to another; adjudged, that the new Adminiſtrator ſhall not avoid this Under-Leaſe, becauſe the Repeal was only of the Sentence upon the Citation, and not as if the Appeal had been brought originally upon the firſt Adminiſtration. *Raym.* 224. *Simms* verſus *Simms*, by the Name of *Semaine* verſus *Semaine*. *Nota*, This is the ſame in effect with *Packman's* Caſe. 2 Lev. 90.

(P)

Pleading Plene Adminiſtravit, good.

1. DEbt againſt an Adminiſtratrix, who pleaded, that *T. S.* had obtained a *Judgment* againſt her for 100 *l.* and that ſhe *Plene adminiſtravit*, and had not *Goods* of the Inteſtate in her Hands, at the Time of the Original Writ brought, nor at the Time of Judgment, *nec unquam poſtea, præterquam Bona & catalla non attingentia ad* 5 *l.* It was objected againſt this Plea, that it did not ſet forth the certain Value of the Goods, and that it was repugnant, becauſe the Defendant, after he had pleaded *plene Adminiſtravit*, confeſſed, that there was 5 *l.* not adminiſtred, but it was anſwered and adjudged, that it was only Matter of Form to aſcertain the Value of the Goods, and that the Subſtance of the Plea was, that the Defendant had not above 5 *l.* to ſatisfy the Demand of 100 *l.* neither is this Plea repugnant; for the three firſt Adverbs, *nec unquam poſtea*, relate as well to the Time of the Original Writ brought, as to the Time of the Judgment, and the next Adverb, *præterquam*, explains the Whole; ſo that the Senſe is, that the Defendant, after the Writ brought, and Judgment obtained againſt her, had never any of the Inteſtate's Goods, except Goods not of the Value of 5 *l.* and if ſo, then *Plene Adminiſtravit* before that Time, excepting thoſe Goods. *Hob.* 133, 218. *Moor* verſus *Andrews.*

2. The Teſtator owed 500 *l. on Specialties*, and 500 *l.* more upon *Simple Contract*, and having deviſed 400 *l.* in Legacies, and made an Executor *durante minore ætate of his Son*, he died, leaving a perſonal Eſtate to the Value of 2000 *l.* the Executor paid 1400 *l.* in Diſcharge of the ſaid Debts and Legacies, and accompted with the *Infant* when he came of Age, and upon Payment of 91 *l. Reſiduum* to him, had a *Releaſe*; afterwards an Action was brought againſt him by one of the Creditors of his Teſtator, and upon pleading *Plene Adminiſtravit*, the Jury found, that he paid the Debts and Legacies, as aforeſaid, and that he delivered up *All the Reſidue of the perſonal Eſtate* of the Teſtator to his Executor, when he came of Age: It was objected againſt this Verdict, that it did not maintain the Plea of *Plene Adminiſtravit*, becauſe here were Aſſets delivered over to the Executor, and this Plea is never proper, but where all Debts are paid as far as there are Aſſets; but it was adjudged good, for wherever the Executor lawfully diſcharges himſelf of the Teſtator's Eſtate, he may plead this Plea. 1 *Mod.* 174. *Brooking* verſus *Jennings.*

3. Where the Defendant pleads *Plene Adminiſtravit*, to an Action of *Debt on a Bond*, the Debt is admitted by that Plea; and if the Defendant give Evidence, that he paid a Debt on another Bond owing by the Teſtator, he muſt prove that the Bond was Sealed and Delivered; but ſuch a Plea to an Action of *of Debt upon Simple Contract* is good, if the Defendant prove the Payment of the Debt, for where there is no Bond, 'tis good Adminiſtration to pay any Debt. *Sho.* 81. *Sanderſon* verſus *Nicholls.*

(Q)

Pleading Plene Adminiſtravit, not good.

1. WHere an *Executor* of an Executor is ſued, he cannot plead, that *his Teſtator in vita ſua plene Adminiſtravit* all the Goods and Chattels of the firſt Teſtator; but he ought to plead, that after the Death of both the Teſtator's, he admitted all the Goods of the *firſt Teſtator*, and then conclude thus (*viz.*) *Et ſic nihil habuit in manibus ſuis of his Teſtator. Dyer* 174. *Williams* verſus *Keinſham.*

2. Judgment againſt the Inteſtate, and a *Sci. fa.* againſt his Adminiſtrator; he pleaded *Plene Adminiſtravit*, and upon a Demurrer to this Plea, (but the Report doth not mention whether General or Special) this was adjudged no good Plea by one who was charged with a *Judgment*, becauſe it admitteth, that the Goods did come to his Hands, which he ſaith he fully adminiſtred, and that he might do, *by Payment of Debts of inferior* Nature to Judgments; but this was againſt the Opinion of the *Lord Chief Juſtice Anderſon*; and ſo it was likewiſe in another Caſe againſt the Opinion of the Lord Ch. Juſt. *Rolls*, who tells us, there is no Priority of Debts on Record, unleſs in the Caſe of the King. *Cro. Eliz.* 575. * *Ordway* verſus *Godfrey. poſtea pl.* 3. *S. P.* Sci. fa. (D) *S. C. Allen* 47. *Petchcott* verſus *Woollenſton, S. P.* 1 *Brownl.* 76. *S. C. Moor* 158. *Harcourt* verſus *Wrenham. S. P. Poſtea* Aſſets. (A) 12. *S. C.*

* *Denied to be Law* per Totam Curiam. 4 Mod. 296.

3. Debt againſt the Defendant as Executor, he pleaded *Plene Adminiſtravit*; the Jury found that his Wife was Executrix of *W. R.* and that ſhe, to deceive his Creditors, made a fraudulent Deed of Gift of his Goods, but ſtill continued in the Poſſeſſion thereof, and afterwards married the now Defendant, and died, and that he had Goods in his Hands ſufficient to ſatisfy the Creditors; adjudged for the Plaintiff, becauſe the Defendant by pleading *Plene Adminiſtravit*, had confeſſed himſelf to the Executor, and therefore ſhall be chargeable; for the Property of the Goods was not altered by this fraudulent Gift of his Wife, but continued ſtill in her. *Moor* 396. *Watſon's* Caſe.

4. 'Tis no good Plea in an Action of Debt for Rent brought againſt an Adminiſtrator in the *Debet* and *Detinet. Sid.* 334. *Auſtin* verſus *Miller.* 2 *Vent.* 184. *S. P.*

5. *Judg-*

5. *Judgment* againſt the Teſtator in Debt, and upon a *Scire facias* againſt his Executor, he pleaded *Plene Adminiſtravit* generally; adjudged no good Plea. *Raym.* 230. *Bradley* verſus *Hutchinſon. Style* 328. *Newman* verſus *Maſſey, S. P. Cro. Eliz.* 575. *Ordway* verſus *Godfrey, S. P. Poſtea* Scire facias. (D) 3. *S. C.*

6. *Aſſumpſit againſt an Executor*, who pleaded ſeveral *Bonds* owing by the *Teſtator* not ſatisfied, and that *Plene Adminiſtravit* all the Goods which the Teſtator had at the Time of his Death: Upon Demurrer to this Plea, it was adjudged ill, becauſe the Plea relates to the *Time* when it was pleaded; and if Iſſue had been joined upon it, the Defendant might give in Evidence at the Trial, that after the Writ brought, and before the Plea pleaded, he had paid Debts upon Simple Contract; he ſhould have added this Clauſe, *that he had no Goods or Chattels of the Teſtator, vel habuit die impetrationis brevis originalis præd' vel unquam poſtea, præterquam* Goods and Chattels, to the Value of 10 *l.* which are not ſufficient to ſatisfy the Debts due on the Bonds with which they ſtand charged, and this would have made the Plea good. 3 *Lev.* 28. *Hewlet* verſus *Framingham.*

7. Debt againſt an Executor, who pleaded, that his Teſtator was indebted to one *Lomb* in a Bond for 300 *l.* which was not ſatisfied, but that it was ſtill in Force, and that he had fully adminiſtred, and had not Aſſets *ultra* 10 *l.* to ſatisfy that Debt, *Die exhibitionis Billæ*, nor afterwards; there was a Replication and a Demurrer, but the Bar was adjudged ill, becauſe the Defendant pleaded, that he had fully adminiſtred, *ante exhibitionem Billæ*, when it ſhould be *ante impetrationem Brevis.* 2 *Lutw.* 1634. *Covel* verſus *Deval.*

8. *Caſe, &c. againſt an Executor*; upon *Plene Adminiſtravit* pleaded, it was adjudged, that the Plaintiff muſt prove his Debt, or elſe he ſhall recover but a Penny Damages, tho' there is Aſſets, becauſe this Plea only admits the Debt, but not the *Quantum*; that all Debts mentioned in the Inventory ſhall be taken to be Aſſets, unleſs a Demand and Refuſal is proved. 1 *Salk.* 296. *Shelley's* Caſe.

9. *Sci' fa. upon a Judgment againſt the Teſtator* being brought *againſt the Executor*, he pleaded *Plene Adminiſtravit*, and that he had no Goods on the Day of the bringing the firſt *Sci. fa.* nor at any Time after; and upon a ſpecial Demurrer to this Plea, for that the Defendant did not ſhew *how he had adminiſtred*, the Plaintiff had Judgment, becauſe againſt a Judgment he ought to ſhew *how he adminiſtred*; but upon a general Demurrer it might have been a good Plea. 1 *Salk.* 296. *Newton* verſus *Richards.* Moor 158. 3 Cro. 575. Allen 48.

(R)

Of Judgment and Execution upon Plene Adminiſtravit pleaded.

See *Execution.* (C) 9.

1. WHERE *Plene Adminiſtravit* is pleaded, and the Plaintiff replieth *Aſſets*, tho' the Jury find leſs than the Value of the Debt in Demand, yet the Judgment muſt be, that he recover the * whole Debt, but he ſhall have Execution only for ſo much as found; and if more Goods of the Teſtator afterwards comes to the Defendants Hands, in ſuch Caſe the Plaintiff may have a *Scire facias* upon that Judgment. *Cro. Eliz.* 592. *Waterhouſe* verſus *Woodhouſe.* 8 *Rep.* 134. *Mary Shipley's* Caſe. *Allen* 37. *Gawdy* verſus *Langham. S. P.* * Poſtea 4.

2. 'Tis true, the *Lord Chief Juſtice Anderſon* was of Opinion, that the Judgment did not Warrant the *Scire facias*; but that if more Goods of the Teſtator came to the Hands of the Executor the Plaintiff muſt bring a new Action of Debt againſt him. *Moor* 346.

3. But it hath been a Queſtion, whether the Plaintiff ſhall have Judgment to recover *cum Aſſets acciderint*, where he hath *confeſſed* the Plea to be true; but now it hath been adjudged, that he ſhall have ſuch *Judgment even upon a Confeſſion of the Plea to be true*, and that the Judgment ſhall be for him to recover *de bonis Teſtatoris, quæ in futuro ad manus Defendentis devenerint*, and afterwards, upon a Suggeſtion of more Aſſets, he may have a *Scire facias* upon that Judgment, and this hath been affirmed upon a *Writ of Error in the Exchequer-Chamber. Cro. Car.* 372. *Dorcheſter* verſus *Webb.* 2 *Saund.* 226. *Noell* verſus *Nelſon. Sid.* 448. *S. C.* 1 *Lev.* 286. *S. C.* 1 *Vent.* 24. *S. C.* W. Jones 345.

4. And ſince the laſt Caſe, it hath been adjudged, that this Judgment did Warrant that *Scire facias*, and that the Difference is where upon *Plene Adminiſtravit* pleaded, the Plaintiff replies Aſſets, and where he *confeſſeth the Plea* to be true; for if he reply Aſſets, and ſome are found, tho' very ſmall, and not near the Value of the Demand, the Plaintiff ſhall have Judgment for his whole Debt, and Execution for ſo much as is found, and likewiſe for the Reſidue, when more Aſſets come to the Defendant's Hands, and ſo is *Mary Shipley's* Caſe. 2 *Lev.* 22. *Chapman* verſus *Gale. S. P. Allen* 37. *Gawdy* verſus *Langham.*

(S)

Of Pleading Bonds, good and not good.

1. *Aſſumpſit* againſt an *Adminiſtrator*, who pleaded, that on ſuch a Day the Inteſtate entered into *Bond* to *T. S.* to pay 40 *l.* at *Michaelmas* next enſuing, and that *Plene Adminiſtravit* all the Goods of the ſaid Inteſtate *præterquam*, to ſatisfy that 40 *l.* and upon a Demurrer, it was adjudged a good Plea; for tho' *the Debt on the Bond* is not due till the Day of Payment, yet a *Debt upon a Contract* ſhall not be paid before it. *Cro. Eliz.* 315, *Buckler* verſus *Brook.*

5 Rep. 82. 2. Debt upon a Bond of the Inteſtate was brought againſt the Adminiſtrator, who pleaded, that his Inteſtate being a *Citizen of London*, *contracted* with another *Citizen* to pay Money to him, and that by the *Cuſtom of London* he is chargeable with ſuch *Contract*, as if it had been a *Debt due on Bond*, and that he had not Aſſets *ultra*, to pay that Debt upon *Contract*; and upon a Demurrer, this was adjudged a good Plea; for a Debt upon *Simple Contract* is as much a Debt as a *Debt on a Bond*, only the Law hath made the Bond Debt payable before the other; but this being a reaſonable Cuſtom, by Conſequence 'tis a Law, and hath made the Debt on the Contract equal to that on the Bond. *Cro. Eliz.* 409. *Snelling* verſus *Norton.* 5 *Rep.* 82. *S. C.*

3. Debt againſt an Executrix, who pleaded, that her Teſtator was indebted to her *on Bond*, with a Condition to *pay Rent*, and that at the Time of his Deceaſe there was 300 *l.* due from him to her for Rent, and that ſhe had no more than 60 *l.* Aſſets, to pay that 300 *l.* the Plaintiff replied, that at the Time of the Death of the Teſtator, there was no more than 30 *l.* due from him for Rent; and upon Demurrer, this was adjudged a good Replication, for in Truth there was no more due; 'tis true, the *Bond was forfeited* at that Time for Non-payment of the Rent, and by Conſequence the *Penalty was due* to her, but ſhe ought not to inſiſt upon that, nor take more than is juſtly due. 1 *Vent.* 354. *Page* verſus *Denton.*

4. Where the *ſecond Security* is better than the *firſt*, an *Executor* may plead it in Diſcharge of the *firſt:* as for Inſtance, An Action of Debt was brought on a *Bond* againſt the Defendant, as *Heir of the Obligor*, who pleaded, that his Father died Inteſtate, and that Adminiſtration, *&c.* was granted to *W. R.* who gave the Plaintiff *another Bond*, in Satisfaction of the firſt; adjudged, a good Plea, becauſe this Bond given by the Adminiſtrator, was better than the Bond given by the firſt Obligor, for the Adminiſtrator was not only anſwerable for the Goods which he had of the Inteſtate, but is now chargeable *De bonis propriis.* 1 *Mod.* 225. *Blithe* verſus *Brittells.*

5. But not long after the laſt Caſe there ſeems to be a contrary Reſolution, for the Plaintiff brought an Action of Debt one a *Bond*; the Defendant pleaded an Agreement between them, that he ſhould give the Plaintiff a *new Bond*, or Security for the Debt, and that he being Executor of the firſt Obligor, gave the Plaintiff a Penal Bill for the Debt; adjudged an ill Plea, becauſe one Bond cannot be given in Satisfaction of another, tho' the new Bond did oblige the Defendant *de Bonis propriis*, and the old one *de Bonis Teſtatoris* only. 3 *Lev.* 55. *Lobley* verſus *Gildard.* Accord. (A) 9. *S. C.*

4 Mod. 44. 2 Vent. 184. 6. Debt againſt an Executor for Rent due upon a *Leaſe Parol* made to his Teſtator, and for three Years Rent, *after the End of the Term*: The Defendant pleaded, that his Teſtator entered into a *Bond to T. S.* for the Payment of ſo much Money, and that he had not Aſſets *ultra* 5 *l.* to ſatisfy that Bond; and upon Demurrer, this was adjudged an ill Plea, for the Determination of the Leaſe made no Manner of Alteration of the Contract, ſo as to make the Arrears only Perſonal, but that the Action was ſtill maintainable by Reaſon of the Profits of the Land which the Teſtator had received, and it being brought for * *Rent*, that favoured of the Realty, and muſt therefore be paid before the Bond Debt. 3 *Lev.* 267. *Newport* verſus *Godfrey* Affirmed in Error in the Exchequer-Chamber.

* Poſtea Executor (C) 4.

(T)

Pleas of Judgments by Confeſſion, good and not good. See antea (H) 6. *Executor.* (D) per Totum. (I) per Totum.

Moor 173, 705. 1. DEBT againſt an Executor, who pleaded, that pending that Action *T. S.* brought another Action againſt him for 100 *l. pro vero & juſto debito* due to him from his Teſtator, and that he had *confeſſed Judgment* in that Action, and had not Aſſets *ultra*, to ſatisfy that Judgment; the Plaintiff replied *proteſtando*, that the Action brought againſt the Defendant was not for a *true Debt*, and *pro placito*, that the Judgment was confeſſed *by Covin* to defeat him of his Debt, *&c.* And upon Demurrer, this Replication was held ill, becauſe the Defendant having expreſly alledged in his Plea, that the Action was brought againſt him * *pro vero & juſto debito*; the Plaintiff ought likewiſe expreſly to anſwer that Part of the Plea, and not to anſwer it by *Proteſtation*; for if it is true, that the Action was brought *pro vero & juſto debito*, then the Defendant could not confeſs Judgment in that Action by *Covin*; but the later Authorities are, that the Defendant need not ſet forth, that the Action was brought againſt him * *pro vero & juſto debito*

* Poſtea 2.

* Poſtea (V) 3.

debito, for it ſhall be preſumed that it was ſo. *Cro. Eliz.* 462. *Green* verſus *Wilcox*. 1 *Lutw.* 662. *Robinſon* verſus *Corbet*. *Sid.* 332. * *Palmer* verſus *Lawſon*. *S. P.* 1 *Lev.* 200. *S. C.* *Antea* (G) 10. *S. C.* See *Searle*'s Caſe. * Executor. (I) 5.

2. But when *Debt* was brought againſt an *Executor*, who pleaded, that his Teſtator entered into a *Statute* to *T. S.* for 3000 *l.* *ultra quod*, *&c.* Upon a Demurrer this was held an ill Plea, becauſe the Defendant did not alledge, that it was * *pro vero & juſto debito*, for it might be for Performance of Covenants, and probably there may be no Covenants broken, and if ſo, then 'tis no good Plea in Bar to the Action. 2 *Cro.* 8. *Phillips* verſus *Echard*, and *ibid.* 182. *Woodell* verſus *Hungate*. *S. P.* and *ibid.* 102. *Mills* verſus *Sherfeild*. *Antea* 1. Poſtea (V) 3. (W) 2.

3. Debt againſt an Executor brought in the Court of Common Pleas for 100 *l.* and pending that Action another was brought againſt him in *B. R.* for 100 *l.* in which he *confeſſed Judgment*, which he pleaded in Bar to the firſt Action, and that *plene Adminiſtravit* all but the ſaid 100 *l.* it was the better Opinion at that Time, that by the firſt Proceſs the Goods were ſo attached in his Hands, that he ought to anſwer that Action firſt, and that it was a *Devaſtavit* to confeſs Judgment in the ſecond Action, to which he ought to have pleaded, that there was another Action then depending againſt him. *Moor* 173.

4. 'Tis true, ſome of the Judges were then of Opinion, that the Defendant might *confeſs Judgment* in the ſecond Action and plead it in Bar to the firſt Action, becauſe he is bound by Law to ſatisfy the firſt Judgment, and with this Opinion the later Authorities do agree. *Moor* 678. *Searle*'s Caſe.

5. Adjudged, that where an Action is brought againſt an *Executor* for a juſt Debt, and he appears and imparls to the next Term; if the Plaintiff fears he will confeſs a Judgment to another to defeat him of his ſaid Debt, he may move the Court, that the Defendant may plead to his Action in the ſame Term in which the Action is brought. 1 *Bulſt.* 123.

6. The Creditors of *T. S.* exhibited a Bill in Chancery for their Debts, ſome of which were on Mortgages, ſome on Judgments, and one was upon a Bond on which *T. S.* was *outlawed*, and one of the *Judgment Creditors* had brought an Action of Debt on his Judgment; and the Queſtion being, which of theſe Debts ſhould be firſt paid, it was decreed, that the *Outlary* being upon *meſne Proceſs* before Judgment, did not alter the Nature of the Debt, and create a Charge upon the Land; but where there is an *Outlary* and Seiſure thereon, there the Debt attaches upon the Land, and ſhall take Place of a *Judgment*, tho' *Prior* to the *Outlary*; that the bringing an Action upon this Judgment did not put it behind other Judgments, and it was not a Waiving the Charge on the Land, becauſe the bringing this Action was the Act of the Attorney, and there was no other Remedy at Common Law after the Year and the Day. 1 *Salk.* 80. *Erby* verſus *Erby*.

7. Adjudged, that where an Executor or Adminiſtrator ſuffers Judgment to go againſt him by Default, he ſhall not, upon the Writ of Inquiry, give in Evidence want of Aſſets; becauſe, as to that Matter he is now *eſtopped*, he ought to have pleaded *plene adminiſtravit*, or ſpecially, what Aſſets he had. *Mod. Caſes* 308. *Treile* verſus *Edwards*.

(V)

Of Pleading other Judgments and Executions, good. See *Executor*. (I) per totum.

1. DEbt againſt the *Adminiſtrator* of *T. S.* who pleaded, that *W. P.* had obtained a *Judgment* againſt him as *Executor* to *T. S. prout patet per Recordum*, and this was held a good Plea, tho' it was objected in the like Caſe, that the Defendant ought to have pleaded in *Abatement* to the Action, that he was *Executor* and not *Adminiſtrator*; but adjudged, that he need not plead it in *Abatement*, eſpecially ſince the Judgment was obtained for a true Debt. *Cro. Eliz.* 646. *Smalpeice* verſus *Smalpeice*. 1 *Lev.* 261. *Parker* verſus *Amys*. *S. P.* *Sid.* 404. *S. C.* by the Name of *Parker* verſus *Maſters*.

2. *Debt upon Bond* againſt an *Executor*, who pleaded, that *T. S.* had obtained a *Judgment* againſt him for ſo much, *ultra quod* he had not *Aſſets*, which Judgment was then in Force; and upon a Demurrer this was adjudged a good Plea, tho' the Defendant did not ſet forth in what Action, or for what the Judgment was obtained; for admitting it to be upon a Debt upon * *ſimple Contract*, yet 'tis good, becauſe the Defendant might not have Notice of the Bond. *Sid.* 230. *Brown* verſus *Purchas*. * Poſtea 3.

3. *Caſe* againſt an Adminiſtrator, upon a Promiſe of the Inteſtate; the Defendant pleaded in Bar, *two Judgments* had againſt him, one in Debt upon * *ſimple Contract*, and the other upon an *inſimul computaſſet prout per ſeparalia Recorda inde plenius apparet*, beyond which he had not Aſſets; and upon Demurrer to this Plea, for that he did not ſay the Judgments were had *pro* † *veris & juſtis debitis*, and for that he did not conclude to each Record, but only *prout* * *per ſeparalia Recorda*, *&c.* yet the Plea was adjudged good, for 'tis not neceſſary to aver, that the Judgments were obtained *pro veris & juſtis Debitis*, for if they were not ſo obtained, the Plaintiff ought to ſhew it in his Replication, and ſo is 3 *Cro.* 471. *Further*'s Caſe; then, as to the Concluſion, *prout patet per ſeparalia Recorda*, 'tis well enough, for it ſhall be taken diſtributively; then, as to the Matter of the Plea in Bar, it was adjudged, that Judgments in Debt upon *ſimple Contract* are pleadable to this Action, for the Debt is not loſt by the Death of the Inteſtate, but his *Antea* 2. † Antea (T) 1, 2. * Poſtea 11. (W) 2. (X) 2.

his Adminiſtrator is ſtill liable, becauſe an Action on the Caſe lies againſt him for ſuch Things, for which Debts upon ſimple Contract are brought, and upon which the Plaintiff may recover againſt him, and he ought not to uſe Dilatories, but to let Judgment paſs againſt him by *Non ſum informatus*, as he did in this Caſe; 'tis true, Debt upon *ſimple Contract* cannot be maintained againſt *an Executor*, if he had *demurred* to the Declaration; but if he plead to it, 'tis good, and the Judgment ſhall not be reverſed for that Reaſon, and thoſe Caſes in 1 *And.* 182. and 3 *Cro.* 121. which are to the contrary, are not Law; now, if this Plea is not good, then the Debts which the Defendant paid in Satisfaction of theſe Judgments will be a *Devaſtavit*, which no Man will affirm, becauſe, if an Action is brought on a Contract, and the Defendant pleads *Plene Adminiſtravit*, he may give Payment on another Contract in Evidence, and by the ſame Reaſon he may ſuffer Judgment to paſs againſt himſelf. *Sid.* 333. *Palmer* verſus *Lawſon.*

4. *Debt againſt two Executors* upon a *Bond* of 100 *l.* entered into by the *Teſtator*; the Defendants plead, that their Teſtator had acknowledged a *Recognizance* in the Nature of a *Statute Staple* to *W. R.* for 1200 *l.* and that they had not Aſſets *ultra*; the Plaintiff replied, that one of the Defendants, and who was alſo one of the Executors, was bound with the Teſtator in the ſaid Recognizance; and upon a Demurrer to this Replication, Judgment was given againſt the Plaintiff, becauſe the Recognizance being joint and ſeveral, the Cogniſee might bring his Action either againſt the ſurviving Cogniſor or againſt the Executors of him who is dead; now, here he hath brought his Action againſt the Executors of the dead Cogniſor, who was bound with the Teſtator, ſo that all his Goods in their Hands are liable, and they have pleaded, that they have none *ultra* ſo much to ſatisfy this Recognizance; and 'tis uſual upon ſuch a Plea, to give in Evidence, Payment of Bonds in which they were bound with the Teſtator; ſo the Plaintiff had Leave to diſcontinue. 1 *Mod.* 165. *Rogers* verſus *Danvers.*

5. *Debt upon Bond* of 40 *l.* againſt an *Adminiſtratrix*, who pleaded, that the Inteſtate was indebted to *W. R.* in 250 *l.* on a *Statute Merchant*, yet in Force, *&c.* and that ſhe had not above 40 *s.* Aſſets, beſides what will ſatisfy that *Statute*; the Plaintiff replied, that *the Statute was burnt with Fire*; and upon a Demurrer to this Replication, three Judges were of Opinion for the Plaintiff, becauſe by the Demurrer the Defendant had admitted, that the Statute was burnt, and if ſo, then it could never riſe up in Judgment againſt him; becauſe, by the Statute 23 *H.* 8. *cap.* 6. Execution is to be made on *Statutes Staple*, in ſuch Manner as therein is provided, and the *Statute Staple* refers to the *Statute Merchant*, and that to Statute of *Acton Burnell made* 13 *Ed.* 1. which provides, that *if it be found by the Roll*, that the Debt was acknowledged, and *the Day of Payment paſt*, that then, *&c.* now if the Roll is burnt it cannot appear, that the Day of Payment is paſt, and conſequently there cannot be any Execution; beſides, the Cogniſee in Pleading muſt ſay *hic in Curia prolat'*, which is now impoſſible: But *Vaughan* Ch. Juſt. held the Plea good and the Replication ill, for admitting the Record was burnt, the Plaintiff cannot avoid it by ſuch a Replication, becauſe 'tis againſt a Rule in Law, that a Matter of Record ſhould be avoided by Matter of Fact; this is proper for a Caſe in Equity. 1 *Mod.* 186. *Buckley* verſus *Howard.*

6. *Aſſumpſit* againſt an *Adminiſtrator*, upon a Promiſe made by the *Inteſtate* to pay 418 *l.* to the Plaintiff, for Goods ſold and delivered; the Defendant pleads ſeveral Judgments obtained againſt him as Adminiſtrator upon *ſimple Contracts*, and avers, that the ſeveral Debts, at the Time of the Death of the Inteſtate, and at the Time of the Judgments obtained, were juſt and *true Debts*, and that the Judgments were in Force and not ſatisfied, and that he had not Aſſets beyond thoſe Judgments; the Plaintiff replied, that the ſaid Judgments were *obtained by Fraud*, and traverſed, that they were had for *juſt and true Debts*; and upon a ſpecial Demurrer to this Replication it was objected, that it was double, for the Plaintiff having avoided the Judgments by Pleading, that they were obtained *by Fraud*, ought to have relied upon that, and then the Judgment would have been *de Bonis Inteſtati*, and therefore he ought not to have perplexed it with a *Traverſe*, that they were obtained *for juſt and true Debts*, and ſo is *Beaumont's* Caſe in *Latch.* 111. but adjudged, that the Plaintiff ſhall have Liberty to *traverſe* the Special Matter, or to rely upon the *Fraud*, which he will, and that either Way is good. 2 *Sand.* 49. *Trethewy* verſus *Ackland.* See *Turner's* Caſe, and *Treſham's* Caſe.

2 Saund. 50. S. C. Norton *v.* Harvey.

7. Debt againſt an Executrix, who pleaded that *T. S.* had obtained a Judgment againſt her Teſtator and one *Harvey jointly*, and that the ſaid *Harvey* was ſtill living, and that ſhe had not Aſſets *ultra* the ſaid Judgment, to ſatisfy the Debt demanded by the Plaintiff; and upon Demurrer this was adjudged a good Plea, becauſe the Charge ſurvives to *Harvey*, and whilſt he lives the Executrix is not liable to the Debt. *Raym.* 153. *Harvey* verſus *Harvey.*

8. *Aſſumpſit* againſt the Defendant as *Adminiſtratrix* of her Husband, ſhe pleaded, that he was bound in a *Statute* to one *Cordell* for 2000 *l. pro vero & juſto debito minime ſoluto*; the Plaintiff replied, that *Cordell the Cogniſee* had ſued out an Extent, and upon a *Liberate* had got the Poſſeſſion of the Lands of the Cogniſor, which he the ſaid *Cordell* had accepted in Satisfaction of the Recognizance, *prout patet per Recordum*; adjudged, this was a good Replication, becauſe the Cogniſor was concluded by this Acceptance of the Lands to have any other Execution upon the Goods of the Inteſtate, and therefore thoſe Goods are liable in the Hands of the Adminiſtratrix, and ſhe is chargeable. 3 *Lev.* 269. *Barker* verſus *Dye.* 1 *Lutw.* 453. *Johnſon* verſus *Young. S. P.*

9. *Debt upon Bond* againſt an *Adminiſtrator*, who pleaded a Judgment recovered againſt his Inteſtate in *Hillary-Term*, 26 *Car.* 2. and that he had not Aſſets *ultra*, *&c.* The Plaintiff replied and confeſſed, that an Action was then brought againſt the Inteſtate, but that *he died before Judgment* was had in that Action, and that it was obtained after his Death, and kept on Foot by

Fraud;

Fraud; the Defendant rejoined and traverſed the *Fraud*, but did not anſwer the *Death of the Inteſtate*; and upon a Demurrer to the Rejoinder it was inſiſted for the Plaintiff, that he being a *Stranger* to this Judgment might well avoid it by a Plea, as he had done in this Caſe, and that he had no other Way to avoid it, becauſe being a Stranger to it, he could neither bring a Writ of Error or Writ of Deceit; and of that Opinion was the Court. 2 *Mod.* 308. *Randall's* Caſe.

10. *Indebitatus Aſſumpſit* againſt an *Executor* who pleaded *ſeveral Judgments, &c.* and that he had not Aſſets *ultra*; the Plaintiff replied *particularly to each Judgment*, and averred, that they were kept on Foot by *Fraud*; the Defendant, in his Rejoinder, put all the Judgments together, (*viz.*) that * *ſeparalia judicia prædict'* were not kept on Foot by Fraud; and upon a Demurrer to this Rejoinder, the Queſtion was, whether the Rejoinder ſhould be as particular as the Replication: *Sed per Curiam, ſeparalia judicia prædicta* ſhall refer to each Judgment *reddendo ſingula ſingulis.* 4 *Mod.* 63. *Beak* verſus *Kent.* *Antea* 3.

11. *Debt upon Bond* againſt an *Executor*, who pleaded *ſix ſeveral Judgments*, each for 100 *l.* and that he had not Aſſets *ultra* 10 *l.* The Plaintiff replied ſeverally as to *five of the Judgments*, that they were kept on Foot by *Fraud*, and prayed Judgment for Debt and Damages in every Plea; and as to the *Sixth*, he replied, that the Defendant had Aſſets *ultra* 10 *l.* and concluded to the Country; and upon Demurrer to this Replication it was adjudged, that the Plaintiff might reply to each Judgment ſeverally, but that this Replication is ill, becauſe, where a Defendant pleads *ſix Judgments*, he confeſſes Aſſets for above *Five*; and if the Plaintiff in his Replication tenders an Iſſue, that the Defendant had Aſſets *ultra* a certain Sum, 'tis ill, becauſe by his Pleading ſix Judgments, he had confeſſed that before. 1 *Salk.* 298. *Aſton* verſus *Sherman.*

12. Action againſt an *Adminiſtrator*, who pending that Suit, let Judgment be had againſt him by another, and did not plead that Judgment in Bar to the firſt Action, but ſold Part of the Goods of the Inteſtate to ſatisfy that Judgment; however, the Plaintiff in the firſt Action proceeded, and he likewiſe got Judgment and brought a *Fi. fa.* to take the Goods in Execution, and the Sheriff levied Part, and as to the reſt he returned a *Devaſtavit*, and an Action was brought againſt him for a falſe Reeurn; it was inſiſted for the Plaintiff, that ſuffering Judgment to go by Default *pending* the Action, was no Confeſſion of Aſſets, and that the Sheriff ought to have returned a *Devaſtavit*, but *nulla Bona*, and ſo there ſhould be a *Scire fieri* Inquiry; but adjudged, that he may return a *Devaſtavit*, that the *Scire fieri Inquiry* is only for his Safety, that if an Executor ſuffers Judgment to *go by Default, or confeſſes it*, he admits Aſſets; 'tis true, he might have pleaded, that Judgment and *Riens ultra*; but not Pleading it when he might, is an Admiſſion of Aſſets, as to the ſecond Judgment, and he is eſtopped to ſay the contrary upon a *Devaſtavit* returned. 1 *Salk.* 310. *Rock* verſus *Leighton.* Dyer 57. Sid. 70.

13. *Debt upon Bond* againſt an *Executor*, who pleaded ſeveral Judgments, and *nihil ultra* 5 *s.* the Plaintiff replied as to one Judgment, there was but ſo much due, which the Creditor was willing to accept in full, and that the Defendant kept it on Foot by Fraud, and replied the ſame Thing as to another Judgment, and demurred to the reſt; the Defendant rejoined as to one Judgment, that it was not kept on Foot by Fraud, and as to the other no Aſſets *ultra, &c.* and ſo to the Third, and as to the reſt he joined in Demurrer; adjudged, that where an Executor pleads a *Judgment with a Penalty*, he ought to ſhew how much is really due; that where he pleads ſeveral Judgments, and one of them is found fraudulent or ill pleaded, the Plaintiff ſhall have Judgment; that if he plead ſeveral Judgments, 'tis a Confeſſion of Aſſets as to all, and the *nihil ultra* is only Form and not *traverſable*; that if it appear the Creditor was willing to take leſs than the Judgment, this is Evidence of a *Fraud*, but then, if 'tis ſhewed that the Adminiſtrator had not Aſſets to pay that Sum, 'tis no Fraud; that where an *Adminiſtrator pleads one or more Judgments*, and the Plaintiff confeſſes the Plea and prays Judgment when Aſſets ſhould happen, *&c.* if Aſſets ſhould come afterwards to his Hands he may ſatisfy the Judgments pleaded, becauſe the Judgment, *when Aſſets ſhall happen*, is to be diſcharged after the other Judgments; that the Concluſion of the Replication with *hoc paratus eſt verificare* as to every Judgment, is well enough, but a general Concluſion to all had been better. 1 *Salk.* 311. *Parker* verſus *Atfield.* 2 Saund. 338.

14. *W. R.* brought an Action againſt the Defendant as Executor, and had *Judgment by Default*, and a Writ of Enquiry, and then *W. R.* died Inteſtate, and the Writ of Enquiry being abated by his Death, the Plaintiff got Adminiſtration, and brought a *Scire facias* againſt the Defendant to ſhew Cauſe *why Damages ſhall not be aſſeſſed* and recovered againſt him, who pleaded, that the Plaintiff ought not to recover, becauſe the Defendant's Teſtator was indebted to *L. R.* in 100 *l.* upon Bond, who obtained Judgment againſt the ſaid Teſtator, and that this Defendant had not Aſſets *ultra* to ſatisfy that Judgment; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe the * Statute which gives the *Scire facias* never intended that a Defendant Executor ſhould make any other Defence than what his Teſtator might have done; and if a *Scire facias* had been brought againſt his Teſtator, he could have pleaded nothing but a *Releaſe* or ſome other Matter in Bar; he is by the Words of the Statute to ſhew Cauſe *why Damages ſhall not be had and recovered againſt him*; and if he appears at the Return of the *Sci. fa.* and doth not ſhew any Matter to Arreſt the *final Judgment*, a Writ of Enquiry ſhall be awarded, therefore the Defendant, who is an Executor, ſhall never plead a Judgment in Bar to a *Scire facias* brought againſt him upon an *interlocutory Judgment.* 1 *Salk.* 315. *Smith* verſus *Harman.* See *Burnet* and *Holden's* Caſe. Mod. Caſes 142. * 8 & 9 Will. 3. cap. 11. *That if either Plaintiff or Defendant die after an Interlocutory, and his Executor or Adminiſtrator, to ſhew Cauſe why Damages in ſuch Caſe ſhall not be recovered, &c. and if he appear and ſhall not ſhew ſufficient Matter to Arreſt the final Judgment, then a Writ of Enquiry ſhall be awarded, &c.* before *final Judgment, his Executor or Adminiſtrator ſhall have a* Sci. fa. *againſt the Defendant, if living, or againſt*

Mod Caſes 125. 1 Saund. 216. *There the Action was brought by the Party to the Judgment.* Sid. 102.

15. *Judgment* was had againſt *W. R.* as *Executor*, and now, after the Death of the Judgment Creditor, his Executor brought an Action of Debt againſt the ſaid *W. R.* ſuggeſting a *Devaſtavit* in the Life-time of his Teſtator, and the Plaintiff had Judgment in the *C. B.* upon Default; and on a Writ of Error brought in *B. R.* it was objected, that the Plaintiff in this Action of Debt was not Privy to the Judgment obtained by his Teſtator againſt the Executor, and therefore he ought firſt to have brought a *Sci. fa.* and then have ſuggeſted a * *Devaſtavit*, according to *Wheatly* and *Lane*'s Caſe; but adjudged, that the Executor of him to whom the Wrong was done may bring an Action of Debt, but not againſt the Executor of him who did the Wrong; but here the Defendant, tho' he was Executor, yet Judgment was had againſt him, by which Aſſets are admitted; now, the Wrong being done to the Property of the Plaintiff's Teſtator, by Conſequence an Intereſt is veſted in the Plaintiff as his Executor, and he is within the Equity of the Statute *de Bonis aſportatis, &c.* 1 *Salk.* 314. *Berwick* verſus *Andrews.*

* Antea 2, 3. 2 And. 159. Vaugh. 94. 1 Mod. 157.

16. *Per Curiam*, a Judgment upon * *ſimple Contract*, may be pleaded in Bar to an Action of Debt on a Bond, and that 'tis no *Devaſtavit* in an Executor to pay ſuch a Debt where he had no Notice of the Bond. 3 *Mod.* 115. *Harman* verſus *Harman.*

(W)

Pleading other Judgments, not good. See Antea (T) 4.

1. DEbt againſt an *Adminiſtrator*, who pleaded, that a Judgment was obtained againſt him in *London*, in an Action of Debt due and owing by his *Inteſtate*; and that he had not Aſſets *præterquam, to ſatisfy that Juddgment*; the Plaintiff in his Replication confeſſed, that ſuch Judgment was had againſt the Defendant, but that before the Plaintiff brought this Action, the Judgment Creditor *had acknowledged Satisfaction on Record*; and upon Demurrer to this Replication it was adjudged againſt the Defendant, becauſe *Satisfaction being acknowledged* on that Judgment, he cannot plead that he had not Aſſets *præterquam* to ſatisfy it, when that was done already. *Mich.* 41 *Eliz. Cro. Eliz.* 726. *Hampton* verſus *Bartholmew.*

2. *Debt againſt an Executor*, who pleaded *three Judgments* had againſt his Teſtator for ſo much Money *prout patet per Recordum*, and that he had not Aſſets *ultra*, to ſatisfy thoſe Judgments; and upon Demurrer this was adjudged an ill Plea, for he ought to have pleaded * *prout patet per ſeparalia Recorda*; beſides, he ought to have ſet forth, that the Judgments were obtained * *pro veris & juſtis Debitis*, and to have ſhewed how much he had in his Hands to ſatisfy the ſame. 2 *Cro.* 625. *Samms* verſus *Mercer.*

* Antea (V) 3, 11.

* Antea (T) 2.

3. *Debt againſt an Adminiſtrator*, who pleaded ſeveral Judgments had againſt him amounting to 514 *l.* and that he had not Goods of the Inteſtate to adminiſter *præterquam Bona & Catalla quæ non attingunt ad valenciam præd'* 514 *l. verſus ipſum in forma præd' recuperat'*; the Plaintiff replied, that one of the Judgments was obtained by *Covin*, and that the other Judgment Creditor had accepted a Compoſition of Part for the whole Debt, and the Defendant delayed to take a *Releaſe* from him; and upon a Demurrer to this Replication the Plea was adjudged ill, for theſe Reaſons, firſt, for that it was *incertain*, becauſe every leſs Sum than 514 *l. non attingit* to pay that Sum; beſides, nothing ſhall be accompted to be adminiſtred but what was really paid purſuant to the Compoſition; and that the Converſion of any Part of the Inteſtate's Eſtate to the Uſe of the Defendant, and his neglecting to take a Releaſe of the Judgment is plainly againſt the Duty of an Adminiſtrator. 8 *Rep.* 132. *Turner*'s Caſe. *Jones* 91. *Veal* verſus *Gatesden. S. P.*

4. *Debt againſt an Adminiſtrator*, who pleaded *two Recognizances* acknowledged by the *Inteſtate*, which were not ſatisfied, and that he had not Goods, *&c. præterquam Bona & Catalla, which did not amount* to what was due on the ſaid Recognizances; and upon a Demurrer to this Plea it was adjudged againſt the Defendant, for he ought to have pleaded, that he had not Goods *præterquam Bona, to ſatisfy* the ſaid Recognizances, or no Goods beyond ſuch Value, which did not amount to the Sums due on the ſame. 2 *Brownl.* 118, 153. *Charnock* verſus *Coney.*

5. *Debt againſt an Executor* for 100 *l.* who pleaded, that *T. S.* had obtained a *Judgment* againſt him for 10 *l. due for Rent, ultra quod* he had not Aſſets; and upon a *ſpecial Demurrer* this was adjudged no good Plea, for he ought to have pleaded, that he had not Aſſets *but to ſo much, and ſo to ſhew the certain Sum* to ſatisfy the Debt of 19 *l. ultra quod* he had not Aſſets; 'tis true, this is only Matter of Form, and therefore the Plea had been good, if the Plaintiff had only demurred generally; but upon a Special Demurrer 'tis otherwiſe. *Sid.* 210. *Davage* verſus *Davage.* 1 *Lev.* 132. *S. C.* by the Name of *Davies* verſus *Davies.*

6. *Debt againſt an Executor*, who pleaded ſeveral *Judgments*, which ſeverally did amount in the whole to ſuch a Sum, and that *plene adminiſtravit*, and had not any Goods of his Teſtator to be adminiſtred *tempore mortis ſuæ, nec habuit die, impetrationis Brevis originalis præd', nec unquam poſtea, præterquam Bona & Catalla ad Valenciam* of the ſeveral Judgments, *& quæ non ſunt ſufficientia* to ſatisfy the ſame; and upon Demurrer to this Plea it was adjudged not good, for 'tis a Contradiction to ſay, that he had not Goods but to the *Value* of the Judgments, and then to ſay, that they were not *enough* to diſcharge them; beſides, the Plea is *incertain*, for he ought to have pleaded, that he had no Goods of his Teſtator to adminiſter, *præterquam* Goods *ad valenciam* of the ſeveral Judgments, and aver, that they are not ſatisfied, and ſo confeſs that he had enough

to ſatisfy them, or if he had not enough, then he ſhould plead *præterquam bona & catalla ad valentiam of a certain Sum, & non ultra, quæ eiſdem debitis obligat' onerabilia exiſtunt*; but the Lord *Chief Juſtice Vaughan* tells us, the better Way is to plead *præterquam bona & catalla ſufficientia* to ſatisfy the Judgments (if the Defendant hath enough) and aver, that they are not ſatisfied, and that the Goods are chargeable with the ſaid Judgments; and then the Plaintiff may reply, that the Defendant had Aſſets *ultra* to ſatisfy, *&c. 9 Rep. Meriel. Treſham's* Caſe. *Vaugh.* 103. *S. P.*

7. *Debt againſt an Adminiſtrator*, who pleaded a *Recogniſance* acknowledged by his *Inteſtate*, and not ſaisfied; as alſo a *Judgment* in Debt for 5000 *l.* on a Note payable upon Demand, *with Intereſt*, and that the Money being not paid on ſuch a Day, *the Intereſt amounted to* 700 *l.* and ſo there was a Judgment againſt him for the Principal and *Intereſt*, for ſuch a certain Sum, and that he had not Aſſets *ultra* 40 *l.* chargeable to this Recogniſance and Judgment; and upon Demurrer to this Plea, it was adjudged againſt the Defendant, for his Pleading the Judgment obtained againſt him for *Intereſt on the Note*, is not good, becauſe 'tis a *Devaſtavit* in him to ſuffer ſo much *Intereſt* to incur; beſides, he ought to have pleaded, that there was not *Aſſets* to ſatisfy the Principal Sum before any *Intereſt* became due. 2 *Lev.* 39. *Seaman* verſus *Dee.*

(X)

Of Replications to Pleas of Judgments, good and not good.

1. AS to ſuch *Replications* in general, 'tis neceſſary to know, that where an *Executor or Adminiſtrator pleads a Judgment*, the Plaintiff muſt ſhew in his *Replication*, that ſome Aſſets remain in the Hands of the Defendant after the Judgment is ſatisfied; for until that appears, it cannot be ſaid that the Defendant hath done any Injury to the Plaintiff; as for Inſtance, Debt was brought againſt an Executor, who pleaded a Judgment obtained againſt him for 200 *l.* and that Execution was taken out, and that there was another Judgment had againſt him *for* 100 *l. abſque hoc* that he had Aſſets to ſatisfy the Judgment of 200 *l.* this is a good Plea, and the Plaintiff muſt reply, that he had Aſſets in his Hands, *ultra* the 200 *l.* and *ultra* the 100 *l.* for before thoſe are ſatisfied, the Plaintiff hath no Injury by the Defendant, and cannot be entitled to make any Demand on him. *Vaugh.* 104.

2. *Debt againſt an Executor*, who pleaded ſeveral Judgments not ſatisfied, *&c.* The Plaintiff replied diſtinctly to *each* of the Judgments, that they were *obtained by Fraud*; and this is a better Way of pleading than to ſay * *ſeparalia judicia* were *obtained by Fraud*; for if one is found to be a true Debt, the Plaintiff muſt have Judgment. 1 *Mod.* 33. See 2 *Saund.* 48, 49.

* Antea (T) 1, 2. (V) 3, 11. (W) 2.

3. *Aſſumpſit* againſt an *Executor* upon a Promiſe of his Teſtator; the Defendant pleaded a *Recogniſance* entered into by the Teſtator, and *ſeveral Judgments*, all which he had paid, and that he had not any of his Goods *præterquam Bona & Catalla ad valenciam* of the ſeveral Sums paid by him in Satisfaction of thoſe Judgments, *& præterquam Bona & Catalla ad Valentiam* 5 *l. quæ onerata exiſtunt*, and are not ſufficient to diſcharge the *Recogniſance*; the Plaintiff in his Replication *proteſtando* that the Judgment was obtained by Fraud, *pro placito dicit*, that the Defendant did not pay the Money to ſatisfy one of the Judgments, nor the Money to ſatisfy another of the Judgments, and ſo in like Manner to the Reſt of the Judgments, and concluded this Part of his Replication to the Countrey; and as to the *Recogniſance*, he pleaded, that it was ſatisfied and kept on Foot by *Fraud*; and upon Demurrer to this Replication, it was objected, that it was putting too many Things in Iſſue when one Thing would have ſerved; but adjudged, that the Replication was good, for the Plaintiff is at Liberty to deny all, or any of the Judgments; and 'tis his beſt Courſe to deny the Payment of the Money upon every Judgment, becauſe he might be miſtaken if he had denied it in one. 1 *Lev.* 281. *Jefferies* verſus *Dee.*

4. *Debt upon Bond* againſt an Executor, who pleaded *ſeveral Judgments* in Bar to the Action, *ultra quod* he had not Aſſets: The Plaintiff replied, that *placitum* (of the Defendant) *eſt minus ſufficien', &c.* for that Satisfaction on Record was acknowledged on one of the Judgments, and that all the other were kept on foot by Fraud, * *& hoc parat' eſt verificare*, but did not ſay *per Recordum*; and upon Demurrer to this Replication, it was adjudged for the Plaintiff, becauſe *hoc parat' eſt verificare* ſhall be taken reſpectively to the ſeveral Judgments, and the Word *Placitum*, takes them all in, for all the Judgments make but one Plea in Bar. *Sid.* 429. *Hancock* verſus *Prowt.*

* *See* Waites *v.* Biggs. S. P. Sci. fa. (C) S. P.

5. *Debt on Bond* againſt an *Executor*, who pleaded a *Judgment* obtained againſt him upon another Bond of the Teſtator, but did not ſay *prout patet per Recordum*, as he ought; then he pleaded ſeveral other Judgments had againſt him, *&c.* and that *Plene Adminiſtravit* all the Goods and Chattels of the Teſtator *præterquam* 10 *s.* which was charged with the ſaid Judgments, and not ſufficient to diſcharge them; the Plaintiff in his Replication *protſtando*, that the Judgments were obtained by Fraud *pro placito dicit*, that at the Time when he brought this Writ there was no more than 10 *l.* due on all the Judgments, and that at that Time the Defendant had ſufficient Aſſets to diſcharge them all, and likewiſe the Debt due to the Plaintiff, but that he ſuffered the Judgments to remain in Force by Fraud; and upon a Demurrer to this Replication it was held good, as to the Method of pleading Aſſets to ſatisfy all the Debts; but becauſe he did not alledge *any Place* where the Defendant had Aſſets, it was for that Reaſon adjudged againſt the

* 3 Lev. 393. Plaintiff; and tho' the Plea was ill, becauſe the Defendant did not conclude * *prout patet per Recordum*, yet, becauſe the Plaintiff had taken no Advantage of it in the Replication, but had ſet forth other Matter to be tried (*viz.*) Aſſets at the Time of the Writ brought, that Fault is now helped. 3 *Lev.* 311. *Knighton* verſus *Moreton*, and 368. See *poſtea pl.* 9. See *Executor* (I) 6. *S. P.*

6. *Debt againſt an Executor* upon a *Bond* of his Teſtator; the Defendant pleaded *two Judgments* had againſt the Teſtator, and ſet them forth particularly, and that he had not Aſſets *ultra* 40 *s.* to diſcharge thoſe Judgments; the Plaintiff replied, that ſo much was paid in Satisfaction of one Judgment, and ſo much to diſcharge the other, and that *they were ſtill kept on foot by Fraud*; and upon Demurrer to this Replication it was inſiſted for the Defendant, that it was *complicated*, and no Iſſue could de taken upon it, for the Plaintiff had put both the Judgments together by alledging, *they were kept on foot by Fraud*; but notwithſtanding this Objection the Plaintiff had Judgment. 2 *Mod.* 36. *Maſon* verſus *Stratton.*

7. Debt againſt an Executor, who pleaded ſeveral Judgments, and that he had not Aſſets *ultra*, *&c.* The Plaintiff replied, that *the Judgments were kept on foot by Fraud*; the Defendant rejoined, that he did not keep them on foot by Fraud: and upon a Demurrer to this Rejoinder, it was adjudged againſt the Defendant, becauſe he did not ſet forth, that he did not keep them, *or any of them* on foot by Fraud. *Carter* 221. *Warcupp* verſus *Simonds.* 1 *Lutw.* 241. *contra.*

8. Tho' in another Caſe, which was an *Aſſumpſit* for Wares ſold and delivered; the Defendant pleaded Infancy; the Plaintiff replied, that the Goods, *&c.* were for Neceſſaries, the Defendant rejoined, *that the Goods delivered* were not for Neceſſaries; and upon a Demurrer to this Rejoinder, it was objected, that the Defendant ought to have alledged that the Goods, *or any Part thereof*, were not for Neceſſaries; but it was adjudged for the Defendant, becauſe, if any of the Goods were for Neceſſaries, the Plaintiff ought to have ſhewed it in his Replication. 1 *Lutw.* 241.

9. *Debt againſt an Adminiſtrator* upon a *Bill Penal* of the Inteſtate, *&c.* the Defendant pleaded in Bar ſeveral Judgments obtained againſt him as Adminiſtrator, upon Bonds of the Inteſtate, amounting to 115 *l.* and that he had fully adminiſtred *præterquam* 10 *l.* which was not ſufficient to diſcharge the ſaid Judgments: The Plaintiff replied, and confeſſed the Bonds, but that at the Time of the Judgments obtained there was but 48 *l.* 10 *s.* due on the ſaid Bonds, and ſhews to whom, and that it was more than was really due for all the Debts and Damages on the ſaid Judgments: and *that it would be accepted in full Diſcharge thereof*, and that the Defendant had Aſſets *ultra* the ſaid 48 *l.* 10 *s.* to ſatisfy the Plaintiff's Debts; and upon Demurrer to this Replication, it was held ill, becauſe nothing was put in Iſſue, for the Allegation, that 48 *l.* 10 *s.* *would be accepted in full Diſcharge of the Judgments*, is Matter which might be given in Evidence to prove the Fraud; he ſhould have ſaid, that the Creditors would have *accepted* leſs than the Debts due to them, and that the Defendant would not pay it, but kept the Judgments on foot by Fraud. 1 *Lutw.* 445. *Bell* verſus *Bolton.* See *antea placito* 5. *Hardr.* 75. *S. P.*

(Y)

Where Judgment ſhall be againſt an Adminiſtrator or Executor De bonis propriis alone.

1. AN Executor or Adminiſtrator ſhall never be charged *de bonis propriis*, but where he doth ſome Wrong; as by *ſelling* the Teſtator's Goods, and converting the Money to his own Uſe, or by *waſting* them, or by pleading what is Falſe; as for Inſtance, Debt againſt two Executors, one of them confeſſed the Action, and the Judgment againſt him was, that the Plaintiff ſhould recover *de Bonis* of the Teſtator *in both their Hands*; and upon a *Fieri facias againſt both*, the Sheriff returned, that at the Time of the Writ brought they had *nulla Bona*, but that *one of them* had Goods of the Teſtator to the Value of the Debt, but had *waſted* them *ante receptionem Brevis*, *&c.* And upon this the Plaintiff brought a *Scire facias* againſt him alone, to ſhew Cauſe why he ſhould not have Execution upon that Judgment, and he had Judgment accordingly. *Dyer* 210. See *Merchant* verſus *Driver.* *Poſtea* 12.

2. *Debt* againſt an *Executor of an Executor* upon a *Bond* of the firſt Teſtator; the Defendant pleaded, that the Teſtator was indebted to him in 100 *l.* and that Goods of that Value came to his Hands, which he *retained*, *&c. ultra quod* he had not *Aſſets*; the Plaintiff replied, and averred, that he had *Aſſets*, upon which they were at Iſſue, and it was found for him; adjudged, that he ſhall recover *de Bonis* of the firſt Teſtator in the Hands of the Executor, and Damages *de Bonis propriis*; and if afterwards the Sheriff ſhould return *nulla Bona* of the firſt Teſtator; upon a *Fieri facias* to levy the Debt, he muſt likewiſe return a *Devaſtavit* in the Executor, becauſe the Verdict found that he had Aſſets; and the Sheriff made ſuch a Return, and thereupon the Plaintiff had Execution againſt him *de Bonis propriis*. *Trin.* 2 *Eliz.* *Dyer* 185. *Sir John Chicheſter's* Caſe. Aſſets. (C) 4. *S. C.*

Owen 132. 3. The Plaintiff recovered a *Judgment againſt the Executor* for 60 *l.* *de Bonis Teſtatoris*, and 6 *l.* for Damages *& ſi non*, *&c.* *de Bonis propriis*; and upon a *Fieri facias* iſſued againſt him, the Sheriff returned *nulla Bona*; afterwards, upon a Suggeſtion, that the Executor had *waſted*

the Goods, a ſpecial *Fieri facias* was directed to the Sheriff, who upon an Inquiſition taken made a Return, *That the Goods of the Teſtator*, after his Death, came to the Hands of the Executor, and that he *converted them to his own Uſe*; thereupon the Plaintiff brought a *Scire facias* againſt him, to ſhew Cauſe why he ſhould not have Execution *de Bonis propriis:* The Defendant pleaded to this *Scire facias*, that *quoad* the 6 *l.* for Damages the Plaintiff ought to have Execution, but *quoad* the 60 *l. plene Adminiſtravit*; and upon Demurrer this was adjudged a good Plea, for the Defendant ſhall not be concluded by the *Inquiſition and Return* of the Sheriff, becauſe 'tis not directly in Purſuance of the Writ, but of a collateral Matter, and the Return is no more than the Opinion of thoſe who were upon the Inqueſt. *Cro. Eliz.* 859. *Gibſon* verſus *Brook.*

4. In *Petifer's* Caſe, the like Judgment was given againſt an Executor, and upon a *Fieri facias* directed to the Sheriff to levy the Debt, he returned *nulla Bona*, and upon a Suggeſtion on the Roll, that the Defendant had waſted the Goods, the Plaintiff did bring a ſpecial *Fieri facias* to levy the Debt *de Bonis Teſtatoris*, as he ought to have done, and that *ſi ſibi conſtare poterit*, that the Executor had waſted, *&c.* then *de Bonis propriis*; but inſtead of that, a Writ was directed to the Sheriff, and he having taken an Inquiſition by a Jury, returned, that the Executor had *waſted* the Goods, and then a *Scire facias* was brought againſt him to ſhew Cauſe why Execution ſhould not be had upon the Judgment, to which he did not plead as he might have done, but upon the Sheriff's returning *nihil*, the Plaintiff had Judgment; but upon a Writ of Error brought, it was reverſed, becauſe upon *Nulla Bona* returned, the Plaintiff ſhou d have brought a ſpecial *Fieri facias*, as aforeſaid; and the Reaſon is, becauſe upon ſuch a *Fieri facias*, if the Sheriff make a Falſe Return, that the Sheriff had waſted the Goods, when in Truth he had not, an Action on the Caſe lies againſt him; but if he makes a Falſe Return upon ſuch an Inquiſition, the Defendant hath no Remedy. 5 *Rep.* 32. *Pettifer's* Caſe. Execution. (D) 7. *S. C.*

5. The Inteſtate was indebted for Goods, and after his Death the Adminiſtratrix *promiſed*, that if the Plaintiff would deliver to her more Goods, ſhe would pay for all, and in an Action brought againſt her for the Whole, upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict: It was objected for the Defendant in Arreſt of Judgment, that *entire Damages* could not be given in this Caſe, becauſe the Judgment for the Inteſtate's Debt ought to be *de Bonis inteſtati*, and for her own Debt, *de Bonis propriis*; but adjudged, that this Action being founded on her own Promiſe, ſhe hath made her ſelf chargeable by her own Act, and therefore the Judgment ſhall be *de Bonis propriis* only. *Cro. Eliz.* 91. *Howell* verſus *Trevannian.* Action on the Caſe. (M) 5. *S.C. Wheeler* verſus *Collier. Cro. Eliz.* 406. *S. P. Moor* 419. *S. C.* 1 Leon. 93.

6. *Debt againſt Husband and Wife* as Executrix, of her former Husband, and after Judgment for the Plaintiff, he brought a *Fieri facias* directed to the Sheriff to levy the Debt, who returned *Nulla bona Teſtatoris*, and for the Coſts *Nulla Bona*; afterwards the Plaintiff upon a *Teſtatum*, that the Goods of the Teſtator were eſloined by the Defendant, he (the Plaintiff) brought a ſpecial *Fieri facias*, reciting the Judgment, and the former *Fieri facias*, and the Return thereof, and that *Teſtatum exiſtit*, that the Defendant had Goods ſufficient, and had eſloined and converted and ſold them; therefore the Sheriff was commanded, that by Inquiſition *vel alio modo* he ſhould enquire, if the Defendant had eſloined and ſold the Goods, and if it was found that he had, then *Scire faciat* the Defendants to be in Court in *Octab' Michaelis*, to anſwer the *Waſte* done by them, and to ſhew Cauſe why Execution ſhould not be awarded *de Bonis propriis*; the Sheriff returned the Inquiſition, finding, that the Defendants had ſold the Teſtator's Goods, and that *Scire feci* the ſaid Defendants to appear, *&c.* whereupon they appeared and demurred to the Writ, and Judgment was given upon that Demurrer, that they ſhould anſwer over; then they imparled, and Judgment was afterwards given againſt them by Default, and that the Plaintiff ſhould have Execution *de Bonis propriis*, which Judgment was affirmed upon a Writ of Error. Now this Caſe differs from *Pettifer's*, for there Judgment was given againſt the Defendant upon the Sheriff's Return of *Nihil* upon the *Scire facias*, but here it was upon his Return of *Scire feci. Cro. Car.* 518. *Mounſon* verſus *Bourne. Style* 372. *S. P.* W Jones 417.

7. Debt againſt Husband and Wife, as Adminiſtratrix of her firſt Husband, in which the Plaintiff had *Judgment*; and upon a *Fieri facias* to the Sheriff to levy the Debt, he returned *Nulla bona inteſtati*; and upon a Suggeſtion, that they had waſted the Goods, there was another *Teſtatum fieri facias* againſt them, with this Clauſe, *ſi ſibi conſtare poterit per inquiſitionem, &c.* that they had waſted the Goods, then *Scire fecerit, &c.* the Defendants to ſhew Cauſe why Execution ſhould not be *de Bonis propriis*, as the beſt and uſual Courſe is; the Sheriff returned, that *the Jury found* the Wife had to the Value of 100 *l.* of the Goods of the Inteſtate which ſhe had waſted before ſhe married the other Defendant, her ſecond Husband, and that he had not waſted any, yet Execution was awarded *de Bonis propriis* of the Husband and Wife, becauſe he is ſubject to the Waſte ſhe had done. *Cro. Ca.* 603. *Knight* verſus *Hilton. Poſtea Devaſtavit* (D) 4. *S. C. Poſtea* Baron & Feme. (H) 9. *S. C.*

8. Where an Executor brings a *Writ of Error* to reverſe a Judgment, and afterwards the Judgment is *affirmed*, he ſhall be chargeable *de Bonis propriis. Litt. Rep.* 53.

9. *Judgment* againſt the *Inteſtate*, and upon a *Scire facias* againſt his *Adminiſtrator*, to ſhew Cauſe why the Plaintiff ſhould not have Execution; the Sheriff upon an Inquiſition returned, that the Defendant had Goods of the Inteſtate, *&c.* but that he kept them ſo privately, that he could not find them to levy the Debt, *&c.* Adjudged, that in ſuch Caſe an Action will lie againſt 2 Roll. Rep. 295.

gainſt the Adminiſtrator, and that he ſhall be chargeable *de Bonis propriis*. *Godb.* 285. *Yates* verſus *Alexander*.

10. So where an Executor pleads *Plene Adminiſtravit*, and 'tis found againſt him, the Judgment ſhall be *de Bonis propriis*, becauſe 'tis a Falſe Plea, and that upon his own Knowledge. 2 *Cro.* 191. *John* verſus *Adams*. Executor. (H) 4. *S. C.*

Poſtea Executor (H) 7.

11. Debt on a Bond of the Teſtator, conditioned to deliver a Load of Hay to the Plaintiff every *Michaelmas-day* during his Life; the Defendant pleaded, that he and his Teſtator had performed the Condition, upon which they were at Iſſue, and the Plaintiff had a Verdict: It was the Opinion of *Dyer*, that the Plaintiff ſhould have Judgment againſt the Executor *de Bonis propriis*, as if he had pleaded a Releaſe of the Debt or Duty, which had been falſe. *Moor* 69.

1 Saund. 306. 1 Vent. 20. S. C.

12. *Scire facias* againſt an Adminiſtrator, to ſhew Cauſe why the Plaintiff ſhould not have Execution *de Bonis propriis*, upon a Judgment had againſt his Inteſtate; the Sheriff upon an Inquiſition returned, that he had Goods of the ſaid Inteſtate in his Hands to the Value of the Debt and Damages, for which the Plaintiff had obtained a Judgment, and that he had ſold and eſloined the Goods, and *ad uſum ſuum convertit*; upon this they were at Iſſue, and the Plaintiff had a Verdict; afterwards it was moved in Arreſt of Judgment, that the Plaintiff could not have Execution againſt the Defendant *de Bonis propriis*, becauſe there was no *Waſte* found, and in Truth it was not in Iſſue; for that was, *that he had converted the Goods of the Inteſtate to his own Uſe*, which may be true, and yet the Defendant Not guilty of a *Devaſtavit*, becauſe he might have paid a Debt of the Inteſtate to the Value of the Goods, and if ſo, he might lawfully convert them to his own Uſe; but the Plaintiff had Judgment againſt the Defendant *de Bonis propriis*; for if he had paid to the Value of the Goods, then the Property is altered and veſted in him, and he cannot convert his own Goods. *Sid.* 412. *Merchant* verſus *Driver*.

1 Vent. 221. S. C.

13. But in a parallel Caſe my Lord *Hale* gave another and better Reaſon, (*viz.*) That tho' the Defendant had not waſted the Goods, but ſtill he had them *in Specie*; yet, if he kept them in ſuch a clandeſtine Manner, that the Sheriff could not find them to levy the Debt, 'tis very reaſonable, that he ſhould be anſwerable *de bonis propriis*. 2 *Saund.* 402. *Blackmore* verſus *Mercer*. *S. C.*

T. Jones 88.

14. The Inteſtate entred into a *Recogniſance* of 800 *l.* and died; an *Executor de ſon tort* poſſeſſed himſelf of all his Goods, and afterwards a Rightful Adminiſtrator brought an Action on the Caſe againſt him, pending which Action they came to an *Agreement by Articles*, that the Rightful Adminiſtrator ſhould diſcharge the *Executor de ſon tort*, and that he ſhould pay the other 650 *l.* which he *covenanted* to pay accordingly, but had not done it; afterwards the Cogniſee brought a *Scire facias* againſt the Rightful Adminiſtrator, ſuggeſting, that *he had waſted the Goods, and had ſold them, or converted to his own Uſe*, upon which they were at Iſſue, and all this Matter was found Specially; and upon arguing the ſpecial Verdict, it was inſiſted for the Adminiſtrator, that he was ſo far from waſting the Eſtate, that he had taken the moſt effectual Means to ſecure it; for the *Covenant* which he had taken from the *Executor de ſon tort*, to pay 650 *l.* made the Value of it certain, which before was incertain, and reſted only in Damages to be recovered againſt him by that Action, which was brought by the Adminiſtrator, and the Money being not yet paid to him, the Property of the Goods for which it was to be paid is altered; but adjudged, that it was altered by *this Agreement*, for as much as it extinguiſhed the Original Cauſe of Action; for the Adminiſtrator having accepted a *Covenant* to pay the Money to him, that ſhall operate as a *Sale*, and 'tis Aſſets in his Hands immediately, tho' it was not to be paid till the Day to come, and therefore he ſhall be chargeable *de Bonis propriis*. 2 *Lev.* 189. *Norden* verſus *Levett*.

15. Where the Plaintiff declared, that the Inteſtate was indebted to him, and that the Adminiſtrator in Conſideration that, *at his Requeſt*, the Plaintiff would Accompt with him, promiſed to pay what ſhould appear to be due; and that he did Accompt with him, and that he was found in Arrear ſo much, *&c.* which he had not paid: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment to recover *de bonis propriis*, which was held good, for here was an *expreſs Requeſt* made to the Plaintiff to Accompt with the Adminiſtrator, which, without ſuch Requeſt, he was not obliged to do; and there was an expreſs Promiſe to pay what ſhould be found in Arrear, which is as much as a Promiſe to pay in Conſideration of Forbearance, and ſuch a Promiſe is ſufficient to charge an Executor *de bonis propriis*. 2 *Lev.* 122. *Hawes* verſus *Smith*.

16. *In Covenant*, the Plaintiff declared againſt *Chriſtopher Guiſe*, *Baronet*, for that he (the Plaintiff) granted a Leaſe to one *Geo. Harvey* of the Rectory of *Berkley* for ſixty Years, after the Determination of a Leaſe then in Being, which Leaſe expired, and that *Harvey* covenanted for himſelf, and his Aſſignes, to *Repair*, *whoſe Eſtate* one *William Guiſe* had, by Aſſignment, *&c.* who made the Defendant Executor, and died, and that the *Chancell* was out of Repair in the Time of the Teſtator, and ſince, and alſo one great Barn, *&c.* The Defendant, as to not repairing the *Chancell*, pleaded, that the Plaintiff did not leaſe it to *Harvey*, and thereupon they were at Iſſue; and as to the Barn he demurred, and the Plaintiff had a Verdict upon the Iſſue, and 300 *l.* Damages, and alſo 200 *l.* Damages for nor repairing the Barn, if Judgment ſhould be againſt the Defendant upon a Demurrer; and upon arguing the Demurrer, it was inſiſted for the Defendant, that the Plaintiff was miſtaken in the Action, for it was brought againſt the Defendant in his own Right, when upon the Plaintiff's own ſhewing, it ought to be brought againſt him as Executor, and as ſuch, and not otherwiſe, he ought to be diſcharged, for he is not liable to this Covenant, but in Reſpect of Aſſets of the Teſtator, and therefore the Judgment againſt

him ſhould be *De Bonis Teſtatoris*, and ſo it was adjudged, and that this Objection was as well to the Verdict as to the Demurrer. 1 *Saund.* 111. *Dean and Chapter of Briſtol* verſus *Guiſe.*

17. *Covenant, &c.* in which the Caſe was, *Leſſee for twenty-one* Years, under the yearly Rent of 24 *l.* made *Prudence* his Wife Executrix, and died, ſhe made an Aſſignment of the whole Term, in which the Aſſignee covenanted to Repair, who made *Mary* his Wife Executrix, and died, againſt whom this Action of Covenant was brought, and the Breach aſſigned in not Repairing, the Defendant pleaded a Judgment obtained againſt her, and that ſhe had not Aſſets *ultra*; and upon a Demurrer to this Plea it was held good, becauſe the Defendant was charged as Executrix of the Aſſignee, and not as Aſſignee her ſelf, and therefore was liable only to anſwer *De Bonis Teſtatoris.* 1 *Salk.* 316. *Buckley* verſus *Pitt.* See *Tilney* verſus *Norris.*

18. *Capias* againſt two Executors, the Sheriff returned *Non eſt inventus* as to one, the other appeared, and Judgment was given againſt both, whereupon he who appeared brought a Writ of Error, and concluded *ad damnum ipſius, &c.* adjudged, that Judgment ſhall be againſt both *De Bonis Teſtatoris*; and if Error is brought, both muſt join. 1 *Salk.* 312. *Rouſe* verſus *Etherington.*

19. *Leſſee for Years* covenanted to *repair*, the Leſſor brought an Action of Covenant againſt the *Adminiſtrator*, and ſhewed, that *ſtatus de & in præmiſſis* came to the Defendant, and that he entered, and the Premiſſes were in decay and not repaired; it was inſiſted, that this Covenant runs with the Land, and that the Defendant was Adminiſtrator, yet he was charged as *Aſſignee*, and therefore ſhall be liable *in jure proprio* to repair; and adjudged, that it ſhall be *De Bonis propriis.* 1 *Salk.* 309. *Tilney* verſus *Norris.* See *Antea Buckley* verſus *Pitt.*

(Z)

Where an Adminiſtrator or Executor ſhall be chargeable De Bonis Inteſtati & Teſtatoris only.

1. THere is a Difference between a *Plea which is falſe*, but not *wholly falſe*, and a Plea which falls under the Knowledge of the Executor, and is *abſolutely falſe*, as for Inſtance, in an Action brought againſt an *Executor*, he pleaded, that the Plaintiff had recovered againſt him in another Action brought for the ſame Thing, *&c.* the Plaintiff replied, that the Recovery was by *Fraud* and *Covin*, upon which they were at Iſſue, and the Plaintiff had a Verdict; now, in this Caſe the Judgment was *De Bonis Teſtatoris*, becauſe the Plea was true in Part, for there was a Record of ſuch a Recovery, tho' the Plaintiff had avoided it, by ſaying it was had by Covin. 1 *Leon.* 67. *Bracebridge* verſus *Baskervill.* 1 And. 150.

2. *Debt againſt an Adminiſtrator*, who pleaded, that before the Action brought, *the Adminiſtration was revoked and granted to another*, he having then Aſſets in his Hands to the Value of 200 *l.* which he had delivered over to the new Adminiſtrator; the Plaintiff replied, that it was done by *Fraud and Covin*, upon which they were at Iſſue, and ſo it was found, and thereupon the Plaintiff had Judgment to recover the Debt *De Bonis Teſtatoris*; and upon a Writ of Error brought it was objected, that the Judgment ought not to be abſolute *De Bonis Teſtatoris* only, but conditional, *ſi tantum habuit in manibus*; but adjudged, that it was well enough. *Yel.* 219. *Morgan* verſus *Sock.* 1 Bulſt. 187. Poſtea Executor (H) 6.

3. Debt againſt an Executor upon a Bond of his Teſtator, if he plead *Non eſt factum Teſtatoris*, or that the Obligee gave a *Releaſe* to *the Teſtator himſelf*, tho' 'tis *falſe*, yet the Judgment ſhall be *De Bonis Teſtatoris* only, becauſe the Executor cannot have a perfect Knowledge of the Matter; ſo likewiſe for a *Breach of Covenant* in the Life-time of the Executor himſelf, he ſhall be chargeable *De Bonis Teſtatoris tantum*, becauſe 'tis ſtill in reſpect of that Deed which was executed by the Teſtator, and his Executor is not chargeable if he hath not Aſſets. 2 *Cro.* 671. *Hutt.* 35. *Caſtillion* verſus *Smith.* *Dyer* 324. *S. P.* 2 *Cro.* 647. *Bull* verſus *Wheeler. S. P.* *Palm.* 314. *S. C.* 1 *Sand.* 112. * *Dean and Chapter of Briſtol* verſus *Guiſe. S. P.* Hob. 283. * Antea (Y) 16.

4. The Leſſee *covenanted* for himſelf and his Executors to *Repair, &c.* afterwards the Houſe was burnt down by the Negligence of the Executor; and yet in an Action brought againſt him, the Judgment muſt be *De Bonis Teſtatoris tantum*, becauſe 'tis brought upon the *Covenant* of the Teſtator, by which his Executor is bound, as repreſenting him. *Hob.* 188. *Collins* verſus *Thoroughgood.*

5. *Debt upon Bond* conditioned to pay 300 *l.* brought againſt an *Executor*, and Aſſets were found to 200 *l.* and Judgment in *B. R.* that the Plaintiff ſhould recover his whole Debt *De Bonis Teſtatoris*; and upon a Writ of Error in the Exchequer-Chamber, this was aſſigned for Error, but the Judgment was affirmed. 1 *Roll. Rep.* 58. *Lee* verſus *Ridford.*

6. Where an Executor or Adminiſtrator pleads that which will be a perpetual Bar to the Action of the Plaintiff, and of which he might have perfect Notice, and 'tis found againſt him, in ſuch Caſe the Judgment ſhall be *De Bonis Teſtatoris*; and if upon the *Fieri facias* to levy the Debt, the Sheriff ſhould return *nulla Bona*, then the Defendant ſhall be chargeable *De Bonis propriis*; as for Inſtance, if he plead, that the Plaintiff hath *releaſed* the Debt, or if he plead, that he never was Executor, or adminiſtred as Executor, becauſe theſe are Things which fall under his Knowledge, and which he hath pleaded, knowing them to be falſe. 2 *Cro.* 671.

7. Buc

2 Roll. Rep. 415. 7. But if he hath *any Goods* of the Teſtator in his Hands, then he ſhall be charged *De Bonis Teſtatoris* for ſo much of the principal Debt, and Damages *De Bonis propriis* for the Reſidue. 2 *Cro.* 671. *Bridgeman* verſus *Lightfoot.*

8. Debt againſt an Executor for 40 *l.* who pleaded *Plene adminiſtravit*, and the Jury found, that he had Aſſets to the Value of 20 *l.* and Damages to 5 *l.* adjudged, that the Plaintiff in this Caſe ſhall have Judgment *De Bonis Teſtatoris* as to the 20 *l.* and *De Bonis propriis* as to the Damages, and that a *Capias ad Satisfaciend'* lies againſt him for the Damages. *Godb.* 178. *Newman* verſus *Balingſton.*

9. The Teſtator got *Judgment* in an Action of Debt, and died, and his Executor acknowledged Satisfaction on Record; afterwards the Judgment was reverſed upon a Writ of Error, and Reſtitution was awarded *De Bonis Teſtatoris, & ſi non, &c. De Bonis propriis*; for if he had been chargeable *De Bonis Teſtatoris* alone, then he who paid the Money to the Executor upon an erroneous Judgment obtained againſt him, might be in Danger of loſing it, becauſe it might happen, that the Executor to whom it was paid might not have *Aſſets* to the Value of what he received; and on the other Side it would be very hard, that the Executor ſhould be chargeable *De Bonis propriis* only, becauſe the Debt for which the Judgment was obtained by his Teſtator was immediately Aſſets in his Hands, and ſubject to the Teſtator's Debts, which his Executor is bound to pay, and by paying them he doth no manner of Wrong, therefore if he ſhould have paid ſo many of the Debts of the Teſtator as the Money obtained upon that Judgment would amount unto, and if upon the Reverſal of that erroneous Judgment he ſhould not have ſufficient of the Teſtators, that he might retain to make himſelf Satisfaction, it would be unreaſonable to charge him *De Bonis propriis tantum.* 2 *Roll. Rep.* 400. *Nelſon* verſus *Powell.*

10. But where ever an Adminiſtrator or Executor is ſued, and he pleads *Plene adminiſtravit* generally, or if he plead ſpecially, that he hath no more than to ſatisfy ſuch a Judgment, and the Iſſue ſhould be found againſt him, the Judgment muſt be *De Bonis Teſtatoris*, and the *Fieri facias* muſt be to levy the Debt on the Goods of the Inteſtate in the Hands of the Adminiſtrator; and upon the Return of the Sheriff the Plaintiff may have a ſpecial Execution to levy the Debt *De Bonis Teſtatoris*, and if he hath waſted the Goods, then *De Bonis propriis. Ibid.*

11. *Judgment againſt the Teſtator*, and after his Death the Plaintiff brought a *Scire facias* againſt his *Executor*, to ſhew Cauſe why he ſhould not have Execution; the Defendant pleaded, that *he was not Executor, nor that he ever adminiſtred as Executor*, upon which they were at Iſſue, and it was found againſt him, yet the Judgment ſhall be *De Bonis Teſtatoris tantum*; for tho' the Plea was falſe, yet it was pleaded to a *Scire facias*, and that being brought, to have Execution upon the firſt Judgment againſt the Teſtator, therefore it muſt relate to that Judgment. *Litt. Rep.* 53.

12. So where there was a *Judgment againſt the Teſtator* for a Debt and Damages, and the Plaintiff brought a *Scire facias* againſt four Executors, to ſhew Cauſe why he ſhould not have Execution, they *all pleaded Plene adminiſtraverunt*, and the Jury found 100 *l.* Aſſets in the Hands of one, and 40 *l.* in the Hands of another, and as to the other Two, *nulla Bona*, yet Judgment muſt be againſt *them all De Bonis Teſtatoris*, for by Pleading *Plene Adminiſtraverunt*, they had acknowledged themſelves to be Executors. *Cro. Car.* 286. *Nevill* verſus *Delabarr.* Error. (A) 18.

Admiralty.

In what Caſes he hath Juriſdiction. (A) | In what Caſes he hath no Juriſdiction. (B)

(A)

In what Caſes he hath Juriſdiction.

1. THE *Admiral* hath Juriſdiction where the Common Law can give no Remedy, and of all Contracts made *ſuper altum Mare. 6 Rep. Dowdall's* Caſe.

2. The Court may Cauſe the Party to enter into a Bond, which is in the Nature of a *Stipulation*; and tho' in this Bond the Word *Hæredes* is inſerted, which extends to Executors and Adminiſtrators, yet becauſe the *Civil Law* doth not take Notice of *Executors*, the Ship is uſually arreſted, and the Libel is againſt the Ship and not againſt the Party, but yet he may be taken in Execution, but in no Caſe the *Lands. Goldsb.* 193, 260. *Greenway* verſus *Barker.*

3. One *Butler*, and others, upon the *Sea* near the Coaſt of *Suffolk*, robbed the Queen's Subjects, and brought the Goods into *Norfolk*, where they were apprehended; two Judges were of Opinion, that becauſe the Common Law did not take Notice of the original Offence, *(viz.)* of

the *Piracy*, therefore the bringing thoſe Goods to the Land which they had taken by Piracy on the Sea, did not make them puniſhable at Common Law, but that the Admiral had Juriſdiction. 28 *Eliz.* *Butler*'s Caſe.

4. The *King's Intereſt in the Sea* extends to the Middle between *England* and *Spain*, and to the whole Sea between *England* and *France*, becauſe he is King of *England* and *France*. 3 *Leon.* 75. in *Sir John Conſtable*'s Caſe.

5. By the *Civil Law*, if two Ships meet at *Sea*, tho' they did not go out in Company of each other, yet if one of thoſe Ships ſo meeting takes a Ship and Goods in the Preſence of the other, that Ship ſo preſent ſhall have the Moiety both of the Ship and Goods taken; for tho' that Ship was not aſſiſting actually to take the Prize, yet her Preſence at the Time of the Taking was a Terror to the Ship taken, without which that Ship might have got off; now, upon a Libel to the Court of Admiralty for a Moiety of this Ship, the Plaintiff ſuggeſted for a Prohibition, that both the Ships came into *England* with the Prize, and there it was agreed between them, that the Plaintiff ſhould have four Parts of the Ship and Goods ſo taken, for that he actually took the ſame, and the other Ship ſhould have the other fifth Part, which Agreement he pleaded in the Admiralty-Court, but they would not allow the Plea, and thereupon a Prohibition was granted. 2 *Leon.* 181. *Sir Rich. Buckley*'s Caſe.

6. *Indictment* for the Death of a Man upon *Scarborough Sands*, between *High and Low Water-Mark*, which being removed into *B. R.* and the Defendant arraigned, he pleaded, that the Indictment upon which he was arraigned was taken by Commiſſion, 1 *Maii*, directed to the Judges of Aſſiſe, but that afterwards, (*viz.*) on ſuch a Day another Indictment was taken againſt him for the ſame Fact, by Vertue of a Commiſſion directed to the Admiral, and others, upon the Statute 28 *H.* 8. *cap.* 15. and this was *Ad inquirendum tam ſuper altum Mare quam ſuper littus Maris*; adjudged, that the firſt Commiſſion was repealed by the Second, and ſo the Indictment upon which he was arraigned was *coram non judice*, for theſe two Commiſſions are in reſpect of ſeveral Authorities, the one at *Common Law*, the other by the *Statute*, and therefore the Party was diſcharged of the Indictment at the Suit of the Queen. *Hill.* 25 *Eliz.* 1 *Leon.* 270. *Lacy*'s Caſe. Moor 121.

7. The Court of Admiralty hath Juriſdiction in Caſes of *Freight*, *Mariners Wages*, or for *Breach of Charter-Parties*, tho' made within the Realm, ſo as the Penalty be not demanded, and likewiſe in Caſes of *Building*, *Mending*, *Saving*, or *Victualling* Ships, ſo as the Suit be againſt the Ship and not againſt the Party, and this Court hath a Juriſdiction to redreſs Annoyances and Obſtructions in *Rivers*, which may hinder Navigation to and from the Sea. 2 *Cro.* 216.

8. An *Action on the Caſe* was brought for ſuing in the Admiralty-Court, in a Cauſe where they had no Juriſdiction, (*viz.*) for a Thing done on the Land, and not on the Sea. 1 *Brownl.* 4. *Row* verſus *Alport*.

9. The *Mariners* ſued the *Maſter of the Ship* in the *Admiralty-Court* for their *Wages*; and after Judgment he prayed a Prohibition, ſuggeſting that the Contract was made with them on *Land*; but adjudged, that he came too late after Sentence, and that it would be inconvenient to grant a Prohibition, for then the *Mariners* muſt bring ſeveral Actions againſt the Maſter, but here they * all join in a Libel, and are not delayed in their Wages. *Winch* 8. *Mariners* verſus *Jones*. * Poſtea 26, 29, 31.

10. The Maſter of an *Hamborough* Veſſel freighted her at *Brazil*, and became bound in the Cuſtom-houſe there to diſcharge his Ship at *St. Michaels*, that the King of *Spain* might have what was due for Cuſtoms; the Ship never touched at *St. Michaels*, but was drove by Tempeſt on the *Coaſt of England*, and the *Spaniſh Ambaſſador* proſecuted in the Admiralty here, ſuppoſing the Goods were forfeited to the King of *Spain* for not paying Cuſtoms; the Judge of the Admiralty gave Sentence, that the *King of Spain* ſhould have the Poſſeſſion, but did not determine the Right, from which Sentence an *Appeal* was brought; and the Civilians inſiſted, that an *Appeal* would not lie, becauſe the Sentence was only for the Poſſeſſion, and not for the Right; but adjudged, that an *Appeal* lies as well where the Sentence is for the Poſſeſſion as for the Right. *Moor* 814. *Spaniſh Ambaſſador* verſus *Plage*. 1 Roll. Rep. 133.

11. *Caſe*, *&c.* on the Statute, *&c.* for ſuing in the Admiralty for a Matter done at * Land, wherein the Plaintiff ſet forth, that he was attached in that Court *pro defalcatione* of Oar, *infra fluxum & refluxum Maris*, when in Truth, if any Thing was done, it was *infra Corpus Comitatus*, and that he was attached to appear before one *Compton*, Deputy-Preſident or *Judge of the Court*, *&c.* after a Verdict for the Plaintiff, and a *Writ of Error* brought, it was aſſigned for *Error*, that the Declaration was ill, becauſe the Plaintiff had ſet forth, that *if any Thing was done*, it was *infra Corpus Comitatus*, *&c.* which is not a direct Affirmation, that it was done *infra Corpus Comitatus*: *Sed per Curiam*, if nothing was done at Land, yet a Suit in the Admiralty, ſuppoſing a Thing to be done at Sea, which in Truth was not, is puniſhable by the Statute; then it was objected, that the Plaintiff ſet forth, that he was attached to appear before one *Crompton*, *Deputy-Preſident*, *&c.* when the Statute ſays, it muſt be before the Admiral or his *Deputy*, and the Plaintiff did not alledge, that he was ſummoned to appear before the Admiral: *Sed per Curiam*, 'tis well enough, ſince it appears he was Judge of the Court; ſo the Judgment was affirmed: 1 *Roll. Rep.* 203, 415. *Flemming* verſus *Yates*. * Poſtea 19.

12. 'Tis uſual in the Libel, to alledge the Contract was made *ſuper altum Mare*; but if a Ship lies at Anchor, and wants Victuals, and ſends to *B. B.* at Land to ſupply Victuals, and then the

Contract is made in the Ship at Sea, it ſhall be tried in the *Admiralty*, but contrary, if the Contract is made *at Land*, and the Victuals afterwards ſent to the Ship. *Latch* 11. *Godfrey*'s Caſe.

13. In a Prohibition, *&c.* the Caſe was, the Defendant was Maſter of a Ship, of which *T. S.* was Owner, which Ship was taken by Pirates at Sea, and the *Maſter*, in order to redeem both himſelf and the Ship, made an Agreement with the Pirates, to pay 50 *l.* and pawned his Perſon for the Payment of the Money; afterwards the *Pirate* carried him to the *Iſle of Scilly*, and there he borrowed the 50 *l.* for which he gave Bond, and paid the Money to the *Pirate*, and being diſcharged, he libelled in the Admiralty for the 50 *l.* and the Owner moved for a *Prohibition* after Sentence, but it was denied, becauſe the * original Cauſe was at Sea, and all which followed was but acceſſary and conſequential to that Cauſe, and therefore might be determined in that Court. *Hardres* 183. *Spark* verſus *Stafford.*

* Poſtea 20, 22. S. P.

14. There was a Suit in the Admiralty for *Beaconage of a Rock* near the Sea; and upon a Motion for a Prohibition it was denied, for tho' the *Rock* may be Parcel of the Inheritance of the Plaintiff, yet the Profits of *Beaconage* belong to the Admiral, and by Conſequence the Suit for theſe Profits are within his Juriſdiction. *Sid.* 158. *Croſſe* verſus *Diggs.*

15. Suit in the Admiralty for a Ship that was *Flotſam*, left near an Harbour in *Norfolk*; the Plaintiff ſuggeſted for a Prohibition, that the Dereliction was *infra Corpus Comitatus*, and for that Reaſon a Prohibition was granted, tho' it was agreed, that the Admiralty had a Juriſdiction in Caſes of *Flotſam*, the Defendant might take Iſſue upon the Suggeſtion, and if it was found not to be *infra Corpus Comitatus*, the Court would grant a Conſultation. *Sid.* 178. *The Lord Admiral* verſus *Linſted.*

16. We being at *War with Denmark*, one *Murrey*, *a Scots Privateer*, took a *Daniſh* Ship as Prize, and being condemned as a Prize in *Scotland*, was bought by one *Thompſon at Land*, and afterwards one *Smith* libelled in the *Admiralty*, claiming a Property in the Ship, that ſhe was loaded with his Goods, and not a *Daniſh Ship*, but of *London*; and now *Thompſon* moved for a Prohibition, for that the Admiralty had no Juriſdiction, he having bought the Ship at *Land*, but it was not granted, becauſe the Queſtion was, *Prize or no Prize*, of which they have a Juriſdiction. *Sid.* 320. *Thompſon* verſus *Smith.*

17. A Ship was taken at Sea as *Prize*, and being brought near the Shore, was ſtranded, but the Perſons from whom it was taken libelled in the Admiralty-Court, ſuggeſting that this Ship was not *Prize*; and upon a Motion for a Prohibition it was not granted, becauſe the *Taking* was the Cauſe of this Suit, and that was at Sea, where the Admiralty hath Juriſdiction. *Sid.* 367. *Turner & al'* verſus *Smith.*

18. In a Prohibition to ſtay a Suit in the Admiralty for *Mariners Wages*; the Suggeſtion was, that this Suit was founded on a Charter-Party made at Land, and not *ſuper altum Mare*; but the Prohibition was denied, becauſe * Wages are due to Mariners for Labour done at Sea, tho' the Contract was made on Land to aſcertain them. 3 *Lev.* 60. *Coke* verſus *Crotchet.*

* Antea 9. Poſtea 26, 29.

19. Caſe, *&c.* on the Statutes 13 *R.* 2. 15 *R.* 2. and 2 *H.* 4. for ſuing in the Admiralty for a Matter done at * Land, wherein the Plaintiff declared, that 13 *Decemb.* 34 *Car.* 2. he was about to Sail from the *Port of London*, with a Ship called the *Commerce*, *&c.* in his Poſſeſſion, and loaded with Merchandizes, *&c.* and that the Defendants proſecuted a Suit in the Admiralty, for Stay of the ſaid Ship, till Security given, that they ſhould not Traffick with Infidels within the Limits of the Charter of the *Eaſt-India Company*; and that 14 *Decemb. &c.* the Defendants procured the ſaid Ship to be arreſted by Proceſs out of the *Admiralty* at *P. &c.* and there detained till, *&c.* whereby the Plaintiff loſt the Profit of his Voyage, *&c.* upon Not guilty pleaded a ſpecial Verdict was found of the Charter of the *Eaſt-India Company*, by which they were incorporated, and the ſole Trade to the *Indies* was granted to them, with a Prohibition to all others to Trade with *Infidels* there, under the Penalty of Forfeiture of Ship and Goods; that the Plaintiff and other Merchants had fitted out this Ship with Goods to Traffick at the *Eaſt-Indies* with *Infidels*, within the Limits of the *Eaſt-India Company*; whereupon *Child* (the Defendant) petitioned the King in Counſel for Stay of the ſaid Ship, upon which there iſſued an Order of Council to the Admiralty to ſtay it, by Proceſs of that Court, which was done, *&c.* and upon arguing this Special Verdict the Plaintiff had Judgment; and now upon a Writ of Error brought the principal Objection was, that this was not a Suit in the Admiralty within any of theſe Statutes, becauſe there was neither *Plaintiff or Defendant*, but only a *Proceſs to ſtay the Ship*, ſued out by King's Proctor, and by his Command in Council, who has Power to ſtay Ships and to grant *Embargoes*, for which Reaſon this is not a Suit, but an *Embargo* on the Ship, and a Prohibition to Trade with Infidels, who are perpetual Enemies; but adjudged, that *Suits in the Admiralty* may be only againſt the *Ship* it ſelf, as in this Caſe, and *Child* (who is the Governor of the Company) is the Proſecutor, and *Sands* the Party grieved; and the Statute 2 *H.* 4. gives an Action and double Damages to the Party grieved, ſo that this is a *Suit* within the Statute; and tho' 'tis in the Name of the King's Proctor and by his Command, yet 'tis done at the Proſecution of *Child*, and he paid the Fees: As to *Embargoes*, 'tis true the King hath a Power to grant them in Point of State, and in Time of Danger; but in the principal Caſe, it was upon a particular Accompt not to Trade with *Infidels*, within the Limits of the Charter of the *Eaſt-India Company*, and not in reſpect of any Dangers from foreign Princes, or for any Injuries done by them to his Subjects, *&c.* the Judgment was affirmed. 3 *Lev.* 351. *Sands* verſus *Child & al'.*

4 Mod. 176. Salk. 31. * Antea 11.

20. One who had Letters of *Marke*, *&c.* in the *Dutch War*, took an *Oſtender* at Sea inſtead of a *Dutch* Ship, and brought her into Port, and libelled againſt her to have her condemned *as*

Sid. 367.

Prize; but Sentence was given in the Admiralty, that ſhe was not *Prize*, whereupon the *Oſtender* libelled againſt the *Captor* for Damages, and he moved for a Prohibition, for that the Suit was for Damages done in the *Port*; but it was denied, becauſe the * Original Cauſe being a Taking at Sea, and ſo within the Admiral's Juriſdiction, the Conſequents thereof ſhall be tried there. 1 *Lev.* 243. *Turner* verſus *Neale*. * Antea 13. S. B. Poſtea 22. S. P.

21. The *Court of Admiralty* is not a *Court of Record*, but yet they may puniſh thoſe by *Fine and Impriſonment*, who reſiſt the Proceſs of that Court; and therefore, where a Prohibition was prayed, for tha tthere was a Libel againſt the Plaintiff for Reſcuing a Ship, and Taking away the Sails from one who came to execute that Proceſs, and for that in the Face of the Court he aſſaulted the Court; now theſe Things were determinable at Law, the Ship being *infra Corpus Comitatus*; yet the Prohibition was denied, becauſe they may *fine and impriſon* for this Matter, but cannot give *Damages*. 1 *Vent.* 1. *Sparks* verſus *Martin*.

22. There was a Sentence in *Scotland*, that the Ship *M.* was lawful *Prize*, for that he had carried *Contrabond Goods*, and under that Sentence the Plaintiff brought her *infra Corpus Comitatus*; afterwards one *Eglesfeild*, and another, pretending they were Owners of the Ship, libelled for her in the Admiralty in *England*, ſuggeſting, that this Ship was taken *Piratice*, and ſo not lawful *Prize*; thereupon the Plaintiff, who had bought the Ship, brought an Action againſt them upon the Statute 13 *Car.* 2. *cap.* 5. *and* 2 *H.* 4. *cap.* 4. for ſuing him in the Admiralty, pretending that ſhe was taken *Piratice*, ſetting forth, that the Defendants had exhibited a Libel, that the Ship belonged to them, that ſhe was laden with Maſts, and had Letters of ſafe Conduct, *&c.* and that certain *Scots* Privateers did endeavour to take her; that afterwards the Defendants did take her, and being required by the Plaintiff, did refuſe to deliver her, and that *ratione lucri ceſſantis & damni emergentis*, he ſuffered ſo much Loſs: The Defendants pleaded Not guilty, and at the Trial, prayed the Opinion of the Court, whether, upon the Libel, as it was now ſet forth, he had not good Cauſe to ſue in the Admiralty, and adjudged, they had; for the libel is, that the Ship was taken *Piratice*, which muſt now be taken to be true; and the rather, becauſe he did not plead to the Libel, either the Sentence given in *Scotland*, or that it was not taken *Piratice*; now if Goods are taken *at Sea*, and ſold afterwards at *Land*, yet the Admiralty hath a Juriſdiction, becauſe 'tis incident to the Original Matter, tho' it hath been otherwiſe adjudged in *Bingley*'s Caſe. 1 *Vent.* 173. *Radley & al'* verſus *Egglesfeild & al'*. 2 *Saund.* 259. *S. C.* 2 *Lev.* 25. *S. C. Sid.* 320. *S. P.* 1 *Roll. Rep.* 531. *S. P. Hob.* 78. *S. P. Yelv.* 92. *S. P.* Poſtea 23.

23. Prohibition to the Admiralty, where the Libel was for a Ship taken by *Pirates* and carried to *Tunis, and there ſold*, ſo that the Sale being at Land, that Court had no Juriſdiction; but the Court held, that *what was taken by Pirates* is originally within the Admiral's Juriſdiction, and ſo continues, tho' the Sale thereof is afterwards at Land; but 'tis otherwiſe, where a Ship is taken by *Enemies*, for in ſuch Caſe the Property is altered; and tho' 'tis taken by Pirates, yet it muſt appear to be *ſuper altum mare*, for theſe Words are abſolutely neceſſary to ſupport their Juriſdiction. 1 *Vent.* 173, 308. *Ridley* verſus *Egglesfeild*. 2 Saund. 259. Antea 22. S. C. 2 Lev. 25. S. C.

24. A Contract was made *at Land*, with ſeveral Seamen, to bring a Ship from one *Port* to another, for which they were to have a certain Sum of Money; and upon a Libel in the Admiralty for this Money, it was ſuggeſted for a Prohibition, that the Contract was made at Land, with ſeveral Seamen for a *Sum in Groſs*, and therefore it could not be within the ordinary Rules of *Mariners Wages*, who were favoured to ſue in that Court, becauſe they may all * join, to prevent an Inconvenience of ſuing ſeverally at Law, but as this Contract is, they are to ſue at Law; but the Prohibition was not granted, for this ſhall be taken for *Mariners Wages*, and therefore the Admiralty have Juriſdiction, tho' the Contract was at Land; and ſince this Prohibition was prayed after Sentence, 'tis Diſcretionary in the Court, whether they would grant it or not. 1 *Vent.* 343, 146. *Lev.* 60. *S. P. Raym.* 3. *S. P.* * Antea 9, 16, 17.

25. Libel by *two Officers* of the Ship for *Mariners Wages* againſt *two of the Owners* of the Ship, who ſuggeſted for a Prohibition, that the Contract was made at Land; it was inſiſted for the Owners, that tho' Suits had been permitted for * *Mariners Wages*, yet that was when they *all joined* in the Suit; and this was in their Favour, to prevent ſeveral Actions, as they muſt do, if they ſued at Common Law; but here the Suit was by *two only, and againſt two*, and therefore they ought not to have the Privilege of Common Seamen, eſpecially ſince the Contract with the Owners is joint, and *two only* are ſued; but a Prohibition was not granted, for tho' the Plaintiffs were *Purſer and Boatſwaine, &c.* yet they are Mariners ſtill, and may ſue in the Admiralty for Wages, and the proper Remedy is there, if they do proceed according to their Law. 2 *Vent.* 181. *Alleſon* verſus *March*. * Antea 9. Poſtea 26, 29, 55.

26. A Prohibition ſhall not go to the Admiralty for *Mariners Wages*, tho' the Contract was made upon the *Land*; for 'tis more convenient for them to ſue there, becauſe they may all * join, and not be put to the Inconvenience of ſuing ſeverally, as they muſt at Law. 1 *Vent.* 146, 343. *S. P. Raym.* 3. *S. P.* But if the Contract is in Writing, a Prohibition ſhall go. 1 *Salk.* 31. *Opie* verſus *Addiſon*. *Antea 9.

27. Ruled, that where a Ship is taken *Piratice*, or by Letters of *Mart*, 'tis no lawful Prize, if 'tis not brought *infra præſidia* of that King or Prince by whoſe Subjects it was taken. *March* 110.

28. By the Cuſtom of the Court of Admiralty, Goods may be attached in the Hands of a third Perſon *in cauſa maritima & civili*, and that after four Defaults made, the Goods ſo attached ſhall be delivered into the Poſſeſſion of the Plaintiff, he giving Caution to redeliver them, if the Cauſe of Action be diſproved within a Year and a Day after the four Defaults; and if the Party in whoſe Hands ſuch Goods are, refuſe to deliver them, then 'tis the Cuſtom of that Court to impriſon him until he do. *March* 204.

29. One *Broom*, by Letters of *Mart*, *&c.* from the *African* Company, took a French Ship near *Gambay*, which he brought into *Africa*, and the Admiralty there condemned her as *Prize*; afterwards he ſold the Ship at Land, and applied the Money to his own Uſe, and then coming into *England* was ſued in the Admiralty here, to give an Accompt, and Sentence being given againſt him, he appealed, and moved for a Prohibiton, but it was denied, becauſe the Suit here is but in Execution of the firſt Sentence, and the Admiralty having Juriſdiction, their Sentence ſhall bind the Property till reverſed by Appeal. 1 *Salk.* 32. *Broom's* Caſe.

Mod. Ca. 11. 30. The *Maſter* took Proceſs out of the Admiralty, againſt the Owners, to arreſt the Goods *cauſa ſalvagii* being landed at *Briſtol*: Upon *Affidavit* made, that this Proceſs was awarded before a *Libel*, the Court was moved for a Prohibition; adjudged, that tho' the Goods be arreſted at Land, yet the *Salvage*, which was the Cauſe of the Arreſt, might be at Sea; therefore a Prohibition was denied till Appearance or Libel exhibited, for this Proceſs is only for Appearance. 1 *Salk.* 35. *Tranſfer* verſus *Watſon*.

* Antea 9, 26. 31. The the Executor of a *Maſter of a Ship* libelled in the Admiralty for *Wages*; adjudged, that it was by Indulgence, that *Mariners* were allowed to ſue there for *Wages*; the firſt Inſtance of ſuch Suit is in *Winch Rep.* 8. the Suit is eaſier there, becauſe they may all * join, whereas at Common Law they muſt all ſever, and 'tis better there, becauſe the Ship is liable; but it was never yet allowed to the *Maſter*, for he contracts on the Credit of the *Owners*; but the Mariners contract on the Credit of the Ship. 1 *Salk.* 33. *Clay* verſus *Sudgrace*.

32. The *Maſter* was ſued in the Admiralty by the *Mate* for his *Wages*, and upon a Motion for a Prohibition, it was inſiſted, that a *Mate* is not in Nature of a *Mariner*, for he is to ſucceed the Maſter if he die in the Voyage; but adjudged, that the *Mate* contracts with the Maſter for his Wages, as other Mariners do. 1 *Salk.* 33. *Baily* verſus *Grant*.

Mod. Ca. 79. 33. The *Maſter* took up Neceſſaries at *Boſton in New England*, and gave a Bill of Sale by Way of Pawn, for the Payment of the Money; and now upon a Suit in the Admiralty againſt the Ship, and the *Owners*, a Prohibition was granted as to them, becauſe the Contract of the *Maſter* cannot perſonally ſubject them to this Suit; but as to the *Ship*, it was denied, becauſe the *Maſter* can have no Credit abroad, but upon an *Hypothecation of the Ship*. 1 *Salk.* 35. *Johnſon* verſus *Shippin*. See *Hob.* 12, 115. 1 *Vent.* 32. 1 *Lev.* 267.

34. The *Maſter* may *Hypothecate* either the Ship or Goods, for he is truſted with both, and repreſents the *Traders* as well as the *Owners*; but this muſt be done by his expreſs Agreement, therefore, when the Libel ſet forth, that the Ship was in great Diſtreſs at Sea, and wanting a Cable, the Maſter contracted with the Plaintiff for a Cable, which he delivered, *&c.* The Defendant ſuggeſted for a Prohibition, that the Contract was made at Land, (*viz.*) at *Ratcliffe* on the *River Thames*, where the Ship then lay, and a Prohibition was granted, for tho' by the Maritime Law, every Contract of the Maſter implies an *Hypothecation*, yet 'tis not ſo by the Common Law without an expreſs Agreement. 1 *Salk. Juſtin* verſus *Ballin*. See 2 *Salk.* 740. *The Pleadings*.

35. The Defendant gave Bail upon the *Stipulation* in the Nature of a *Recogniſance* to abide the Judgment of the *Court of Admiralty*, but died before the Sentence, and yet the Court proceeded againſt the Bail, by which the Defendant had bound himſelf and his Heirs; and it was inſiſted for a Prohibition, that it was unreaſonable that the Suit ſhould be in a better Condition by the Defendant's being in Cuſtody of his *Bail*, than if he he had been actually in *Priſon*, for if he had died there, that would have ended the Suit, but on the other Side it was ſaid, that *Bail* in the Admiralty are ſued as *Principals*, becauſe the Parties being Sea-faring Men, are ſubject to more Caſualties than others; the Caſe was compounded by Agreement. 1 *Salk.* 33. *Betts* verſus *Haucock*.

36. The Defendant was in *Execution in a Priſon of the Admiralty*, upon a Sentence given againſt him in that Court, and an *Habeas Corpus* iſſued to remove him from thence to anſwer an Action in *B. R.* and upon the Return, it was moved, that he might be committed to the *Marſhall*; but he was remanded, for tho' the Admiralty proceeded according to the Civil Law, yet their Proceedings were ſupported by the Cuſtom of the Realm; beſides, there was no Action depending in *B. R.* 1 *Salk.* 351. *Keache's* Caſe.

37. Libel for *Seamens Wages*, *&c.* The Caſe was, the *Builder* made a Contract for a Ship, with *W. R.* and others, who were to be *Part-Owners*, who thereupon had the Ship, and afterwards *W. R.* contracted with Seamen to go a *Voyage* with him, and in order to rig the Ship he employed ſeveral Seamen on Board for a conſiderable Time; but upon ſome Diſagreement between the Builder and Owners, the *Voyage was put of*, and the Seamen diſmiſſed, who libelled againſt the Ship for their *Wages*: The Defendant ſuggeſted for a Prohibition, that the Work was done *infra Corpus Com'*, *&c.* and that the Ship did not proceed in her Voyage; but the Prohibition was denied; for where a Contract is made with Seamen to *go a Voyage*, and in order thereunto they work in a *Port*, in ſuch Caſe, if the Ship do not proceed on her Voyage, thro' the Owners Fault, they may ſue for their Wages, for Work done in *Harbour*, becauſe it was

done in Purſuance of a Contract, *to go a Voyage*; but it had been otherwiſe, if the Work had been done in Purſuance of a Contract to *Work in the Harbour*, and here the Ship ought to be liable, becauſe the Builder truſting it in his Owner's Poſſeſſion, gave him an Opportunity of agreeing with Seamen; and the true Reaſon why Seamen may ſue for their Wages, tho the Contract is made at Land, is, becauſe they may all join in the Admiralty, and the Ship is made liable in that Court, but not at Law. *Mod. Caſes* 238. *Wells* verſus *Oſmond.*

38. By the Statute 11 & 12 *W.* 3. *cap.* 3. Pyracies, Felonies and Robberies at Sea, *&c.* may be tried at any Place at Sea or Land, in any of the King's Dominions, and thereby a Commiſſion under the Great Seal, or under the Seal of the Admiralty, directed to all Admirals, Vice-Admirals, *&c.* Commanders of Ships of War, and to all, or any ſuch Perſons, or Officers, by Name, as the King ſhall appoint. 11 & 12 W. 3. c. 3.

Which Commiſſioners jointly or ſeverally, may by Warrant under their Hand and Seal, commit ſuch Pirates and Robbers, and call a Court of Admiralty, either at Sea, or on Land, which Court ſhall conſiſt of ſeven Perſons at leaſt, which muſt be Captains, Lieutenants, or Warrant-Officers in the King's Ships, or Captains, Maſters or Mates in ſome *Engliſh* Ships.

The Commiſſioners may iſſue Warrants, to bring Perſons accuſed before them to be tried, and to ſummon Witneſſes, and give Sentence, and award Execution according to the Civil Law; and Perſons convicted ſhall ſuffer Loſs of Goods, as if attainted by Statute 28 *H.* 8.

When the Court is aſſembled, the King's Commiſſion ſhall be read, then the Regiſter ſha'l read the Articles againſt the Priſoner upon which he is to be tried, to which he muſt plead Not guilty, otherwiſe it ſhall be taken *pro confeſſo* againſt him.

After Not guilty pleaded, the Witneſſes ſhall be ſworn and examined *viva voce* againſt and for the Priſoner; then he ſhall be heard in his own Defence, and then all Perſons ſhall withdraw but the Regiſter; and after Debate, Sentence ſhall be given by Plurality of Voices in the Preſence of the Priſoner, who, if convicted, ſhall be executed either at Sea, or within the Ebbing and Flowing thereof, as the Preſident of the Court, or the Major Part of them, by a Warrant directed to the * Provoſt Marſhal, ſhall appoint.

* *To be conſtituted by the major Part of them.*

The Proceedings ſhall be regiſtred, and tranſmitted to High Court of Admiralty, *&c.*

(B)

Where he hath no Jurisdiction.

1. ALL the Ports and *Havens* in *England*, are *infra Corpus Comitatus*, and the Admiral hath no Juriſdiction of any Thing done in them.

2. *R. B.* being a *Maſter of a Ship*, bought Goods of a Saleſman at *St. Katharine's near the Tower*, who delivered them on Board the Defendant's Ship there, and for Non-payment of the Money ſued him in the Admiralty; but becauſe this Contract was made *infra Corpus Com'*, and for that the Admiral hath no Juriſdiction but of Contracts made *ſuper altum mare*, a Prohibition was granted. *Owen* 122. *Leigh* verſus *Burley.*

3. As to Criminal Offences, the Statute 25 *H.* 8. *cap.* 15. extends only to ſuch which are done *ſuper altum mare.* *Owen* 122.

4. *Libel* againſt *R. B.* for a Ship lying at Anchor at *Lime-houſe*; this was *infra Corpus Com'* and the Admiral had no Juriſdiction. 2 *Cro.* 514. *Violet* verſus *Blague.* *Poſtea pl.* 15. *S. C.* *Moor* 916. *Dorrington's* Caſe. *S. P.* 2 Rol. Rep. 49. Moor 891. S. C.

5. A Contract made beyond Sea, ſhall not be tried in the Admiralty; but if the Defendant admit of the Juriſdiction of the Court, and ſuffer Sentence to paſs, then *B. R.* will not grant a Prohibition, *&c.* unleſs it appear in the Body of the Libel, that the Admiral had not Juriſdiction. 1 *Brownl.* 16. 2 *Brownl.* 34.

6. *Libel* in the Admiralty, upon an Agreement put in Writing in *Barbary*, for tranſporting *Sugars*, *&c.* which were ſpoiled at Sea; ſo on a Contract made at *Malaga*, a Prohibition was granted. *Hob.* 79. *Palmer* verſus *Pope.* *Moor* 450. *Turner* verſus *Oldfeild. S. P.*

7. *Sir Julius Caſar*, Judge of the Admiralty, exhibited a Bill in that Court againſt the Deſendant *Nicholas*, who was an Officer of the Lord Mayor, for meaſuring Coals at a Wharfe in the Pariſh of *St. Dunſtan* in the *Eaſt*, upon the *River Thames*; but adjudged, he had no Juriſdiction. *Leon.* 106. *Sir Julius Caſar's* Caſe.

8. *The Admiral* hath no Juriſdiction of *Wreck of the Sea*, nor any Thing on the Soil on which the Sea doth *Ebb and Flow* between the High-Water and Low-Water Mark, for that may be Parcel of a Manor. 5 *Rep.* 106. *Sir Henry Conſtable's* Caſe.

9. Goods were confiſcated in *Spain*, and afterwards the Offender brought them into *England*, and ſold them here; the *Spaniſh* Ambaſſador ſued the Vendee in the Admiralty; but adjudged that the Property ſhall be tried at Law, and not in the Admiralty. *Hob.* 219 *Don Alonſo*, *&c.* verſus *Cornero.* 2 *Brownl.* 29. *S. C.* reported by the Name of *Sir John Watt's* Caſe.

10. An *Engliſh* Man felled ſeveral Lands of *Braſill Wood in Spain*, for which the *Spaniſh* Ambaſſador libelled againſt him in the Admiralty here; but adjudged, that Court had no Juriſdiction to try the Fact, but it may be laid to be done in any Place in *England*, and ſo tried here. 2 *Bulſt.* 322. *Don Diego*, *&c.* verſus *Bruntiſh.*

11. If

1 Roll. Rep. 80. S. P. Tourſon v. Tourſon.

11. If the Defendant by his Plea confeſs the Thing to be done *ſuper altum mare*, when in Truth it was not, and Sentence is given, tho' his Admitting it cannot give the Admiralty any Juriſdiction, where of Right it had none; yet he ſhall not afterwards have a Prohibition upon a Suggeſtion againſt his own Confeſſion, that the Thing was done *ſuper altum mare*, unleſs by ſome other Matter it plainly appears to the Court, that his Suggeſtion is true. 12 *Rep.* 79. See 1 *Brownl.* 30. *Jennings* verſus *Audley.*

12. If one is ſued in the Admiralty contrary to the Statute, he may have a *Superſedeas*, in Nature of a *Prohibition*, to cauſe the Judge to ſtay the Proceedings, and may alſo have an Action againſt the Party who ſues. 10 *Rep.* 75. *Caſe of Marſhalſea.*

13. The *Maſter of a Ship* borrowed 50 *l.* upon the high Sea, and pawned the Ship for the Payment, which Ship coming afterwards into the River *Thames*, he, who lent the Money, arreſted her by Proceſs out of the Admiralty, whereupon the *Owner* appeared and denied, that the *Maſter had any Property*; but that Court proceeding to Judgment, the *Owner* moved for a Prohibition, and it was granted, for tho' in Caſes of Neceſſity the *Maſter* may pawn the Ship, and the Owner is *chargeable*; but where no ſuch Cauſe appears, (as it did not in this Caſe) the *Maſter* hath not Power to pawn her. *Hob.* 11. *Bridgman*'s Caſe. *Moor* 918. *S. C.* by the Name of *Barnard* verſus *Bridgman.*

14. By the Opinion of the Chief Juſtice *Hobart*, in every Libel in the Admiralty, the Plaintiff muſt lay the Cauſe to be *ſuper altum mare*; for the Juriſdiction of that Court ariſes not from the Cauſe, but from the *Place*, and the Libel muſt warrant the Suit, otherwiſe a Prohibition ſhall go; and 'tis not ſufficient to alledge the Thing done, *infra juriſdictionem, &c.* generally, but it muſt be ſo laid, that it may evidently appear to the Court that it was ſo. *Hob.* 219. *Palmer* verſus *Pope.* *Antea 6. S. C.*

15. A Merchant libelled in the Admiralty againſt *Francis Blake*, for that he was poſſeſſed of a Ship called *F. infra juriſdictionem Curiæ Admiralitatis*, together with the Tackle and Furniture thereof, and that ſhe was detained by the ſaid *Blake*: The Defendant ſuggeſted for a Prohibition, that his Father was poſſeſſed of the ſaid Ship, lying at Anchor at *Lime-houſe*, and being ſo poſſeſſed, gave her to the Defendant, by Vertue whereof he detained her; ſo that if any Injury was done to the Plaintiff, it did ariſe *infra Corpus Comitatus*, upon which Suggeſtion a Prohibition was granted; for tho' the Libel ſet forth, that it was *ſuper altum mare*, this Suggeſtion is an Anſwer to that Matter, and traverſable, for the Harbours, Shores and Coaſts, are not within the Juriſdiction of the Admiralty; and *Lime-houſe* is an Harbour. *Moor* 891. *Antea pl.* 4.

16. *Libel* in the Admiralty; the Caſe was, the Defendants were *Owners of a Ship*, which they ſent to the *Indies* to merchandize, and in the Voyage the *Mariners* committed *Piracy* on the Sea, as it was ſuggeſted in the Libel; and when the Ship returned into the *Thames*, ſhe and all the Goods were ſeiſed, and claimed by the *Admiral* as *Bona piratorum*, by Vertue of a Grant from the Queen; and the *Owners* afterwards took the Sails and Tackling, for which they were ſued in the Admiralty; but a Prohibition was granted, for tho' the Admiral had a Grant *de Bonis piratorum*, that muſt be intended of their proper Goods, and not thoſe which they got by Piracy; but if the Admiral was intitled to ſuch Goods, yet in this Caſe he ought not to ſue in the Admiralty, becauſe the Sails and Tackling were taken *infra Corpus Comitatus*, (*viz.*) on the *Thames.* 1 *Roll. Rep.* 285. *Hildibrand*'s Caſe.

2 Cro. 543. Palm. 96.

17. Upon an *Habeas Corpus* directed to the *Lord Warden of the Cinque-Ports*, to bring up the Body of *T. S.* and to certify the Cauſe of his Impriſonment, he returned, that the *Wardenſhip, &c.* was an antient Office, and that the *Warden* is an *Admiral*, and had a Court of Admiralty for Sea Affairs, which happen within the Juriſdiction of the *Cinque-Ports infra fluxum & refluxum maris*, and that he hath an Officer to ſeize Goods caſt on the Land by the Sea, *&c.* and that an Anchor was caſt on the Sand *infra, &c.* and that *T. S.* carried it away, whereupon Proceſs iſſued out of the Admiralty, directed to the Officer to ſummon him to appear at the Court of Admiralty, who accordingly appeared, and the *Lord Warden* required him to reſtore the Anchor, or to ſhew Cauſe why he detained it, which he refuſed to do, whereupon *per Conſiderationem Curiæ* he was *impriſoned quouſq; Anchoram præd' mihi reſtituerit vel* 40 l. *pro eadem mihi ſolvitur*; it was objected, that this Return was ill, becauſe it appeared, that this Anchor was *Wreck*, and by the Statute 15 *R.* 2. that is excepted out of the Juriſdiction of the Admiralty; beſides, it was upon the Sand *infra fluxum & refluxum maris*, and that is upon Land, and by Conſequence not within their Juriſdiction; for where a Ship is in Danger, and the Mariners cut the Cable, and leave the Anchor in the Sea, the Admiral ſhall not have it, becauſe the proper Owner is known. 2 *Roll. Rep.* 157. *Barnes*'s Caſe.

18. A *Charter Party* was made between *R. B.* and the Plaintiff at *Dunkirk*, and the Defendant as Attorney of *R. B.* by Vertue of a Letter of Attorney, proſecuted a Suit in the Admiraly againſt the now Plaintiff; adjudged, that if all the Matter was to be done at *Dunkirk*, then 'tis a Marine Cauſe, and the Admiral ſhould have Juriſdiction; but if Part was to be done in *England*, then 'tis otherwiſe. *Godb.* 385. *Cremer* verſus *Tookey.* *Latch* 188. *S. C.* See *Style.* 470. *Pool* verſus *Tryan.*

19. *Libel* in the Admiralty upon a Contract made at *Marſelles in France*; adjudged, that the Admiral hath no Juriſdiction, and that the Contract may be laid to be made at *Marſelles in Kent.* 2 *Brownl.* 11.

20. The

20. The Plaintiff was in Execution upon a Judgment obtained in the Admiralty againſt him upon a Contract made on Land in *New England*; and this appearing upon a Bill exhibited againſt the now Defendant, upon the Statute 2 *H.* 4. *cap.* 11. for ſuing in the Admiralty upon a Contract made at Land, he was diſcharged. *Cro. Car.* 438, 603. *Ball* verſus *Trelawny.*

21. A Man was taken by a *Warrant iſſued out of the Admiralty, and reſcued*, for which the Perſon who made the *Reſcous* was arreſted by a Proceſs out of the Admiralty; adjudged, that they might examine the Perſon for a Contempt, but they cannot proceed criminally againſt him for it. *Style* 171. *Tench* verſus *Harriſon*, and ſee *Ibid.* 340.

22. A *Dunkirker* took a *Frenchman's* Ship at Sea, and before it was brought to any of the Dominions of the King of *Spain*, it was driven by contrary Winds to *Weymouth in England*, and there the Ship and Goods were ſold; the *Frenchman* libelled in the Admiralty-Court againſt the Vendee, ſuggeſting that the Ship, *&c.* was taken by *Piracy*; the Vendee inſiſted, that it was taken by *Letters of Mart*; the Court inclined to grant a Prohibition, for it was not material, whether the Ship was taken by Letters of Mart, or not, ſince the Sale was *infra Corpus Comitatus. Trin.* 17 *Car. March* 110.

23. Upon a Suggeſtion for a Prohibition to the Admiralty, the Caſe was, one *Juſtice, and others, had three Parts* of a Ship lying in the *River Thames* at *Ratcliffe*, and *Janeways had the fourth Part*, and the Owners of *the three Parts* would have the Ship make a Voyage, but *Janeways* would not conſent to it, whereupon *they petitioned* the Judge of the Admiralty againſt *Janeways* to compel his Aſſent; and the Court by Way of *Stipulation* took a *Recognizance* of 200 *l.* Penalty to the Uſe of *Janeways*, that the Ship ſhould return from the intended Voyage within eighteen Months, or elſe the Owners of the three Parts ſhould pay to *Janeways* the Value of his *fourth Part:* The Ship proceeded in the Voyage but never returned, *Janeways* made his Wife Executrix and died; the Widow married one *Brown*, and then ſhe died Inteſtate; *Brown* takes out Adminiſtration to his Wife's Eſtate, and ſues *Juſtice* upon this Recognizance in the Admiralty, and had Sentence againſt him, upon which *Juſtice* moved for a Prohibition, for that the Court of Admiralty have no Power to make ſuch a *Stipulation* to bind the Intereſt of another againſt his Conſent; beſides, the Ship was *infra Corpus Comitatus* when the Recognizance was taken, and there was *no Suit depending* in that Court, only a Petition exhibited to the Judge, and the Plaintiff *Brown* can have no Title as Adminiſtrator to his Wife, for he muſt ſue as Adminiſtrator *de Bonis non of Janeway*, and not one alone, but all of them, becauſe the Recognizance is joint: *Hale* Ch. Baron held, that the Ship being *infra Corpus Comitatus*, the Admiralty hath no Juriſdiction, and that the Recognizance was void, becauſe it was not incident to any Suit, or depending upon it, for there was no Suit there, for if it had, then probably it might have been good, if ſuch Recognizances had been uſually taken; beſides, if there is but a probable Cauſe for a Prohibition, it muſt be granted *ex debito juſtitiæ*, for if granted where it ought not, the other Party hath a Remedy by *Conſultation*; but if denied where it ought to be granted, the Party is without Remedy. *Hardres* 473. *Juſtice* verſus *Brown.*

24. There was a Contract made at *Malaga* concerning the Lading a Ship; and upon a Libel in the Court of Admiralty there, the Breach aſſigned was, that the Defendant would not receive forty Buts of Wine in his Ship according to his Agreement, and that Court gave Sentence that the Wine ſhould be received, *&c.* which being refuſed, another Libel was brought in the Court of Admiralty here, reciting the former Sentence, and charging the Defendant with the Breach of it; and in a Prohibition it was ſuggeſted, that this Contract was made at Land; to which it was anſwered, that where Sentence is given in a *foreign Admiralty*, the Party may libel for Execution of that Sentence here, becauſe *all Courts of Admiralty in Europe* are governed by the Civil Law, which the Court agreed, but that in this Caſe the Sentence in the *foreign Admiralty* was not compleat, for it was no more than an Award, that the Wine ſhould be received in the Ship; now the Breach thereof being alledged in the Libel here, 'tis in Nature of an original Suit; and if ſo, tho' the Breach was at Sea in not receiving the Wine into the Ship, yet the Contract was on the Land, ſo a Prohibition was granted. *Sid.* 418. *Ivrado* verſus *Gregory.* 1 Vent. 32. 1 Lev. 267.

25. A *Dutch* Ship being *wreck'd* by Tempeſt in a Creek of the Sea, *infra Corpus Comitatus of Dorſet*; they who *ſaved* the Goods procured a Commiſſion out of the Admiralty to ſell them, pretending, that they were *Bona peritura*, thereupon the true Owners brought a *Superſedeas*; and upon producing the Libel in the Admiralty, prayed a Prohibition and had it, becauſe the Cauſe of Action did ariſe *infra Corpus Comitatus*, and by Conſequence the Court of Admiralty had no Juriſdiction; and if they ſhould be permitted in this Caſe, the Sale would be good, becauſe they are *Bona peritura. Sid.* 81. *Culliver* verſus *Brand.*

26. Suit in the Admiralty for *Mariners Wages*, but a Prohibition was granted, for where a Ship periſhes by *Tempeſt*, *Fire*, or is *taken by the Enemies*, the Mariners loſe their Wages, for otherwiſe they would not endeavour to preſerve the Ship. *Sid.* 179.

27. *Libel* in the Admiralty for *Mariners Wages againſt Two*, there being a Sentence and Execution againſt one of them, he paid the Money, and now they both moved for a Prohibition, upon a Suggeſtion, that the Contract was *made at Land*; it was denied as to him who had paid the Money, but granted as to the other. *Sid.* 331. *Walker* verſus *Adams.*

28. *Libel* in the Admiralty, upon an Agreement made with a *Maſter of a Ship by the Owners*, to find Mariners and Proviſion for them in ſuch a Voyage, and for refuſing to pay the Money after the Voyage performed, but a Prohibition was granted, becauſe this was a Suit upon a *Contract made at Land*, and by Conſequence the Admiralty had no Juriſdiction; but one Judge was againſt the

the Prohibition, upon the Authority of the Caſe. *Hill.* 8 *Car.* 1. *Cro. Car.* and *Hob.* 67. that where a Thing is of its Nature *Maritime* (as in this Caſe the *Mariners Wages* are) the Admiralty hath Juriſdiction, but thoſe Caſes were denied to be Law, and the Prohibition was granted. *Raym.* 3. *Woodward* verſus *Bonithan.*

29. In a Special Verdict in *Trover* for a Ship, Tackle and Furniture, the Caſe was, that the Ship was *Dutch built*, of which one *William Gault*, *a Dutch-man* was *Owner*; that in the War between *France* and *Holland* ſhe was taken as a *Dutch Prize*, and as ſuch condemned in the Court of Admiralty in *France*, and afterwards ſold to the Plaintiff; that at the Time when this Ship was taken as *Prize*, there was Amity between *France and England*; that the Owner at that Time was a *Dutch-man* born, but a *Denizen of England*, that his Mate and eight Mariners were *Engliſh-men*, and that he had two *Dutch-men* on board; and that the Defendant, as Servant to the ſaid *William Gault* (the Owner) took her from the Plaintiff to whom ſhe was ſold, as aforeſaid; the Queſtion was, whether the Sentence of the Admiralty in *France* ſhall be examined in this Action at Common Law; and adjudged, that it ſhould not, for tho' it was in the Dominions of another King, we ought to give Credit to it, otherwiſe they will give no Credit to the Sentences in our Court of Admiralty: The Way in this Caſe is to petition the King, who will Cauſe the Matter to be examined, and if he finds juſt Cauſe of Complaint, will ſend to his Ambaſſador in *France*, where the Sentence was given, and upon Failure of Redreſs will grant Letters of *Marque and Repriſal*, and Judgment was given for the Plaintiff. *Raym.* 473. *Hughes* verſus *Cornelius.*

30. By the Courſe of the Admiralty they Decree, that where there are *ſeveral Owners* of a Ship, and ſome are for freighting and ſome againſt it, that the Majority ſhall prevail, giving thoſe who diſſent *Caution* for their reſpective Parties againſt all Riſques, which was done in the preſent Caſe, and the Ship being loſt, they libelled for the *Caution* and had a Sentence; and upon a Motion for a Prohibition, ſuggeſting, that this Caution was given at Land, and that all Matters of Property are to be tried at the Common Law; a Prohibition was granted, tho' after * Sentence, and they were ordered to declare upon their Suggeſtion. *Mod. Caſes* 162. *Moor* verſus *Robotham.*

*Hob. 79.

31. *Libel* in the Admiralty againſt the *Maſter and Ship* which lay in the River *Thames*, for careleſly running over another Ship; the Defendant moved for a Prohibition, ſuggeſting the Fact done *infra Corpus Comitatus*; but the Plaintiff informing the Court that the Defendant could not be found, ſo as to appear to an Action at Common Law, the Court refuſed to grant a Prohibition, unleſs he would appear and give Bail. 2 *Salk.* 548. *Wharton* verſus *Pitts.*

Admittance. See **Copyhold.**

Advowſon.

What it is, and of Advowſons appendant. (A)

Of Pleadings where the Advowſon is appendant. (B)

(A)

What it is, and of Advowſons appendant.

1. WHEN the *Chriſtian Religion* was firſt eſtabliſhed in *England*, Kings began to build Cathedral Churches and to make *Biſhops*, and afterwards, in Imitation of them, ſeveral Lords, who had large *Seigniories*, founded particular *Churches* on ſome Part of their own Lands, and endowed them with the *Glebe*, reſerving to themſelves and their Heirs, a *Right of Preſentation* of a fit Perſon to the Biſhop when the ſame ſhould become void.

And this is called an *Advowſon*, and he who hath this Right to Preſent is called the *Patron*, becauſe 'tis preſumed that he who founded the Church will *avow* and take it into Protection, and be a Patron to defend it in its juſt Rights.

Therefore by the Common Law, the Right of Patronage is a real Right, fixed in the Founder of the Church, and his Heirs and Succeſſors, wherein they have as abſolute a Property as any other Man hath in his Lands and Tenements; and when Manors were firſt created, and Lands ſet apart to build a Church on ſome Part of the Manor, the Advowſon or Right of Preſentation to that Church became *appendant* to the Manor; and by a Grant thereof *cum pertinentiis* the Advowſon paſſed.

2. And as 'tis a real Right fixed in the Founder and his Heirs, ſo 'tis a temporal Inheritance, for it lieth in Tenure, and may be holden either of the King or of a common Perſon; of the King *in Capite*, or of a common Perſon by *Homage*, *Fealty*, *&c.*

A *Præcipe quod reddat* lieth of it, and a Common Recovery may be ſuffered of an Advowſon. *Popham* 22. *Crocker* verſus *Dormer*. 1 *Rep.* 56. *S. P.* 2 *Rep.* 74. *S. P.* 5 Rep. 40.

It may be forfeited by *Attainder of Treaſon or Felony*; it may be loſt by * *Uſurpation* and Plenarty for ſix Months; by Outlary, *&c.* 10 *Rep.* 55. *In the Chancellor of Oxford's Caſe.* The *Wife* ſhall be *endowed* by it, and the Husband ſhall be *Tenant by the Curteſy*; it may be divided between Coparceners, and the eldeſt Siſter ſhall have the firſt Preſentation; and by Deed it is transferable as other temporal Inheritances are. *Ibid.* * *By the Statute* 7 Ann. c. 28. *this is altered.*

3. As to the *Appendancy* 'tis always by *Preſcription*, and generally the Advowſons paſs with the Manors or Lands to which they are appendant, unleſs they are ſevered by ſome Grant, Deed, or other legal Act; and this Appendency muſt be to a Thing of ſome ſuperior Nature, as to the *Demeſnes of a Manor*, unto Honours, Caſtles, Lands, or other *corporeal* Things which may have a continual Subſiſtence, becauſe the *Advowſon* it ſelf is an Inheritance incorporeal, and therefore it cannot be appendant to other incorporeal Things, as to *Offices*, *Fairs*, *&c.* *Dyer* 70. *Plow. Com.* 169. 4 *Rep.* 37. in *Terringham's* Caſe.

4. If there is *Tenant in Tail* of a Manor, or if the Husband is ſeiſed thereof in Right of his Wife, and there is an *Advowſon appendant* to it, and either of them makes a Feoffment in Fee of the Manor, the Advowſon ſhall paſs. 1 *Rep.* 122. in *Chudleigh's* Caſe.

5. A *Vicarage* may be appendant to a *Rectory*, and by a Grant of the Rectory *& omnia tenementa parcell' & ſpectan' dictæ Rectoriæ*, the Advowſon of the Vicarage did paſs. *Dyer* 350.

6. Demiſe of a Manor to which an *Advowſon was appendant*, and did not ſay *cum pertinentiis*; adjudged, that the Advowſon did not paſs. *Cro. Eliz.* 18. *Higgins* verſus *Grant.*

7. An *Abbot* was ſeiſed of a *Capital Meſſuage* Time out of Mind, called by the Name of the *Manor of B.* to which an *Advowſon was appendant*; this *Meſſuage* came to *H.* 8. by the Diſſolution of Abbies, who granted it to *B. B.* who made a Feoffment of *the Manor* to *E. W.* and *Livery and Seiſin* upon the Demeſnes; afterwards the ſaid *B. B.* granted the Advowſon to another, and then the Tenant of the Manor attorned to *E. W.* adjudged, that this was a ſufficient *Manor*, to which an Advowſon might be appendant, and that in a legal Conſtruction 'tis appendant to all the Manor, but moſt properly to the *Demeſnes*, out of which it was at firſt derived, and that in this Caſe it paſſed incluſive in the *Livery*, for the *Attornment* was made after the Grant of the Advowſon to another, yet it being appendant to the Manor, it ſhall paſs with the Feoffment, for the Attornment ſhall *relate* to the Livery. 1 *Leon.* 207. *Long* verſus *Hemmings.* 1 And. 222, 226.

8. And as an *Advowſon* may be *appendant* to a Manor, ſo it may to an Acre of Land, Parcel of the Manor, but it cannot be appendant to the *Rents or Services* of the Manor. 5 *Ed.* 6. *Dyer* 70. *Iſham's* Caſe.

9. The King was ſeiſed of a *Manor* to which an *Advowſon* was *appendant*, and he made a Leaſe of the Manor to *R. B.* excepting the Advowſon, and afterwards granted the ſaid Manor to him in Fee *cum pertinentiis*; adjudged, that by thoſe Words the Advowſon did paſs, tho' it was not mentioned, becauſe it was appendant to the Manor. 10 *Rep. Whiſtler's* Caſe. 1 *Bulſt.* 33. *Walter* verſus *Bould. S. P.*

10. *Advowſon appendant to a Manor*, which deſcended to ſeveral *Coparceners*, who made Partition of the Manor without mentioning the *Advowſon*, 'tis ſtill appendant. 8 *Rep.* In *Wiat Wild's* Caſe.

11. *Two Parts* in three of a Manor to which an *Advowſon was appendant*, was ſeiſed by the King for *Recuſancy*, who made a Leaſe thereof, *with the Appurtenances, and all Profits and Hereditaments to the ſame belonging*; yet upon the next Avoidance it was held, that the King ſhould Preſent; for notwithſtanding the Grant, the Advowſon was ſtill appendant to the Manor. *Hob.* 127. *Chancellor of Cambridge* verſus *Walgrave. Moor* 872. *S. C.*

12. The *Advowſon of a Vicarage was appendant to a Prebend*, and a Leaſe was made of the *Prebend, with all Commodities, Emoluments, Profits and Advantages, and Appurtenances* to the ſaid *Prebend* belonging; adjudged, that the Advowſon of the Vicarage did not paſs, becauſe by thoſe Words Things of Gain are implied, which is contrary to the Nature of an Advowſon, and where 'tis once appendant it ſhall not paſs without ſpecial Words. *Hob.* 304. *London* verſus *The Church of St. Mary Southwell.*

13. The *King was ſeiſed of a Manor* to which an *Advowſon* was appendant, and the Church being void, one who had no Right preſented, and his Clerk was in Poſſeſſion ſix Months without the Knowledge of the King, who granted the Manor with the Advowſon to another; then the Incumbent who came in by *Uſurpation* died; it was adjudged, that the Grantee ſhall preſent, becauſe the Advowſon was always appendant to the Inheritance, and ſhall paſs with it to the Grantee, for it was not diſcontinued by this Uſurpation upon the King, but in the Caſe of a common Perſon it had been diſcontinued, until he hath recontinued it in a *Writ of Right of Advowſon. Hob.* 140.

14. The King being ſeiſed of a Manor to which an Advowſon was appendant, granted the *Manor* to *B. B.* for Life; and afterwards he granted the ſame *Manor* to *E. W.* after the Death of *B. B.* to have and to hold the ſame *una cum advocatione*, *&c.* adjudged, that the Advowſon did not paſs to the ſecond Grantee, becauſe an Advowſon in Poſſeſſion cannot be appendant to a Reverſion after an Eſtate for Life. *Hob.* 161. See 11 *Rep. Liford's* Caſe.

15. Where an Incumbent purchaſeth the Advowſon in Fee, and deviſeth that his Executor ſhall preſent upon the next Avoidance, and giveth the Inheritance to another, 'tis good. 2 *Cro.* 371. *Pynchin* verſus *Harris*. *See* Preſentation. (A) 4. *S. C.*

16. The Queen being ſeiſed of a Manor to which an Advowſon was appendant, granted the Manor *una cum advocatione* to *W. R.* the Church being at that Time void; adjudged, that notwithſtanding this Grant ſhe ſhall preſent *pro hac vice*. *Moor* 249. *Sir Thomas Gorge's* Caſe.

17. In a *Quare Impedit*, the Plaintiff declared, that he was ſeiſed of the *Manor* of *Nether Eprington in Com' War'*, and of the Advowſon of the *Vicarage* to which it was appendant, *&c.* the Defendant made a Title to himſelf of the Advowſon as *appendant to the Rectory impropriate of Nether Eprington*, and traverſed the Appendancy to the *Manor*; and upon Evidence to the Jury, at a Trial at Bar, the Court directed, that the Advowſon of a *Vicarage* was of common Right appendant to the *Rectory*, but that it might be in ſome Caſes appendant to a *Manor*, as where the Rectory it ſelf, before the *Appropriation* of it to a Religious Houſe, was appendant to a Manor, the Advowſon of the Vicarage upon the *Appropriation* of the Rectory might be reſerved to the Patron, and ſo be appendant as the Rectory was; and tho' the Inſtrument of *Appropriation* cannot be produced to ſhew this Matter, yet the Uſage and Manner of the Preſentation, and by whom, ſhall be a ſufficient Evidence of its Appendancy to the Manor; now, in the principal Caſe, *Sir Geo. Sherley* had the *Nomination*, and the *Abbot of Kenelworth* the Preſentation, before the Diſſolution, ſo that the *Nomination* is the Subſtance of the Advowſon, for the Abbot could not Preſent without a Nomination, and if ſo, then the Advowſon of this Vicarage may be appendant to the Manor; but the Iſſue being taken upon the Appendancy of the Advowſon of the Vicarage generally; and the Proof being, that the *Nomination* was appendant; the Queſtion was, whether that Evidence would maintain that Iſſue; and thereupon a Special Verdict was found. *Moor* 894. *Sir George Sherley* verſus *Underhill*. *Poſtea* Quare Impedit. (F) 17. *S. C.*

(B)

Of Pleadings where the Advowſon is appendant.

1. ADjudged, where a Grant of an Advowſon was pleaded to one, to the Uſe of another in Tail, that the *Ceſtui que Uſe* need not ſhew this Deed of Grant by a *Profert hic in Curia*, becauſe the Deed belongs to the Grantee, but 'tis ſufficient, if he ſet forth that it was granted to him by Deed. *Hill. 6 Jac. Earl of Huntingdon* verſus *Sir Anth. Mildmay*. *Dyer* 277. *Eſcott's* Caſe. *S. P.*

2. Where a Man is ſeiſed of an Advowſon appendant to a Manor, and being diſturbed to preſent, he brings a *Quare Impedit*, he need not ſet forth how his Title to preſent doth commence, for the Advowſon being appendant, 'tis plain it muſt be by Preſcription. 13 *Eliz. Dyer* 299. *Eveleigh's* Caſe.

Affidavit.

(A)

1. WHere *Affidavits* are taken by *Commiſſioners in the Country*, according to the Statute 29 *Car.* 2. *cap.* 5. and 'tis expreſſed to be in a Cauſe depending between *T. P.* and *R. W.* and there is no ſuch depending, thoſe *Affidavits* cannot be read, becauſe the Commiſſioners have no Authority to take them; and in ſuch Caſe, if they are falſe, the Party cannot be convicted of Perjury; but if there is ſuch a Cauſe in Court, and *Affidavits* are taken concerning ſome collateral Matter, thoſe may be read. 2 *Salk.* 461. *The King* verſus *Jones*.

2. Upon a Rule to ſhew Cauſe, *&c.* the Plaintiff offered ſeveral new *Affidavits*; ruled by the Court, if they contain new Matter, they ſhall not be read, but if the Matter tends to confirm what had been alledged and ſworn before the Rule was made, then they may be read. 2 *Salk.* 461. *Salloway* verſus *Whorewood*.

3. In *Hill. 7 Will. 3. B. R.* two were convicted of a Crime, for which they ſtood in the Pillory, and afterwards the Court would not allow their *Affidavits* to be read; but in *Mich.* 4 *Annæ*, a Man was convicted of *Perjury*, and afterwards a Motion was made to ſet aſide a Judgment on his *Affidavit*, for that it was irregularly obtained, and the Court inclined that it might be read. 2 *Salk.* 461.

Alehouſes.

(A)

Of Alehouſes, Inns and Taverns. See *Juſtice of Peace.*

1. INformation *tam quam, &c.* for ſelling *Wines by Retail in the City of York, without a Licenſe*, by Reaſon whereof the Defendant forfeited 5 *l.* a Day, *&c.* The Jury found a Special Verdict, to this Effect. (*viz.*) they find a Writing *in hæc verba*, by the *Mayor, Aldermen, and Commonalty of York*, by which *Licenſe* was given to the Defendant to *retail Wines* in his Houſe, *&c.* but not in expreſs Words to keep a *Tavern*; that by Colour of this Writing, the Defendant (who had not other Licenſe) ſold Wines to be drank in his Houſe, *&c.* The Queſtion was, whether this was a ſufficient *Licenſe* to exempt him from the Penalty of the * Law, it being only a Licenſe to *retail* Wines, *&c.* but not to keep a *Tavern?* and adjudged, that it was not, tho' he was called a *Vintner* in the Writing, and that his was one of the *eight Taverns in York*; becauſe *Tavern Keeping*, and *Retailing Wines*, are Things of a diſtinct Nature, they have diſtinct Appellations and Penalties in the Statute, and they cannot be intended to be the ſame; for if they ſhould, the Deſign of the Act would be evaded, both as to the Number of Tavern-keepers, and as to the Places wherein they live, becauſe *Retailers of Wine* are not reſtrained to any certain Number or Place, but *Tavern-keepers* are; beſides, ever ſince the making the Statute 7 *Ed.* 7. when a Man had a *Licenſe* to keep a *Tavern*, the Word *Tavern* was always expreſſed in the *Licenſe*; 'tis true, in this Caſe the Jury found, that the Defendant kept *one of the eight Taverns in York*, yet they found no * *Licenſe* to enable him ſo to do. *Hardr.* 338. *Stevens* verſus *Duckworth.*

* 7 Ed. 6. cap. 5. Par. 4. 12 Car. 2. cap. 25. 1 ar. 1.

* *Retailers of Brandy and Spirits, muſt be licenſed, as Alehouſekeepers are, and are under the ſame Penalties*, per Stat. 12 & 13 W. 3. cap. 11. *But Diſtillers and Shopkeepers, who deal more in other Goods than in Strong-Waters, and do not ſuffer Tipling in their Houſes, ſhall not be licenſed.* Stat. 1 Annæ. cap. 14.

2. *Indictment* for ſelling *Ale* without *Licenſe*, quaſhed, becauſe where a *Statute* gives a particular Penalty, the Party ſhall not be puniſhed by *Indictment.* * *Mod. Caſes.*

3. Two Judges were of the ſame Opinion, *Trin.* 4 *Will.* 3. but *per Holt Chief Juſtice*, an Indictment being a ſummary Way of proceeding, is more Beneficial for the Subject, and therefore it ſeems reaſonable that ſuch a Method ſhould be purſued; 'tis prohibited by the Statute 22 *Car.* 2. to travel with more than five Horſes at Length: This is a new Law, and a new Offence, and yet an Indictment will lie againſt the Offender, tho' a particular Puniſhment is directed by the Statute. 4 *Mod.* 144. *The King* verſus *Marriott.*

Alien.

Who is an Alien, and who not. (A)
What Acts he may do. (B)
Of Aliens, Denizens, and Naturalized. (C).

(A)

Who is an Alien, and who not. See *Trials per medietatem linguæ.*

1. AN *Alien* is he, who was born out of the *Allegiance* of the King, and under the Ligeance of another Prince or State; but he, who is born *ſub fida ligeantia & Obedientia Regis*, is not an *Alien*; and therefore thoſe Perſons who were born in *Normandy, Turney, Calais, &c.* whilſt thoſe Places were under the Dominion of our Kings, are not *Aliens*, but natural born Subjects. 7 *Rep.* 22. *Dyer* 224

2. In *Aſſiſe* for certain Tenements in *Shore-ditch*; the Defendants pleaded in Bar, that the Plaintiff, *Robert Calvin*, was an *Alien*, born on the *5th Day of November, Anno* 3 *Jac. at Edenburgh in Scotland, ac infra ligeantiam Domini Regis Regni ſui Scotiæ, ac extra ligeantiam Regni ſui Angliæ*; and upon Demurrer to this Plea, the Queſtion was, whether the Plaintiff born

born in *Scotland*, ſince the Crown of *England* deſcended to King *James*, was an *Alien* born, and ſo diſabled to bring any Action real for Lands here; and adjudged, that he was not an *Alien*. 7 *Rep. Calvin's* Caſe.

3. A Bill was exhibited in the Star-Chamber againſt *William Courteen and* 160 *Dutchmen*, for Buying and Tranſporting ſeveral Sums of Money, who pleaded the *General Pardon* 7 *Ja.* The Queſtion was, whether thoſe who were neither *naturalized*, nor made *Denizens*, were capable of the Pardon? The *Chief Juſtice Hobart* held, that the *Dutch* living here under the King's Protection, and being *Alien Amies*, were truly under the King's Subjection, and therefore were comprehended under thoſe Words in the Preamble of the Act, *Of Loving and Obedient Subjects*, but they could not properly be called *Natural Subjects*; and if ſuch *Alien Amies* commit Treaſon, the Indictment ſhall be, that it was done *contra Dominum Regem*, but not *contra Naturalem Dominum*; and it ſhall conclude *contra ligiantiæ ſuæ debitum*. *Hob.* 271. *Courteen's* Caſe.

Cro. Car. 601. March 91.

4. An *Engliſh* Merchant died in *Poland*, leaving his Wife with Child, who was an Alien; this Child was adjudged a Subject born; for in this Caſe *partus non ſequitur ventrem*; but the Child ſhall be of the Condition of the Father. *Cro. Car.* 437. *Bacon* verſus *Bacon*.

5. *Information* for not paying the Cuſtom for *Linen-Cloth*; the Caſe was, the Defendants were born in this Realm, their Father was an *Alien*, but their Mother was *born* here; and the Queſtion was, whether they ſhould pay Cuſtom as *Aliens*, or not? for that the Attorney General affirmed, that it had been lately held in the Exchequer, that the *Iſſue of Aliens for the firſt Generation, being Merchants*, ſhould pay *Aliens* Duties; but in this Caſe the Mother was an *Engliſh Woman*, ſo that the Defendants were not the Iſſue of *Aliens*. *Hardr.* 335. *Blake* verſus *Vanderberg*.

(B)

What Acts he may do, what not.

He may ſuffer a Recovery, and it will Bar the Eſtate-tail. 4 *Leon.* 84. * 1 And. 25. S. P.

AN Alien Enemy can have no real or perſonal Action, for or concerning any *Land*; but in every ſuch Action the Defendant may plead, that he was born in ſuch a Countrey, *extra Ligeantiam Regis, &c.* and Demand Judgment if he ſhall be anſwered. 7 *Rep.* 16.

2. An *Alien Amie* may by the Common Law, and by any lawful Means be poſſeſſed of Goods and * Chattels here, and may maintain an Action for the ſame; but he cannot *purchaſe Lands*, or maintain a *real Action*, unleſs it be for an *Houſe* for his neceſſary Habitation, this being for the Benefit of Trade. 7 *Rep. in Calvin's* Caſe. 1 *Brownl.* 41. *S. P.* 6 *H.* 8. *Dyer* 8. *S. P.*

3. In *an Action of Debt* brought by an *Adminiſtratrix*; the Defendant pleaded, that the Plaintiff was an *Alien, born in Gant*, under the Allegiance of the King of *Spain*, an Enemy to the Queen: Upon Demurrer to this Plea, it was inſiſted for the Plaintiff, that the Action being brought by her as * *Adminiſtratrix*, tho' ſhe was an *Alien*, it was good, becauſe ſhe was not to recover in her own Right, but in the Right of another, and to his Uſe; and it was a Queſtion, whether the King of *Spain* could be called an Enemy till War was proclaimed. *Paſch.* 31 *Eliz. Owen* 45.

* *The Action not good.* Cro. Eliz. 142.

4. The *Spaniſh Ambaſſador* exhibited his Bill in Chancery againſt *Sir Richard Bingley*, to have a Diſcovery of ſeveral Goods, which he ſet forth, as belonging to the *Subjects* of his Maſter *generally*, without alledging any Perſons certain; and upon a Demurrer to this Bill it was referred by the *Chancellor* to ſome of the Judges; it was reſolved by them, that the *Ambaſſador*, as Procurator General of all the Subjects of *Spain*, could not bring the Bill, becauſe the King of *Spain* could not make a *Procurator* General of all, or any of his Subjects, without their Conſent; 'tis true, he may appoint an *Ambaſſador*, who is a Publick Miniſter for the King, and not for his Subjects, otherwiſe than as it concerns the King and his Miniſter to protect them; and therefore he may mediate, proſecute, and defend for them at the Council-Table, which is in the Nature of a Court of State. Therefore in this Caſe the Chancellor ordered a Bill and Anſwer to be filed by Conſent only, that Examination of Witneſſes might be taken, and then to determine the Matter by Way of Arbitration, and not by a formal Decree. *Hob.* 78. *Don Diego Servienti de Acuna*, the *Spaniſh* Ambaſſador, verſus *Sir Rich. Bingley*.

5. *Caſe, &c. by an Alien*, for Words ſpoken by the Defendant, *(viz.) that he was a Bankrupt*: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff was an *Alien ſub ligeantia* of another Prince, and *extra ligeantiam Domini Regis*; and tho' ſuch an *Alien* may have an Action here for his *Goods or Merchandiſe*, and may have an *Houſe* for his Habitation, yet he cannot maintain a perſonal Action for defaming him; but adjudged, that he may; for *Merchants Strangers* are enabled to Trade here, and by Conſequence they are entitled to all perſonal Actions for the Support of their Credit and Trade, and other Actions likewiſe, as *Aſſault and Battery*, for Aſſaults done upon themſelves. *Trin.* 9 *Jac.* 1 *Bulſt.* 134. *Tirlat* verſus *Morris*. *Moor* 431. *Watford* verſus *Maſham. S. P.*

1 Salk. 46.

6. *Debt* againſt the Defendant, as Executrix of *W.* the Defendant pleaded in *Bar*, that *W.* the Teſtator was an *Alien* born in *France*, and came hither without the King's Licenſe; the

Plaintiff replied, that *W.* from the Time of the Making the Bond, upon which this Action was brought, to the Time of his Death, continued in *England*, with the *Leave*, and under the Protection of the King, *& petit judicium*, and that the Defendant *ad Breve & narrationem reſpondeat*; and upon a general Demurrer to this Replication, the Plaintiff had Judgment, that the Defendant ſhould anſwer over, tho' he had pleaded *in Bar*, and the Plaintiff had concluded his Replication *in Abatement*. 1 *Lutw.* 11. *Wells* verſus *Williams*. 1 *Lutw.* 34, 35.

7. The Defendant was indicted on the Statute 1 *Rich.* 3. *cap.* 9. for uſing a Trade, being an *Alien*, and being found guilty, it was moved to quaſh the Indictment, for that it did not ſet forth, that he did uſe it as a *Servant*, or a Subject, but only *contra formam Statuti*; beſides the Jury did not find, that he had any Goods, ſo no Judgment can he given, becauſe that is only a Forfeiture of Goods. *Sid.* 214. *The King* verſus *Bowers*.

8. *Debt for Rent* againſt an *Adminiſtratrix* of one *Levermere*, upon a Leaſe of a Houſe made to the ſaid *Inteſtate* for ſeven Years, reſerving 20*l. per Annum*, payable Quarterly: The Defendant prayed *Oyer* of the Indenture, and pleaded the Statute 32 *H.* 8. *cap.* 16. by which 'tis enacted, *That all Leaſes made of any Dwelling-houſe or Shop in the King's Dominions to a Stranger, Artificer or Handy-craft Man, born out of the King's Obeyſance, not being Denizen, ſhall be void*; then ſhe ſets forth, that the *Inteſtate Levermere*, at the Time of the Leaſe made, was a Stranger Artificer, born out of the King's Obedience (*viz.*) at *Paris* in the Kingdom of *France*, and not made a *Denizen*, and ſo the Leaſe *virtute actus præd'* is void; and upon Demurrer to this Plea, it was adjudged ill, becauſe the Defendant did not aver, that the Houſe demiſed was a *Dwelling-Houſe*, for the Intent of the Act was to provide againſt Strangers Artificers working here, and uſing Trades to the Prejudice of the King's Subjects in the ſame Trades, but not to hinder alien Artificers, to live here as Gentlemen upon their own Eſtates; for before this Statute, all Leaſes made to Aliens were good, and the Statute makes none void, but thoſe of *Dwelling-Houſes or Shops*. 1 *Saund.* 7. *Jevens* verſus *Levermere*. See 3 *Cro.* 157. Sid. 308.

9. *Debt for Rent, &c.* the Defendant pleaded the Statute 32 *H.* 8. by which *Leaſes, &c. made to Aliens Artificers are void*, and that he was an Alien born *at Paris, &c.* and averred the three Points required by that Statute (*viz.*) that this Leaſe was of a *Manſion-Houſe*, that he is an *Alien*, and that he is an *Artificer*; the Plaintiff replied, that he (the Defendant) is not an *Alien Artificer*; and upon a Demurrer to this Replication, it was objected, that it was objected, that it was double, (*viz.*) that the Defendant is an *Alien Artificer*, for if he was neither, he was out of the Statute; but this was over-ruled, there was a better Exception, (*viz.*) the Plaintiff ſet forth, that the Defendant was not an *Alien Artificer*, but he ſhould have gone on, and ſet forth a Place in *England* where he was *born*, and for this Omiſſion the Judgment was againſt him. *Sid.* 357. *Freeman* verſus *King*.

10. *Debt for Rent* of a Houſe, *&c.* The Defendant pleaded the Statute 32 *H.* 8. *cap.* 16. *That all Leaſes of Dwelling-Houſes, or Shops, made to any Stranger or Alien Artificer, ſhould be void*, and ſets forth, that he is a *Vintner an Alien Artificer*; and upon a Demurrer to this Plea, it was held ill, for *per Curiam*, this Stat. refers to another made *Anno* 1 *R.* 2. *cap.* 9. by which *Alien Artificers* are prohibited to exerciſe any *Handicraft Trade in England*, unleſs as Servant to a Subject skilful in that Art, on Pain of Forfeiture of his Goods; ſo that 'tis plain, they who uſed any *Manual Occupation* were reſtrained, becauſe it might be prejudicial to the King's Subjects; but the *Myſtery and Occupation of a Vintner* chiefly conſiſts in mingling Wines, which is not an *Art*, but a *Cheat*. 3 *Mod.* 93. *Bridgham* verſus *Frontee*.

11. *Indebitatus Aſſumpſit, &c.* The Defendant pleaded, that the Plaintiff was *alienigena in regno Franciæ ſub ligeantia adverſarii Domini Regis oriundus*, inſtead of *natus*; and upon a Demurrer to this Plea, it was objected, that it was not a direct Affirmative, that the Plaintiff was an *Alien*, for it ſhould have been *natus*; but *per Curiam*, that Word is ſupplied by *Oriundus*. 4 *Mod.* 405. *Derrier* verſus *Arnand*. Raſt. Ent. 252 B. 605. B.

12. A Deviſe of Land to an Alien is void; ſo adjudged in 1 *Lev.* 59.

(C)

Of Aliens, Denizens and Naturalized.

1. A *Liens Denizens*, are thoſe who are made ſo by *Letters Patents*, but *Aliens naturalized* are ſo by *Act of Parliament*, the one will not make the Heir inheritable to his Anceſtor, but the other will; as for inſtance, *Cornelius Godfrey* being an Alien born, had Iſſue his eldeſt Son born in *Flanders*; afterwards the Father was made *Denizen*, and had Iſſue his youngeſt Son born in *England*, and died, then the eldeſt Son was *naturalized*, and having made a Leaſe for Years to *Dixon*, rendring Rent, he died without Iſſue, and the younger Brother brought an Action of Debt for the Rent arrear, and adjudged that he might, for by the *Naturalization* of the elder Brother, he was capabale to *purchaſe*, and by Conſequence to make a Leaſe, and that his Brother was inheritable to him, and ſo the Action brought by him was good. *Godb.* 275. *Godfrey* verſus *Dixon*. Palm. 13. 2 Cro. 539. 2 Roll. Rep. 92.

2. If an *Alien* is made *Denizen* and *purchaſeth* Lands, and dieth without Iſſue, it ſhall eſcheat to the Lord; but if an *Alien Merchant* purchaſeth a *Leaſe for Years* of any Thing but

an

an Houſe, the King upon Office found ſhall have it; and ſo he ſhall have the Houſe if the Alien leave the Kingdom, and not his Executors. *Sir John Croft's* Caſe.

4 Leon. 5. Palm. 19.

3. An *Alien* had Iſſue *two Sons*, one of them purchaſed Lands in Fee, and died without Iſſue, the other ſhall not be his Heir, becauſe there was no inheritable Blood between the Father and them; and where the Son cannot be Heir to the Father, there one Son cannot be Heir to another; but if a Man hath *two Sons*, and is afterwards *attainted*, and then one of them purchaſeth Lands, and dieth without Iſſue, in ſuch Caſe the other Son ſhall be Heir to his Brother, becauſe by the Attainder the Lineal Blood was attainted, and not the Blood Collateral which was between the Brothers. *Mich.* 41 *Eliz. Hobbie's* Caſe. *See* Deſcent.

4. If an *Engliſhman* and an *Alien* purchaſe Lands *jointly*, and the *Alien* die, it was a Queſtion, whether the *Engliſhman* ſhould have the whole by Survivorſhip, becauſe they were Jointenants till Office found, but this is denied by others, becauſe if the Freehold ſhould be in the *Alien till Office found*, then he might have an Action of Treſpaſs, for a Treſpaſs done on the Land; but 'tis plain an Alien cannot maintain ſuch an Action. *Dyer* 283. *Goldsb.* 29. *Mich.* 29 *Eliz.* *and* 5 *Rep. Page's* Caſe.

5. *In Ejectment*, the Caſe was, the Teſtator deviſed an Houſe to his Wife for Life, Remainder to *W. R.* (who was an *Alien*) if he ſhould be then a *Denizen*, and a Perſon capable to take, if not, then to the Heirs of his Body, after the Death of the Wife, *W. R.* enter'd, and the Remainder being limited over to the Maſter and Wardens of the Free-School of *St. Ollaves* in *Southwark*; they enter'd and brought an Action, ſuppoſing that *W. R.* was an *Alien*, and having ſold the Eſtate, was now dead without Iſſue: It was given in Evidence for the Defendant, that *W. R.* was a * *Denizen*, becauſe he called himſelf ſo in the Conveyance which he made of the Houſe; beſides, he *exerciſed a Trade*, which by Implication proves him to be a *Denizen*; but adjudged, that ſince a *Denizen* cannot be made but by *Letters Patents*, or by Act of Parliament, the Proof that he is ſo muſt be by Matter of Record; and the Defendant having failed in ſuch Proof, Judgment was given for the Maſter and Wardens of the Shool. 2 *Bulſt.* 33. *Caſe of the Free-School of St. Ollave.*

* *A* Denizen *may purchaſe Lands, but his Heir cannot take by* Deſcent; *An* Alien naturalized *may* Purchaſe, *and his Heir ſhall take by Deſcent.* 2 Roll. Rep. 93.

9 & 10 Will. 3. cap. 20.

6. By the Statute 9 & 10 *Will.* 3. The Children of *Officers* and *Soldiers*, and of other the *natural Subjects*, born beyond Sea during the War with *France*, were naturalized.

11 & 12 Will. 3. cap. 6.

7. By the Statute 11 & 12 *Will.* 3. The natural born Subjects may inherit the Eſtates of their Anceſtors Lineal or Collateral, tho' their Fathers or Mothers were *Aliens*.

8. By an Act made 7 *Annæ*, Foreign Proteſtants are naturalized, who ſhall take and ſubſcribe the Oaths, and make and repeat the Declaration appointed by an Act 6 *Annæ*; and that all Children of natural born Subjects, tho' born out of the Ligeance of the Queen, ſhall be adjudged and taken to be natural born Subjects of this Kingdom.

Alimony.

(A)

1. A Man was ſued in the Spiritual Court for beating his Wife, and there was a Sentence againſt him to pay 3 *s. per Week for Alimony*, and ſeveral Fines were impoſed on him for not performing the Sentence; and afterwards the Court ordered him to enter into a Recogniſance for the Performance of it, which he refuſing, was committed; but upon a Motion to the Court of King's Bench, they granted a Prohibition, and upon an *Habeas Corpus* brought he was diſcharged. *Trin.* 11 *Jac. Agar's* Caſe.

2. The Husband lived ſeparate from his Wife, ſhe petitioned the *Juſtices of Aſſiſe*, and they referred the Matter to the *Biſhop of Bangor*, who ordered, that he ſhould pay 10 *l. per Annum* to her, which Order was confirmed by a Decree in the *Council of the Marches of Wales*; the Huſband diſobeyed the Decree, they ſent a Meſſenger to apprehend him, and they ſequeſtred his Goods and the Profits of his Lands; but a Prohibition was granted, becauſe in ſuch Caſes they have only Power to *Excommunicate*, and that the Eccleſiaſtical Court is the proper Court for *Alimony*. *Hetl.* 69. *Sir John Owen's* Caſe.

3. *Libel* in the Spiritual Court for *Alimony*, for that the Husband beat her ſo much that ſhe could not live with him; in this Caſe a Prohibition was denied, and it was held, that a Wife may have Sureties of the Peace for unreaſonable Beating her. *Moor* 874. *Sir Tho. Seymour's* Caſe.

4. The Wife ſued her Husband in the High Commiſſion Court for a *Maintenance*, but a Prohibition was granted, becauſe the *Spiritual Court* is the proper Place in ſuch Caſes; beſides, the not allowing her a *Maintenance*, is not an Offence within the Statute 1 *Eliz.* but a Neglect of his Duty, and a Breach of his Vow. 12 *Rep.* 30. *Sir Marmaduke Langdale's* Caſe. *March* 80. *Sir Edw. Powell's* Caſe. *S. P.* *Cro. Car.* 161. *Drake's* Caſe. *S. P.*

Amendment.

Original and judicial Writs amendable. (A)
Original Writs not amendable. (B)
Declarations and Rolls amendable. (C)
Declarations and Rolls not amendable. (D)
Records and *Poſteas* amendable. (E)
Records and *Poſteas* not amendable. (F)
Iſſues, Verdicts, and Judgments amendable. (G)
Iſſues, Verdicts, and Judgments not amendable. (H)
Fines and Recoveries amendable. (I)
Fines and Recoveries not amendable. (K)
Indictments amendable. (L)

(A)

Original and judicial Writs amendable. See *Action on the Caſe.* (q) 7. Poſtea (E) 6. *Error* (E) per totum.

1. IN a *Formedon* brought upon a Patent made by *H.* 7. the four Capital Letters of the four firſt Words were left out, (*viz.*) *H. R. F. A. (i. e.) Henricus Rex Franciæ, Angliæ, &c.* and this was done, that there might be the more room to have the Words flouriſhed with Gold and painted; and the Patent was adjudged good, and that thoſe Letters ſhould be added. *Dyer* 342. *Mountford* verſus *Diglie.*

2. *Error* to reverſe a Judgment in *Treſpaſs*, for that the Writ of Enquiry was directed to the Sheriffs of *London quod inquirant*, when it ſhould be *quod* * *inquirerent*; alſo it was, that they *inquirant per ſacr'um proborum, &c. De Civitate præd'*, when it ſhould be *de Balliva*, and there was no City mentioned before; adjudged, that the firſt was amendable, for it was the Default of the Clerk, and that the other was well enough, for it was ſometimes *de Civitate*, and ſometimes *de Balliva. Cro. Eliz.* 657. *Lewſon* verſus *Rudleſton.* * Poſtea 26. S. P.

3. The Caſe was, a *Common Recovery* was ſuffered, but the *Writ of Entry* either by being wet or ill Keeping, was ſo much defaced, that in ſome material Places it was not legible, but in the Roll it plainly appeared what Things were in Demand, and ſo likewiſe in the *Habere facias Seiſinam*; and upon Conſideration of the Statute 8 *H.* 6. *by which Power is given to the Juſtices to amend Writs and Records in Affirmance of Judgments, where it ſhall appear to them to be the Miſpriſion of the Clerk*; it was ruled, that this Writ ſhall be amended, becauſe the *Cuſtos Brevium* is the Clerk of the Court in whoſe Cuſtody this Writ was kept and defaced, and by what ever Means it happened, 'tis a Miſpriſion, (*viz.*) 'tis an Offence and a Default in the Clerk, which as to this Matter is the ſame Thing as a Miſpriſion, but if the Parchment had been eaten by Rats or deſtroyed in Part, it could not have been amended. 1 *And.* 79. *Earl of Arundel* verſus *Lord Lumley.*

4. If an *original Writ* wants *Form*, or if there is *falſe Latin* in it, or if it *varies from the Regiſter in Point of Form*, the Judgment ſhall not be ſtayed after a Verdict, but the ſame is amendable. 4 *Rep.* 45. *Freeman*'s Caſe. *Moor* 5. *Vaughan* verſus *Lord Burgh. S. P.* 1 And. 24.

5. A Note was delivered to the *Curſitor* to make an Original againſt *B. B. Militem*, and inſtead of that *Addition*, he put in *Generoſum*, and in all the Proceedings he was named *Militem*; adjudged, that the *negligent Omiſſion or Addition* of any Thing which the Clerk ought to have added or omitted of Courſe, ſhall be amended. 8 *Rep. Blackamore*'s Caſe.

6. In Treſpaſs upon the General Iſſue pleaded, one of the Jurors of the principal Panel appeared at the Aſſiſes, and no more; and upon the Prayers of the Plaintiff, a *Tales* was awarded, and the Sheriff returned a Panel in this Manner: ſſ. *Nomina decem talium*, and under it he returned the Names of *eleven* Jurors; adjudged, this was only a *Miſpriſion of the Clerk*, and the Word *Decem* was put out, and then the Title was *nomina talium, &c.* 4 *Rep.* 102. *Denbawd*'s Caſe. 2 *Cro.* 316. *S. C.* By the Name of *Denbawd* verſus *Woodley.* Tales. (A) 4. S. C.

7. *In Ejectment, &c.* after a Trial it was moved in Arreſt of Judgment, that in the Concluſion of the *Venire facias* it was thus, *Et habeas ibi hoc Breve*, when it ſhould have been *& habeas ibi nomina juratorum & hoc Breve*, ſo that the Words *Nomina juratorum* was left out; but adjudged, that the *Venire facias* ſhall be amended by the Roll. *Hob.* 68. *Pridle* verſus *Maſſy.*

8. *In Treſpaſs*, there was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment, that the *Venire facias* was directed *Vicecomiti, &c.* leaving out the *County* of which he was Sheriff; but becauſe the Roll was Right, and it being in a judicial Writ it was amended. 2 *Cro.* 78. *Lea* verſus *Lacons.*

9. *Eject-*

9. *Ejectment, &c. ex dimiſſione B. B.* and the Original was *ex Diviſione B. B.* there was a Verdict for the Plaintiff; and upon a Motion in Arreſt of Judgment it was amended. *Brownl.* 130. *Marſh* verſus *Sparrey.*

Yel. 164. 10. *Ejectment, &c.* The Original was for *one Houſe*, but the *Pleadings*, *the Roll*, and the *Record* of *Niſi prius* mentioned *two Houſes*; after a Verdict for the Plaintiff, and a Writ of Error brought, and before the Record was removed, the Plaintiff moved the Court, that the Writ might be amended, which was granted, becauſe the Writ which mentioned *one Houſe* could never be the Ground of all thoſe Proceedings where *two Houſes* were mentioned. *Brownl.* 144. *Sanders* verſus *Cottington.*

11. Judicial Writs ſhall be amended *after a Verdict*, to make them agree with the *Roll*, if that is Right, therefore a *Venire facias*, which bore *Teſte* out of Term, or on a Sunday, or a *Diſtringas* awarded long Time before the Trial ſhall be amended by the Roll. 2 *Cro.* 161. *Comyn* verſus *Ryneto*

1 Roll. Rep. 374. 12. In Ejectment the *Diſtringas* was between *Richard Fowkes and John Child*, and the Panel was between *Richard Fowkes and William Child*; the Truth was, there were two Records of *Niſi prius*, in both which *Richard Fowkes* was Plaintiff, in one againſt *John Child* and in the other againſt *William Child*, and the Sheriff by Miſtake had annexed the Panel between *Richard Fowkes* and *John Child*, to the *Diſtringas* between him and *William Child*; but adjudged it was aided by the Statute of Jeofails, and 'tis as if there had been * no Writ at all. 2 *Cro.* 396. *Fowkes* verſus *Child.*

* Poſtea, 38. S. P.

13. *Error* of a Judgment, *&c.* and the Error aſſigned was, becauſe a *Juror* was returned in the *Venire facias* by the Name of *Hugh Maltby*; and upon the *Diſtringas Hugh Moltby* was returned and ſworn, and another Juror was returned by the Name of *John Collingham* of *Cortlington*, and upon the *Diſtringas*, *John Collingham* of *Gortlington* was returned and ſworn, and both theſe Faults were amended; the firſt, becauſe the *Juror* came into Court, and upon Examination it appeared he was the ſame Man mentioned both in the *Venire facias* and *Diſtringas*, there being only the Alteration of one Letter in his Surname, and the other was amended, becauſe the Variance of the Town where the Juror dwelt is not material, for at the Time of the Return of the *Venire facias* he may dwell in one Town, and at the Time of the Return of the *Diſtringas* in another. 2 *Cro.* 457. *Sir Philip Stanhope* verſus *Stanhope.*

14. Adjudged, that where the *Venire facias* is good, and well returned, a Fault in the *Diſtringas* ſhall be amended by it, by the Sheriff in Court. 2 *Roll. Rep.* 111.

* Poſtea 18. † 4 Leon. 12. S. P.

15. *Quare Impedit* againſt the Biſhop of *Lincoln* and others, and the Writ was *Quæ ſuam ſpectat donationem*, the Adverb * *Ad* was left out, but adjudged, that it was amendable, and a Clerk of the † Chancery came into the Common Pleas and amended it. *Goldsb.* 78. *Brooksby* verſus *Biſhop of Lincoln.*

16. *Quare Impedit* to preſent *ad Eccleſiam, &c.* and before Appearance the Plaintiff moved, that the Writ might be amended, for his Title was to preſent to a *Vicarage* and not to a *Rectory*; the Court doubted, becauſe it was in an original Writ, and in a Matter of *Subſtance*, but becauſe the Attorney gave a Note to the *Curſitor* to draw the Writ to preſent *ad Vicariam, &c.* it was held to be the *Miſpriſion of the Clerk*, and amendable. *Cro. Car.* 53. *Turner* verſus *Palmer. Hutt.* 41. *Shirley* verſus *Underhill. S. P.* Which ſee *Poſtea* Quare Impedit. (F) 17.

17. *Aſſumpſit* againſt *Anne*, the *Executrix of Sir William Wade*, and the Record and *Venire facias* were between the ſame Parties, but the *Habeas Corpora* was between the Plaintiff and the *Lady Wade*, Executrix of *Sir Henry Wade*; it was inſiſted, that the Trial was without Warrant; but adjudged, that ſince all the other Proceedings were Right, this Miſpriſion in the *Habeas Corpora* ſhall be amended. *Cro. Car.* 21. *Smith* verſus *Lady Wade. Hutton* 81. *S. C.*

* Antea 15. S. P.

18. The *Curſitor* had Inſtructions to make a *Writ of Covenant* in order to *levy a Fine* of twenty Acres *in Hedington, &c.* and he made out the Writ, (*viz.*) *Præcipe quod reddat Viginti Acras Hedington*, leaving out the *Præpoſition* * *In*, and this was adjudged to be amendable, tho' it was an original Writ, for 'tis plainly the *Miſtake of the Clerk*, as it appeared by his Inſtructions, and upon his Oath. 3 *Cro.* 644. *Powell* verſus *Brazen-Noſe College.*

19. The *Venire facias* and other Proceſs was directed to the *Sheriffs of Canterbury*, and the Return was made by *one Sheriff*; adjudged this was amendable at Common Law, and likewiſe by the Statute of Jeofails, for that extends to *Indictments and Informations on Penal Statutes*, but this is an Indictment for a Miſdemeanor, ſo the Sheriff of *Canterbury* was ſworn in Court, that there was but one Sheriff, and it was amended. *Sid.* 244.

20. *Debt* upon the Statute againſt the *Hundred* was brought by Original, and at the *Niſi prius* the Plaintiff was Nonſuit, becauſe the Original was *Edward*, when it ſhould be *Edmund*, a Rule was made for the *Curſitor* to attend, and that if he had right Inſtructions, then to amend it, which was done in Court. *Sid.* 412. *Parker* verſus *Hundred of Little.* See 2 *Cro.* 444. *Jones* 219.

21. *Debt* againſt an Executor upon a Bond of the Teſtator, the Defendant pleaded *Non eſt factum Teſtatoris*, upon which they were at Iſſue, and the Plaintiff had a Verdict, and the Judgment was, that *Defenden' capiatur*, when it ought to be *in miſericordia*, becauſe he denied the Deed; it was moved that it might be amended, for it was only a Miſtake in the Entry of the Judgment, as where an Ejectment was brought by *John Wild* againſt *Thomas Wheeler*, and the Plaintiff had a Verdict, the Entry of the Judgment was *quod prædict' Thomas recuperet*, inſtead of *John* (the Plaintiff,) this was amended *Hutt.* 41. *Wild* verſus *Wheeler*; ſo where an Action was

brought againſt Husband and Wife for ſcandalous Words, and the Plaintiff had a Verdict; the Judgment was entered, that the Husband be *in miſericordia*, and nothing was ſaid of the Wife, that was amended. *Hob.* 127. * *Scaife* verſus *Nelſon*, but adjudged, that every Judgment entered upon the Roll is preſumed to be pronounced by the Court, and therefore 'tis the Act of the Court, and not amendable in another Term. *Raym.* 38. *Elliſon* verſus *Elliſon.* See *Dyer* 315. *pl.* 99. *S. P.* See *Cro. Eliz.* 84. *Crowe's* Caſe. *S. P.* See *Hutt.* 41. *Shirley* verſus *Underhill. S. P.*

* Moor 869. 2 Brownl. 16. Poſtea (E) 5.

22. In an Action *on the Caſe*, Part was found for the Plaintiff and Part for the Defendant, and as to that Part the Judgment was entered, that the Plaintiff *& plegii ſui ſint in miſericordia*; it was moved, that it might be amended by Striking out *plegii ſui*, becauſe they ought not to be amerced, the Court took Time to conſider of it. *Raym.* 42. *Delabar* verſus *Yardly.*

23. *Caſe, &c.* wherein the Plaintiff declared, that the Defendant had the Keeping of the Records of *B. R. &c.* and that *W. W.* had recovered Judgment againſt him (the Plaintiff,) and Damages to 106 *l.* in an Action on the Caſe for a Slander, and that this Judgment was entered, that he (*the Plaintiff*) *capiatur*, and thereupon the Plaintiff brought a *Writ of Error* in the *Exchequer-Chamber*, and pending that Writ the Defendant ſo negligently kept the Records, that this *Error* was amended, and made, that the Plaintiff *ſit in miſericordia*, by Reaſon whereof he is made liable to pay the 106 *l.* upon Not guilty pleaded, this Iſſue was tried at Bar; and it was proved, that all the Clerks of the Office, the Clerk of the *Niſi prius for Middleſex*, and his Clerks, and all the *Filazers* of this Court, have Liberty to view the Records in the Treaſury, and that they have been amended after Error brought, and before a *Recordatur* entered on the Roll. *Raym.* 53. *Herbert* verſus *Paget.*

Action on the Caſe. (H) 25. Sid. 77. 1 Lev. 64.

24. *In Covenant, &c.* the Plaintiff declared, that he made a Leaſe of Lands to the Defendant for thirteen Years, reſerving the Rent of 40 *l.* to be paid quarterly, but did not ſay *yearly and every Year*; upon *Non eſt factum* pleaded, the Plaintiff had a Verdict, but after the Plea thus pleaded, the Plaintiff amended the Declaration by putting in the Word *Annuatim*; and upon a Motion to have the Matter examined, the Court held, that the Addition of *Annuatim* is no more than what was implied before, the Demiſe being for *thirteen Years*; and ſince the Defendant had not demanded *Oyer* of the Deed, but pleaded, he is not prejudiced by this Amendment. *Raym.* 160. *Rymes* verſus *Baker.*

25. The Plaintiff brought an Action by *Original*, and the Inſtructions to the *Curſitor* were Right, by his proper Name *Weſtby*, but the Writ was *Weſtly*, and ſo were all the Proceedings; upon a Motion to the Court, the *Curſitor* was ordered to attend, and it appearing that his Inſtructions were Right, the Original was amended in Court, and ſo were all the Proceedings, without applying to the Chancery. 2 *Vent.* 152. *Weſtby's* Caſe.

26. After an *Extent* and *Liberate*, the Writ was *Habere facias Terras & Tenementa*, inſtead of *Liberari facias*; and upon Motion this was ordered to be amended, becauſe it was in a judicial Writ. 8 *Rep.* 157. *a. Cro. Eliz.* 185, 677, 709. where a *Writ of Enquiry* was awarded to the *Sheriffs of London*, and it was *quod* * *inquirat* in the ſingular Number, and this was amended to *Inquirarent*; ſo is *Walker* and *Rich's* Caſe, but in the Caſe of † *Kerr* verſus *Gwyn*, the Roll was Wrong in a very material Thing, for it was ſaid in the *Elegit*, that the Lands were the Lands and Tenements of the Defendant. 2 *Vent.* 171.

* Mod. Caſes 306. Michell *v.* Waldrum. S. P. Antea 2. † *See* Elegit. (C) 6.

27. *Covenant* againſt Two, in which the Plaintiff declared, *quod* * *teneat* in the ſingular Number *Conventionem:* And after a Writ of Error brought it was moved to be amended, and it was amended accordingly, for tho' formerly it hath been held, that *Falſe Latin* in an Original could not be amended, as *Hos Breve* for *Hoc Breve*, and in an Action of Waſte *Deſtrictionem* for *Deſtructionem*, yet now of late a Word miſtaken in an Original was amended, as in Ejectment *diviſit* for *demiſit*, and in *Blackmore's* Caſe, *imaginavit* for *imaginatus eſt* was amended. 2 *Vent.* 173. *Cook* verſus *Rumney.*

S. C. * Antea 26.

28. In Treſpaſs, the Plaintiff declared for ſeveral Treſpaſſes, both in the Time of *Car.* 2. and *Jac.* 2. there was Judgment by Default; and after the Return of a Writ of Enquiry, Error was brought in *B. R.* and the *Want of an Original* was aſſigned for Error; and upon a Certificate awarded to the *Cuſtos Brevium*, he certified an Original between the Parties in the Time of *Jac.* 2. which concluded *contra pacem noſtram*, it was objected, that this could not be the Original in this Cauſe, for it ſhould have concluded *contra pacem noſtram, necnon contra pacem Caroli ſecundi, &c.* and there was a Rule to reverſe the Judgment *niſi, &c.* afterwards it was moved to amend it, becauſe the Inſtructions to the *Curſitor* were right, which was admitted on the other Side, but yet that it ought not to be amended, becauſe the Concluſion was Part of the legal Form of the Writ, and in that an Original is not amendable, and ſo is *Parker's* Caſe in *Hob.* 56. where the Word *Judicari* was put in a Writ upon the Statute of Hue and Cry, inſtead of *Indictari*, but the Court ordered it to be amended upon Payment of Coſts. 2 *Vent.* 49. *Maſſingburne* verſus *Durdant.*

29. *In Ejectment* brought by Original, the Record upon the *Iſſue-Roll* was, that the Defendant *Summonitus fuit* to anſwer the Plaintiff, *&c.* after a Verdict for the Plaintiff, upon Not guilty pleaded, it was moved in Arreſt of Judgment, that here was a *vitious Original*, which is not aided by any Statute of *Jeofails*, for it was, that the Defendant *Summonitus fuit, &c.* when in Ejectment (as this Cauſe was) it ought to be *attachiatus fuit, &c.* and this is not helped by the Verdict; but upon Search of the File there was no Original found, whereupon it was inſiſted for the Defendant, that ſince no Original could be found, it muſt be intended that there was an Original, but that it was vitious, becauſe it appeared to be ſo upon the *Iſſue-Roll*; but adjudged, that it ſhall be intended a good Original, this being after a Verdict, and that ſuch good Original

is loſt, but if it had been vitious, the Court will not intend that it was ſo, unleſs 'tis produced by the *Defendant*. 1 *Saund.* 318. *Bury* verſus *Biſhop*.

30. *Fieri facias* upon a Judgment in Debt *Teſte* 7 *Feb.* 27 *Car.* 2. by Vertue whereof the Goods were ſeiſed and ſold to *White*, afterwards the Judgment-Debtor became a Bankrupt, (*viz.*) 9 *Feb.* and the Commiſſioners ſold the Goods in the Poſſeſſion of *White* to ſeveral Creditors, who took them from *White*, for which this Action of Treſpaſs was brought againſt the Commiſſioners; and upon Not guilty pleaded, the Plaintiff gave in Evidence the Sale made by the Sheriff, and upon producing the *Fi. fa.* it appeared to be *Teſte Franciſco North, &c.* 7 *Feb.* 26 *Car.* 2. this was by Miſpriſion of the Clerk, for *Sir Fra. North* was not then *Chief Juſtice*, but in *Hillary-Term* 27 *Car.* 2. whereupon the Plaintiff *White* was Nonſuit; but *per Curiam*, it was amended upon a Motion in the next Term. *T. Jones* 41. *Smith* verſus *Harward*.

31. Caſe, *&c. for Words*, in which the Plaintiff laid a *Colloquium* between the Defendant and one *T. S.* concerning a Baſtard-Child, ſuppoſed to be born of her, and that *T. S.* ſaid, *I hope ſhe did not murder the Child*, the Defendant replied, *But ſhe did, and Blood requires Blood, (innuendo)* that ſhe had murdered her Baſtard; upon Not guilty pleaded, the Jury found the Defendant guilty of Speaking theſe Words, *Blood requires Blood* (innuendo) *ſhe had murdered her Baſtard-Child, modo & forma*, as the Plaintiff had declared, and as to the other Words Not guilty, but did not find that *T. S.* ſpoke the Words precedent, and without Reference to theſe Words, what the Jury had found was inſenſible, whereupon the Judgment was reverſed; afterwards it appeared to the Court, that thoſe precedent Words were found by the Jury, and that it was the Miſpriſion of the Clerk in not entring them, and thereupon the Clerk of the Aſſiſes was ordered to amend it upon Payment of Coſts to the Defendant, becauſe, as the Verdict was entered before, he had juſt Cauſe to bring a Writ of Error; and after it was thus amended, tho' after a Writ of Error brought, and the Cauſe removed out of *C. B.* into *B. R.* the Judgment was affirmed. *T. Jones* 211. *Nailour* verſus *Clerke*.

32. In *Aſſault, Battery, Wounding, and falſe Impriſonment*, the Defendant anſwered all but the *Wounding*; and upon a Demurrer joined, the Court gave leave to amend the Plea, and put in *quoad vulnerationem*; for after a Demurrer joined and before Judgment given, the Defendant may amend. 2 *Mod.* 187. *Anonymus*.

33. Upon a Motion in Arreſt of Judgment it was inſiſted, that the *Day on which the Aſſizes was to be held*, and *the Place where*, were left out of the *Diſtringas*, and ſo a Miſ-trial: *Sed per Curiam*, if there had been no *Diſtringas* the Trial had been good, becauſe the Warrant to try the Cauſe is the *Jurata*, and that being Right, the *Diſtringas* ſhall be amended by it. 3 *Mod.* 78. *Anonymus*.

34. Judgment was given upon a Demurrer, and a Writ of Enquiry was awarded, and in entring it on the Roll, the Words *per Sacramentum duodecim proborum & legalium hominum* were left out; and upon a Motion to amend it *per Curiam*, this is amendable at Common Law, for 'tis only a *Miſ-entry* of the Clerk, and amendable without paying Coſts. 3 *Mod.* 112. *Anonymus*.

35. The Defendant was convicted upon *an Information* for a *Riot*, the *Memorandum* was, (*viz.*) at the Seſſions of the Peace held, *&c.* on Saturday next after *Quenden' Sancti Martini*, it was preſented, that the Defendant 27 *Die Januarii*, in ſuch a Year, with Force and Arms, *&c.* ſo the *Indictment was before the Fact*, for one was in *Michaelmas Seſſions* and the other was in *January* following: *Sed per Curiam*, this is only a Miſpriſion of the Clerk in titling the Record, and amendable. 3 *Mod.* 167. *The King* verſus *Hockenhull*.

36. *Scire facias* upon a Recognizance of 1000 *l.* to ſhew Cauſe *quare*, the Plaintiff ſhould not have Execution *de prædict' mille libris juxta formam recuperationis, inſtead of Recognitionis præd'*; and it was held upon Demurrer, that that Word was Surpluſage, and the Record was amended. 3 *Mod.* 251. *Ayres* verſus *Huntingdon*.

37. Inſtead of *Miſericordia*, the Judgment was entered with a *Capiatur*; and it was objected in Arreſt of Judgment, that this was not amendable by the Statute 8 *H.* 6. for that helps Miſpriſions of Clerks in entring Judgments, but this is the Fault of the Court in giving Judgment: *Sed per Curiam*, this is now remedied by the Statute 17 *Car.* 2. *cap.* 8. which enacts, that Judgment ſhall not be ſtayed after a Verdict, for Want of *Miſericordia* or *Capiatur*. 4 *Mod.* 6. *Chettle* verſus *Lees*.

38. In an *Action of Debt*, after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the *Diſtringas* was with a Blank, and the Word *Debiti* was omitted, ſo it was a *Diſtringas* in another Cauſe, but adjudged this was as * no *Diſtringas* at all, and ſo aided by the Verdict, but an *ill Diſtringas* is not; that formerly all Trials were had upon the *Venire facias*, that the Statute 13 *Ed.* 1. *cap.* 3. gave the Trial by *Niſi prius* before Juſtices of Aſſiſe, and even after that Statute the Trials were upon the *Venire facias* till the Statute 42 *Ed.* 3. *cap.* 11. which requires that the Names of the Jurors ſhall be returned in Court, and this is now done in *B. R.* by the *Diſtringas* in the *C. B.* by the *Habeas Corpora Juratorum*; the Inconveniencies remedied by this laſt Act are, that the Parties might be the better prepared for their *Challenges*, which they could not ſo well be formerly, and before the Panels were returned into Court, and by this Means the Defendant was prevented to *caſt an Eſſoin* at the Trial in the Country by the *Niſi prius*, which was frequently done before this Statute; becauſe by the Statute of *Marlbridge*, *cap.* 13. he had one *Eſſoin after Iſſue joined*; and upon the Return of the *Venire facias*, and that being uſually returned at the *Niſi prius*, he could then aid their *Eſſoin*, but now 'tis returned in the *Courts at Weſtminſter*, he muſt Eſſoin there, and not at the *Niſi prius*, becauſe the Trial is upon the *Diſtringas*, and

* Antea 12. S. P.

not upon the *Venire facias*; therefore this being as no *Diſtringas*, is aided by a Verdict. 2 *Salk.* 454. *Bullock* verſus *Parſons.*

39. The Declaration was, *Will'us Patiſon queritur de Will'o Milton, &c. pro eo videlt' quod cum Will'us Patiſon* (inſtead of * *Milton*) *indebitatus fuit Will'o Patiſon:* After a Verdict for the Plaintiff, it was moved to amend it, for that it was a plain Miſtake of the Clerk to make the Plaintiff indebted to himſelf, and it was amended accordingly. 4 *Mod.* 161. *Patiſon* verſus *Milton.*

* *The Judgment was* quod prædict' Thomas recuperet

inſtead of Arthurus, *and it was amended.* 4 Mod. 371. Cradock *ver.* Radford.

(B)

Original and Judicial Writs, and other Matters not amendable.

1. AFter the Death of the *Lord Powes, &c.* the Eſcheator took a Verdict in Paper, afterwards a *Superſedeas* came to him at the Suit of one *Herbert* and his Wife, in which Writ the Sillable (*ſe*) was omitted, for it was written thus at Length, *Superdeas*; adjudged, that it was not amendable. *Dyer* 170. *Lord Powes*'s Caſe.

2. In an Action of *Waſte* upon the Statute of *Glouceſter*; the Writ was *quod nullus faciat vaſtam venditionem & Deſtrictionem*, when it ſhould have been *Deſtructionem*; adjudged, this being an Original Writ ſhall not be amended, becauſe 'tis *Matter of Subſtance*; for the Word *Diſtrictio* alters the very Senſe of the Statute. 4 *Rep.* 44. *Freeman*'s Caſe.

3. Debt againſt Husband and Wife upon a Bond made to her *dum ſola*, and Judgment againſt them, who brought a Writ of Error, and aſſigned for Error, that the Writ was brought againſt them in the *Detinet* only, when it ought to have been in the *Debet* and *Detinet*; and adjudged, that this being Matter of Subſtance, is not remedied by the Statute 18 *Eliz.* 5 *Rep. Weſtcot*'s Caſe.

4. At *Common Law* an *Original* was not amendable in the Caſe of a *Common Perſon*; but now by the Stat. 8 *H. 6.* and 18 *Eliz.* the Miſpriſion of the Clerk is amendable both in Form and Falſe Latin; as *imaginavit* for *imaginatus eſt. Blackmore*'s Caſe. 8 *Rep.* 88.

5. The Miſpriſion of the Clerk in Proceſs is not amendable in *another Term*, for then the Roll is the Record, whereas in the *ſame Term* the Record is in the Breaſt of the Judges. 8 *Rep.* in *Blackmore*'s Caſe.

6. The Statute 14 *Ed.* 3. *cap.* 6. extends only to the *Miſpriſion of the Clerk in Proceſs*, that is, to a judicial Writ or Proceſs, but not to an Original, or to a Writ, which is in Nature of an Original, becauſe 'tis nor included within the Word *Proceſs.* 8 *Rep. Ibid.*

7. An *Original Writ* ſhall abate for want of Form, but a judicial Writ ſhall not abate, if it hath *Subſtance*; for if an Original Writ wanteth a legal Form, 'tis ſuch a Miſpriſion as is not amendable by the Statute 8 *H. 6. cap.* 12. becauſe the Clerks in Chancery ought to have Skill and Knowledge in the true Forms of Originals; Falſe Latin in an Original ſhall not be amended, as *Habeas ibi Hos Breve* for *Hoc Breve*, nor the Omiſſion or Addition of any Thing which alters he very Form of the Writ. 8 *Rep.*

8. An *Original Writ* was returned by the Sheriff, but his *Chriſtian Name* was left out; and upon a Motion to the Court, that his Name might be inſerted, it was denied, becauſe the Record was made up. *Goldſ.* 113. *Broughton* verſus *Field.*

9. *Error, &c.* on a Judgment in Debt, and the Error aſſigned was, that the Original Writ was 20*l.* and ſo was all the Mean Proceſs; but when the Defendant appeared upon the Return of the Exigent, the Entry was, that *obtulit ſe in placito debiti decem librarum*, when it ought to have been *viginti librarum*; and upon View of the Record, it appeared that no Original was certified, and therefore it could not be amended. *Goldſ.* 133. *Stangiſton*'s Caſe.

10. Error, *&c.* by a Son and Heir, upon a Judgment by Default in a *Formedon in Deſcender* againſt his Father; the Error aſſigned was the Want of a *Warrant of Attorney*, for it was thus; *B. B. ponit loco ſuo Dawley* (omitting his *Chriſtian Name*) *Attornatum ſuum*; adjudged this was not amendable by any Statute. 2 *Cro.* 332. *Bartholomew* verſus *Blofeild.* 15 *Eliz. Dyer* 336. *S. P.*

11. *In Aſſiſe*, the Writ was *ad faciendam Recognitionem illum* in the *Maſculine Gender*, when it ſhould be *illam*; and becauſe this was *Falſe Latin* in an Original Writ, tho' the *Curſitor* made Oath, that the Note which he now produced was Right, yet the Court would not amend it. *Hob.* 128. *Oglethorp* verſus *Mawde.*

12. Treſpaſs for Taking Goods in *W.* the Defendant juſtified by Reaſon of a *Cuſtom of the Manor of B &c.* the Plaintiff replied *de injuria ſua propria*, upon which they were at Iſſue, and the Sheriff returned the *Ve. fa. de W. only*, 'tis true, the Roll was *de Vicineto de W. & manerio de B.* but it ought not to be *de Vicineto de W.* at all, becauſe the *Taking* was confeſſed both by the Plaintiff and Defendant, and therefore required no Trial; ſo that the Queſtion was about the *Cuſtom of the Manor of B.* whether that would juſtify the Taking or not? and altho' the Roll had been Right *de manerio, &c.* only, ſo that the *Ve. fa.* might be amended by it, yet when it appears that the Trial was not had by ſuch a Jury as the Roll and the Law required, the *Ve. fa.* ſhall not be amended. *Hob.* 77. *Banks* verſus *Parker.*

13. Upon a Motion to amend a *Ve. Fa.* which was *Alium Breve*, the Court refuſed to amend it, tho' the Sheriff's Name was to the Panel; but if the Sheriff had returned the *Ve. fa.* as uſual, (*viz.*) *executio iſtius Brevis patet in quodam pannello huic Brevi annex'*, tho' he had not ſet his Name to that Return, yet becauſe it was in the *Panel*, it ſhould have been amended. 15 *Jac. Brownl.* 43.

14. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the *Name of the Sheriff* was not endorſed on the *Diſtringas*; it was inſiſted, that this being a judicial Writ it was not neceſſary; but adjudged, that it was ill, and not amendable by any Statute, and 'tis the ſame Caſe, as where the Sheriff's Name is not endorſed on the *Ve. fa.* which is never amendable. 2 *Cro.* 188. *Holdſworth* verſus *Sir Stephen Proctor.* *Poſtea* Venire facias. (B) 1. *S. C.*

Mod. Ca. 165. S. C. Poſtea (C) 23. S. C.

15. Error of a Judgment in an Inferior Court, in which the *Plaint* was entered againſt *Francis*, but all the Proceedings were againſt *John*; adjudged, that a *Plaint* is in Nature of an *Original Writ*, and this being Erronious, cannot be amended after a Verdict. *Style* 115. *Brereton* verſus *Mannington.*

16. After a Verdict for the Plaintiff, it was moved to ſet it aſide, becauſe the *Diſtringas* and *Jurata* are returnable *a die Sanctæ Trinitatis in tres Septimanas* (which happened to be on the 26th Day of *June*) *niſi Johannes Holt miles, &c. 27 die Junii, &c. prius venerit*; ſo that the Day of *Niſi prius* was *after the Day in Bank*; but the Plea Roll was Right, for there it was *a die Sancti Michaelis in tres Septimanas*; adjudged, this could not be amended, for the Day appointed by the *Niſi prius* is impoſſible; 'tis true, where the * *Diſtringas* and *Jurata* are Right, the *Niſi prius Roll* may be amended by the *Plea Roll*, ſo as it doth not alter the Point in Iſſue; but here they are both Wrong. 1 *Salk* 48. *Child* verſus *Harvey.*

* Poſtea (C) 21. S. P.

17. Upon a Motion to amend a *Writ of Error*, for that it recited a Judgment given *in Curia Regis*, when it ſhould be *Regis & Reginæ*, for that the Note to the *Curſitor* was Right, and this was a *Miſpriſion* only in Matter of Form; but it was denied to be amended, for there is no Fault in the Writ itſelf; 'tis true, it doth not agree with the Record: Now the Statute 8 *H. 6.* which gives the Court Power to amend, 'tis in Matters precedent to the Judgment, and to ſupport Judgments; but if a *Writ of Error* might be amended, it may be to reverſe a Judgment; beſides, this Writ is a Commiſſion to the Court, and they cannot amend their own Commiſſion. 1 *Salk.* 49. *Thompſon* verſus *Crocker.*

* Poſtea 19. S. P.

Mod.Ca. 164,268.

18. The Defendant was found guilty upon an Information for a Libel; and it was objected in Arreſt of Judgment, that the *Ve. Fa.* was returnable *de Lunæ prox' poſt tres Sept. Sanct. Michaelis* which was 23 *Octob.* but the *Diſtringas*, *thro' Miſtake*, *was Teſte* 24 *Octob.* which was the Day after the *Venire facias* was returnable, when it ſhould be on the ſame Day; this was agreed to be a Diſcontinuance, for the 24th Day cannot continue the 23d Day, and 'tis not amendable at Common Law, or by any Statute of Amendments: Not at Common Law, * becauſe this would be to Warrant a Trial that was tried without any Authority, and to make it contrary to the Truth of the Fact; not by any Statute of *Amendments*, of which there are but two, *viz.*) 14 *Ed.* 3 *cap. 6.* and 8 *H. 6. cap.* 2. 12. Now this laſt Statute was only to enlarge the ſubject Matter of the firſt, which extends only to *Proceſs* out of the Roll; (*i. e.*) Writs which Iſſue out of the Record, and not to Proceedings on the Roll it ſelf; and that Statute doth not extend to Caſes wherein the King is concerned, and the Statute 8 *H. 6.* has always been conſtrued in Imitation of the Statute of 1 *Ed.* 3. not to extend to the Crown. 1 *Salk.* 51. *The King* verſus *Touchin.* See *Dyer* 346. 1 *Roll.* 447. *Cro. Eliz.* 571. *Cro. Car.* 144. 2 *Bulſt.* 35. *Sid.* 243, 259. 3 *Lev.* 14, 430. *Raym.* 440.

* Yelv. 204. 2 Cro. 283. *That was in an Appeal.* Bradley v. Banks.

19. *Sci' fa.* on a Judgment, in which Writ the Plaintiff's Name was inſerted inſtead of the Defendant's; it was inſiſted to amend it, for that it was only a Miſtake of the Clerk; but adjudged not amendable, for there is * no Fault in the Writ it ſelf, and 'tis poſſible there may be ſuch a Judgment. 1 *Salk.* 52. *Vavaſor* verſus *Baile.*

* Antea 17. S. P.

Mod. Ca. 263, 310.

20. Error of a Judgment in *C. B.* the *Scire facias* was *quare Executionem non habet* of a Judgment in Ejectment for *two Meſſuages* whereas the Judgment it ſelf was only *de uno Meſſuagio*; to this *Sci. fa.* the Plaintiff in the Writ of Error pleaded *Nul tiel Record*, and thereupon the Defendant moved to amend it, but it was denied, becauſe there was no Fault in the *Sci. fa* and there may be a Judgment which agrees with it, tho' this doth not, and the Court cannot make this Plea to the *Sci. fa.* falſe, when in Fact 'tis true. 1 *Salk.* 52. *Buckſome* verſus *Hoskins.* See *Cro. Eliz.* 760. * 2 *Cro.* 372. *Cro. Car.* 162, 163. 1 *Roll.* 197, 797. *Sid.* 7, 12. that 2 *Cro.* 372. is a ſtrained Caſe.

* Per Holt *Ch. Juſt. This was a hard Strain.*

21. Judgment in Treſpaſs againſt five Defendants; and a *Writ of Error* being intended, the Attorney left a Note with the *Curſitor* to make it out between the Plaintiff and five more, naming them; *Note E. one of the Defendants is dead, make out the Writ of Error*, which he did againſt *four*, and took no Notice of him that was *dead*; the Queſtion was, whether this was amendable, and adjudged, it was not, for all the Parties in the firſt Judgment ought to join in a Writ of Error, which was not done here, but only four, without mentioning the other to be dead; 'tis true, the Inſtructions to the Curſitor were plain, and it was his * Miſtake; but yet it ſhall be amended, becauſe this is a Writ to reverſe a Judgment, and the Statutes were made to amend Writs for the * Support of Judgments; ſo this Writ was quaſhed. 5 *Mod.* 16, 69. *Walker* verſus *Slackoe.*

* *See* Poſtea (C) 11.

* 8 H. 6. cap. 12.

22. The Plaintiff *Bernardiſton* took out a Writ againſt *W. R.* and delivered it to the Sheriff to be executed, who accordingly arreſted the ſaid *W. R.* and a *Bail-Bond* was taken by the Officer

for the ſaid *W. R.* to appear at the Suit of *Bernardiſton*, and Bail above was given at the Suit of *Bernardiſtant*, and afterwards a *reddidit ſe*, by that Name; he afterwards eſcaped, and in an Action brought againſt the Sheriff, it was moved, that the *Bail-piece and reddidit ſe* might be amended, and made according to the Writ; but it was denied, for the Bail-Piece muſt be made according to the Bail-Bond, and not according to the Writ or the Return; and tho' 'tis *Vitium ſcriptoris* in the Bail-Bond, yet *W. R.* will not help it. *Mod. Caſes* 309. *Bernardiſton* v. *Vic' Middleſex.*

(C)

Declarations and other Pleadings and Rolls amendable.

See *Continuance.* (A) 5.

1. IN *Blackamore's* Caſe it was adjudged, that at Common Law the not Entring the *Continuance* of an *Eſſoin* was amendable, becauſe it was only the Miſpriſion of the Clerk. 8 *Rep. Blackamore's* Caſe.

2. So where a Thing is apparent to be the Miſpriſion of the Clerk, and which he ought to have added without any Inſtruction of the Party, tho' it be in a Point material, it ſhall be amended, tho' in another Term. 8 *Rep. Blackamore's* Caſe. See 4 *Leon.* 123. *Babington's* Caſe. *S. P.*

3. Debt upon a Bond, bearing Date 12 *Novemb.* the Defendant imparled, and the next Term the Plaintiff declared again upon a Bond, bearing Date 12 *Feb.* and had Judgment by Default; the Defendant brought a Writ of *Error*, but before the Record certified, the Plaintiff moved, that it might be amended; the Court was divided in Opinion. *Goldſ.* 136. *Wilkinſon's* Caſe.

4. *Aſſumpſit, &c.* by the Plaintiff againſt *two Defendants*; he had a Verdict, and it was moved in Arreſt of Judgment, that by the *Imparlance Roll* (which is called the Declaration upon the File) the Promiſe was alledged to be made *by one Defendant*, and no more, but in the Plea Roll, and in the Record of *Niſi prius*, and in all other Proceedings after, it was alledged to be by two; but adjudged, that the Imparlance Roll in this Caſe ſhall be mended, becauſe it appeared by the Paper-Book, that the Promiſe was made *by two*; ſo that it was a plain Miſtake of the Clerk to enter it on the Imparlance Roll, that it was made by one. *Cro. Eliz.* 258. *Ramſey* v. *Bird. Latch* 86. *S. P.* and *Yelv.* 164. *Sanders* v. *Cunningham. S. P. Antea* Amendment. (A) 10. *S. C.*

5. Ejectment, *&c.* againſt two Defendants, in which the Plaintiff declared, that they *intraverunt, &c.* but the Expulſion and Ejectment were laid in the ſingular Number, *viz. a poſſeſſione ſua expulit & ejecit*; it was objected, that 'tis not amendable, becauſe 'tis the Point of the Action; adjudged, that it was amendable, for 'tis only the Miſpriſion of the Clerk. 2 *Bulſt.* 35. *Odingfell* verſus *Darlie.* 2 *Cro.* 306. *S. C.*

6. In Debt upon a Bond, the Defendant *imparled*, and on the Roll it was entered, that the Plaintiff declared on a Bond dated 10 *Martii*, the next Term he declared on a Bond dated 10 *Maii*, to which the Defendant pleaded Dureſs: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this could not be amended, becauſe the Defendant had pleaded to it; therefore, if it ſhould be amended, it would quite alter the Defendant's Plea, becauſe he had pleaded, that the Bond dated 10 *Maii* was obtained by Dureſs; and if that ſhould be amended, and made a Bond dated 10 *Martii*, then it would not be the ſame Bond to which the Defendant had pleaded; but adjudged, that it ſhould be amended, becauſe the Imparlance was from *Hillary to Eaſter Term*, in which laſt Term he might declare anew at his Pleaſure. *Brownl.* 57. *Burnell* verſus *Bows.*

7. *In Ejectment*, the Plaintiff declared upon a Demiſe 25 *March*, 6 *Jac.* by Vertue of which he entered and was poſſeſſed, *&c.* until the Defendant *poſtea ſcilicet Anno ſexto ſupradicto* ejected him; ſo that he named the Year, but not *the Day* when he was ejected; the Defendant imparled to the next Term, and then the Plaintiff declared Right, and both the *Day and the Year* were named when he was ejected: After a Verdict for the Plaintiff, on *Error* brought, the Queſtion was, whether it was erronious, for that *no Day* was ſet forth in the firſt Declaration, when the Plaintiff was ejected? It was agreed by the Court, that the firſt is the moſt material Declaration; therefore if any Matter of Subſtance is omitted in it, that ſhall not be amended by the ſecond Declaration after the Imparlance, becauſe that is but a Recital of the firſt; but in this Caſe the firſt Declaration is good, for the Plaintiff declared on a Demiſe 25 *Martii* 6 *Jac.* which is the firſt Day of the Year, and that the Defendant *poſtea ſcilicet anno ſexto Jac.* ejected him, which is certain enough, tho' *the Day* was not mentioned, becauſe it was after the Demiſe, and before the Action brought. 2 *Cro.* 211. *Meriell* verſus *Smith. Poſtea* Ejectment. (C) *S. C.*

8. *Error* of a Judgment, *&c.* and after the Record removed and Error aſſigned, which was in the Entry after the Imparlance, in this Manner, *Ad quem diem venerunt tam præd' Thomas* (the Plaintiff) *quam præd' Samuel'* (the Defendant) *per Attornatos ſuos prædictos Et præd' Thomas defendit vim & injuriam, &c.* when it ſhould be *Samuell*, the Defendant; ſo that the Name of the Plaintiff was miſtaken, and put inſtead of the Defendant; but it was adjudged amendable. 2 *Cro.* 627. *Greenvill* verſus *Smith.* and 444. *Leeſer* verſus *Weſt. S. P.* Palm. 263.

9. *In Trover, &c.* the Plaintiff amongſt many other Goods, declared, that he was poſſeſſed *de uno ſpadone, una equa pretii* 5 *s.* 4 *d.* ſo there was *no Price* added to the *Gelding*; the Court was divided, whether this was a Defect of *Form* or of *Subſtance*; the two Judges, who held it to be a Defect of *Subſtance*, inſiſted, that a *Value* ought to be added to every *dead Thing*, and a *Price*

a *Price* to every live Thing; but the other two held it not neceſſary; eſpecially where the Thing it ſelf was not in Demand, but Damages, and that it was only a Defect of *Form*, which was aided by the *Statute* 18 *Eliz.* but upon viewing the Roll, it appeared to be *de uno ſpadone & de una equa precii* 53 s. 4 *d.* ſo that the Copulative *Et* making it an entire Sentence, the Price ſhall relate to both *Gelding and Mare*, and ſo the Record of *Niſi prius* was amended by the Roll 2 *Cro.* 129. *Wood* verſus *Smith.*

10. Debt againſt an Adminiſtrator, who pleaded *plene Adminiſtravit, &c.* the Plaintiff replied, that *Die impetrationis, &c. habuit diverſa bona*, which muſt be intended, that the Plaintiff himſelf *habuit diverſa bona, &c.* when he ſhould have alledged, that the Defendant *habuit diverſa bona, &c.* but adjudged, upon a Motion in Arreſt of Judgment, that it ſhould be amended, for it was only the Miſtake of the Clerk. *Yelv.* 65. *Birkett* verſus *Manning.*

W. Jones 199. *amended by Conſent.*

11. Debt againſt an *Heir* upon the Bond of his Anceſtor, and the Plaintiff, in reciting the Bond in his Declaration, had left out the Words *Ad quam quidem ſolutionem obligo me & hæredes meos:* After a Verdict for the Plaintiff, it was inſiſted, that it might not be amended, becauſe it was the Subſtance of the Declaration; but adjudged, that it ſhall be amended, eſpecially ſince the Action was brought againſt the *Heir*, and he is ſo amned in the Declaration; and this Omiſſion was meerly by the * Negligence of the Clerk, who had the Bond before him. *Cro. Car.* 147. *Forger* verſus *Sales*, and *Hutt.* 83. *Walker* verſus *Worſley. S. P.* 1 *Lutw.* 503. *Rook* verſus *Clealand.*

* *See* Antea (B) 21.

12. Debt for 300 *l.* Part upon an *Indebitatus Aſſumpſit*, and Part upon *an inſimul computaſſet*, and in ſumming it in the *Imparlance Roll* both did not amount to 300 *l.* for it wanted 10 *l* of that Sum: After a Verdict for the Plaintiff, and Error brought, this was amended. *Hutt.* 83. *Arrowſmith*'s Caſe. and *Hob.* 246. *S. P. Moor* 892. *S. C.* By the Name of *Lee* verſus *Arrowſmith.*

13. *Error* of a Judgment in Ejectment; and the Error aſſigned was, that there was a Variance between the *Imparlance Roll* and the *Plea Roll*; the one being of an Ejectment 10 *Junii* 22 *Jac.* and the other being of an Ejectment 12 *Junii* 22 *Jac.* which at firſt was entered Right, but afterwards was razed, and made 12 *Junii*; but adjudged, that it ſhould be amended by the *Imparlance Roll. Latch* 162. *Foſter* verſus *Tayler.*

W. Jones 238. *See* Outlary. (D) 8. S. C.

14. *Aſſault, &c.* The Plaintiff had a Verdict and Damages to 3100 *l.* Upon viewing the Record the Attorney for the Defendants found, that there was no *Day or Year* entered on the Imparlance Roll, when the Aſſault was committed, but a Blank left for it; and there being a Day given to move in Arreſt of Judgment, the Attorney for the Plaintiff, got by Night into the Treaſury, and filled up the *Imparlance Roll* with the *Day and Year*; the Attorney for the Defendant having beſpoke of the Pronotary a *Recordatur*, which he was to have the next Day; this Matter being diſcovered, it was moved, that the Roll might be made as before; but adjudged, that it was amendable, until and after the *Recordatur* entered, in the one Caſe by the *Clerks*, and in the other by the *Court*, for what was amendable was only Matter of Form. *Latch* 164. *Worſley* verſus *Saville.*

15. *Caſe*, wherein the Plaintiff declared, that whereas in ſuch a Court of Pie-powders held at *Glouceſter ſecundum conſuetudinem Civitatis illius*, he brought an Action of Debt againſt *W. R.* who was arreſted, *&c.* and afterwards ſuffered to eſcape, *&c.* Thoſe Words *ſecundum conſuetudinem Civitatis illius* were in the * *Imparlance Roll*, but were left out of the *Iſſue Roll*: And after a Verdict for the Plaintiff, this was one Objection in Arreſt of Judgment; but adjudged, that it was only *Vitium Clerici*, and therefore amendable. *Cro. Car.* 33. *Hodges* verſus *Moyſes.* See 3 *Lev.* 360, 361. *S. P.*

2 Roll. Rep. 211. Hunt *v.* Athill. S. P.

Latch 58.

16. *In Ejectment*, the *Paper-Book* was Right (*viz.*) *Acram terræ*, but the Declaration upon the File was *Clauſum terræ*; and upon a Motion there was a Rule, that it ſhould be amended by the *Paper-Book* in the Hands of the Plaintiff's Attorney, who being examined in the Preſence of the Defendant's Attorney made Oath, that it was not altered ſince the Defendant's Attorney ſet his Hand to it. *Palm.* 404. *Todman* verſus *Ward.*

17. *Anne Rea*, the Adminiſtratrix of *George Rea*, brought Debt upon a Charter-Party, in which there were ſeveral Covenants between him and the Defendant, and in the End each obliged himſelf to the other in 1000 *l.* for the Performance; the Declaration was Right till the Adminiſtratrix came to the Aſſignment of the Breach, and then it was *idem Georgius in facto dicit*, inſtead of *eadem Anna*, and the Concluſion was Right, for it was *eadem Anna profert hic in Curia, &c.* Upon Demurrer to this Declaration, it was objected, that here was no Breach aſſigned by Reaſon of this Miſtake; but adjudged, that it being Right both before and after, 'tis meerly *Vitium Clerici*, and amendable by the Statute *H.* 6. 2 *Lev.* 117. *Rea* verſus *Barnes.* See 2 *Cro.* 587. *contra.*

5 Lev. 344.

18 *Error* of a Judgment for the Plaintiff in an Action of Debt, for Non-performance of an Award; and the Error aſſigned was, that no *Pledges de proſequendo* were returned on the Back of the Writ; but the Sheriff was permitted to amend it, and that the Plaintiff ſhould pay Coſts for this Amendment, if the Plaintiff in Error would proceed no farther; but if he did, then he ſhould pay no Coſts. 3 *Lev.* 361. *Nicholas* verſus *Chapman.* *See* Arbitrament (B) 30. *S. C.* See 3 *Cro.* 563. *Roe & Bond* verſus *Devys. S. P.*

19. In an Action upon the Statute of *Winton*; the Caſe was, *Bearcroft* ſent 4000 *l.* by the *Worceſter Carrier* towards *London*, and divers Servants to guard the Waggon, which was afterwards robbed in the Hundred of *Burnham and Stone*; and he himſelf declared againſt the Hundreds for an Aſſault and Robbery done to *himſelf* when he was at *Worceſter*, above fifty Miles from the Place where the Robbery was committed, and declared, that he made Oath, that he did not know the Robbers, or any of them; and the Jury being ready at the Bar to try

the Cauſe; the Trial was put off to another Day, before which Day there was a Miſtake found in the Declaration, for that he ought to have declared of a Robbery on his Servants, and of the Oath made by them; and upon a Motion he had leave to amend the Declaration, for otherwiſe the Year would be lapſed, and ſo the Action loſt, tho' this made great Raſures and Obliterations in the Record. 3 *Lev.* 349. *Bearcroft* verſus *Hundred of Burnham.*

20. In Debt upon a *Mutuatus*, the Plaintiff had a Verdict, and the Judgment was entered as of *Hillary-Term* 1700, whereas the Borrowing the Money appeared to be a Year afterwards, (*viz.*) 1701, and thereupon a Writ of Error was brought to reverſe this Judgment; but upon a Motion to amend the Plea-Roll by the Paper-Book, ſigned by the Maſter of the Office, it was granted, becauſe 'tis only a Slip of the Clerk, who ſhould have peruſed the Paper-Book. 1 *Salk.* 50. *Parſons* verſus *Gill.* *Poſtea, pl.* 22. *S. C.* See 1 *Cro.* 147. 1 *Brownl.* 16. *Hob.* 127.

21. *Ejectment* againſt ſeven Defendants, who all joined in the common Rule, to confeſs Leaſe, Entry, and Ouſter, and all pleaded to Iſſue, and the Plaintiff had a Verdict, but the Iſſue in the *Niſi prius* Roll was between the Plaintiff and five Defendants only, which was tried againſt thoſe Five, and a Verdict for the Plaintiff as aforeſaid; upon a Motion to amend it, for that the *Plea-Roll* was Right, and ſo was the *Venire*, the *Diſtringas* and *Jurata*, it was oppoſed, becauſe this would alter the Verdict and make another Iſſue, and two Defendants guilty, who were not tried; but adjudged, that it ſhall be amended, becauſe the Iſſue depended upon the Title of the Plaintiff, which is not altered by this Amendment, for 'tis only to rectify a plain Miſtake. 1 *Salk.* 48. *The Biſhop of Worceſter's* Caſe. Antea (B) 16. S. P.

22. On the Top of the *Plea-Roll* there was this Entry, (viz.) *T. S. ponit loco ſuo W. W. Attorn' ſuum*, and the *Memorandum* was, that *T. S. Venit*, but did not ſay, *per Attornatum*, or *in propria ſua*, and there being a Judgment by *Non ſum informatus*, a Writ of *Error* was brought in the *Exchequer-Chamber*, and it was inſiſted, that the Declaration might be amended by the *Top of the Plea-Roll*, 'tis true, in *C. B.* the Warrant of Attorney is always filed on a diſtinct File, and in *B. R.* it was formerly entered on a diſtinct Roll, but when *Sir Rob. Wright* was Ch. Juſt. this antient Courſe was altered, and the Warrants of Attorney were entered on the ſeveral Rolls to which they belong, which is now the Courſe, and it being thus entered, 'tis as much a Record as if entered on any other Roll, and therefore it cannot be intended but that the Plaintiff declared by Attorney. 1 *Salk.* 88. *Parſons* verſus *Gill.* *Antea, pl.* 20. *S. C.*

23. *Error* of a Judgment againſt an Executor in *Rippon-Court*, wherein the Plaintiff had a Verdict and 3 *l.* Damages, 1 *s.* Coſts, and 5 *l.* 10 *s. de incremento*, and Judgment, that he ſhould recover the aforeſaid Sums *attingen' ad* 7 *l.* when they amount to 8 *l.* 11 *s. &c. de bonis Teſtatoris, ac ſi, &c. de bonis propriis, &c.* and this was moved to be amended: *Holt* Ch. Juſt. they ſhall not amend any Error in Knowledge or Skill by their Minute-Book, but only Errors in Fact in the Record, if it be apparent that it was originally Right in their Minute-Book; ſo where there were * twelve Jury-men in the Minute Book, and but eleven named in the Record, that was amended; but yet in the ſame Caſe *præceptum fuit* for *præceptum eſt*, was not allowed to be amended, this was in the Court of *Northampton.* *Mod. Caſes* 165. *Gawdy* verſus *Pickerſdale.* * Sanderſon v. Lanier. *See* Hob. 127.

(D)

Declarations and other Pleadings, and Rolls, not amendable.

1. DEclarations which want *Subſtance* ſhall not be amended in *another Term*, neither ſhall Matters of *Subſtance* in a Plea in Bar, or in a Replication, eſpecially Matters in Fact, be amended in *another Term.* 8 *Rep.*

2. *In Ejectment*, the Caſe upon the Pleadings was thus, (*viz.*) Tenant in Tail of Tithes demiſed the ſame to *J. S.* and his Aſſigns, for and during the Lives of three Perſons; afterwards the ſaid *I. S.* made an Under-leaſe of the ſaid Tithes to *R. N.* and his Aſſigns, *to the Uſe of B. B.* for the Term of ninety-nine Years, if the ſaid three Lives ſhould ſo long live, *Virtute cujus quidem dimiſſionis idem B. B. poſſeſſionatus fuit, &c.* the Plaintiff had a Verdict, but it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſhew the Beginning of the Eſtate-tail, which is the particular Eſtate out of which the Leaſe was derived, but ſets forth, *Virtute cujus dimiſſionis*, he was poſſeſſed when he came into the Poſſeſſion by *Limitation of Uſe*, therefore he ſhould have ſaid *necnon vigore Statuti, &c.* both which were held to be incurable Faults, and not to be amended. *Cro. Eliz.* 407. *Baker* verſus *Seale.*

3. After a Verdict for the Plaintiff, in an Action on the Caſe upon an *Aſſumpſit*, a Writ of *Error* was brought by the Defendant, and the Error aſſigned was, that there were *no Pledges entered on the Imparlance-Roll*; it was inſiſted this was only Matter of Form, and aided by the Statute 18 *Eliz.* but adjudged, that tho' the *Iſſue-Roll* might be amended by the *Imparlance-Roll*, yet that ſhall never be mended by the *Iſſue-Roll*, becauſe 'tis ſubſequent to the *Imparlance-Roll*, therefore this being Matter of *Subſtance* ſhall not be amended. *Cro. Car.* 65. *Wolfe* verſus *Hole*, and *Hutt.* 82. *Clotworthy* verſus *Clotworthy. S. P.* and *Hutt.* 92. *S. C.*

4. In a *Warrantia Chartæ*, the Plaintiff declared upon a Feoffment, by which *B. B. dedit & conceſſit* to him the ſaid Plaintiff, the Lands at *Denham in Com. S.* whereas the Lands did lie in another Town; and upon Demurrer to this Declaration the Court would not amend it, becauſe it was pleaded without a *Serjeant's Hand.* *Hob.* 249. *Barret's* Caſe.

5. *Debt*

5. *Debt* on a Bond to ſtand to an Award, *&c.* the Defendant pleaded, that the Arbitrators made no Award, the Plaintiff replied and ſhewed the Award, *but aſſigned no Breach*, Iſſue being joined upon the Award; the Plaintiff had a Verdict, but could have no Judgment, becauſe that Defect in his Replication, in not aſſigning a Breach, being Matter of *Subſtance*, could not be amended, for if there was no Breach there was no Cauſe of Action. 2 *Cro.* 220. *Barrett* verſus *Fletcher*. *Poſtea* Replication. (B) 6. *S. C.*

1 Bulſt. 117. 6. In *Debt* for 800 *l.* the Plaintiff declared upon a *Statute*, the Money to be paid *upon Requeſt*; and upon *Oyer* of the *Statute* it appeared, that it was to be paid *on a certain Day*; adjudged not amendable, this was upon a Demurrer to the Declaration. 2 *Cro.* 316. *Fox* verſus *Jukes*.

7. *Debt* on a Bond, the Defendant pleaded *Dureſs*, upon which they were at Iſſue, then the Defendant *relicta verificatione dicit quod non poteſt Decere actionem, &c.* after a Judgment for the Plaintiff, and Error brought, it was objected, that the Entry ought to have been *non poteſt dedicere*, and ſo it was adjudged, and not amendable, for that Word *Decere* made the whole Sentence inſenſible. 2 *Cro.* 344. *Trin.* 10 *Jac.*

8. *Caſe* againſt an Executor, in which the Plaintiff declared, that his Teſtator, in Conſideration, *&c.* on the 30*th Day of October*, 11 *Jac.* promiſed to pay ſo many Quarters of Barley before ſuch a Day, and the Record in Court, upon the Plea-Roll, was of a Promiſe to pay, *&c.* on the 30*th of October*, 10 *Jac.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Record of *Niſi prius* is not warranted by the *Plea-Roll*, and therefore cannot be amended by it, for if it ſhould it would alter the Iſſue to the 30*th of October*, 10 *Jac.* when in Truth the Teſtator was dead before the 30*th of October*, 11 *Jac. & per Cur'*, where the Record of *Niſi prius* varies in a Thing which will alter the Iſſue, it ſhall not be amended; now here the Day of Payment by the Record of *Niſi prius*, was on the 30*th of October*, 11 *Jac.* and by the Record it was to be paid on the 30*th of October*, 10 *Jac.* and if this ſhould be amended, it would alter the Iſſue *from the* 11*th to the* 10*th Year of King James*, when the Teſtator was actually dead before the 11th Year. 1 *Roll. Rep.* 353. *Cook* verſus *Lancaſter*.

9. *Error* of a Judgment in *Aſſumpſit*, and the Error aſſigned was, that there was no Iſſue joined between the Parties, for it was *de hoc ponit ſe ſuper Patriam & præd' Johannes ſimiliter*, who was the Defendant himſelf, it ſhould have been *præd' Joſephus ſimiliter*, for he was the Plaintiff; and adjudged, that it could not be amended, becauſe it would alter the Iſſue which was joined between other Parties. *Style* 113. *Pitcher* verſus *Symonds*.

10. *Caſe, &c.* wherein the Plaintiff declared, that he having brought an Action of Battery againſt the Defendant, and proceeding to a Trial, a Juror was withdrawn, and they ſubmitted the Cauſe to the Award of Two of the Jurors *infra unum menſem proxime ſequen' fiend'*, and that afterwards *eodem die*, in Conſideration that the Plaintiff did Promiſe to perform on his Part, what the Arbitrators ſhould Award (*leaving out infra menſem*) the Defendant promiſed in the ſame Manner, *&c.* but the Words *infra unum menſem* were put in by the Plaintiff's Attorney after Iſſue joined, and without Notice given to the Defendant, upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted by *Roll* only in Court, for that this Amendment was in a Point material; for tho' every Submiſſion to an Award *implies* a Promiſe to perform it, and tho' the Award muſt be taken according to and with Relation to the Submiſſion, which in this Caſe was to be made *within a Month*, yet in Judgment of Law the *Promiſe* is collateral to the Submiſſion; and not being laid in this Declaration, to be made at the ſame, but at another Time, tho' it be *eodem die*, yet 'tis not adequate to the Submiſſion, becauſe it cannot immediately be applied to it, for a little Diſtance of Time, tho' in the ſame Day, alters the Intendment of the Law; a new Trial was awarded. *Allen* 69. *Read* verſus *Palmer*.

Lev. 97. 11. In an Action on the Statute for the Tithes of *twenty Acres* for three Years *de quibus quidem triginta Acris* no Tithes had been paid, *&c.* after a Verdict for the Plaintiff, it was moved to amend the Roll and make it *Viginti*, according to the Truth; but it was denied, becauſe there was nothing to amend it by, for all the Rolls were *Viginti*, but this being after a Verdict, the Word *Triginta* ſhall be rejected as *Surpluſage*, and then it will be *de quibus quidem Acris*, which is well enough. *Sid.* 135. *Fanſhaw* verſus *Mildmay*.

12. *Aſſumpſit, &c.* in Conſideration the Plaintiff would *Affeerere* inſtead of *Afferre, &c.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, for that there was no ſuch Word as *Affeerere*, and the Court ordered the Roll to be ſearched; for *diſtrictionem* inſtead of *deſtructionem*, and *Vaccaria* inſtead of *Vicaria*, could not be amended. 1 *Mod.* 15. *Fettiplace*'s Caſe. See *Beedel* verſus *Wingfeild*. 3 *Cro.* 266. *S. P.* 5 *Rep.* 45. *a.*

13. *Aſſumpſit, &c.* againſt *John Germain Knight*, the Defendant pleaded in Abatement, that he is *a Knight and Baronet*; the Plaintiff replied, that he is a *Knight*, and moved to amend his Declaration upon Payment of Coſts, but it was denied, becauſe there was nothing to amend by, and the Defendant had taken Advantage of the Fault. 1 *Salk.* 50. *Lepard* verſus *Germain*.

14. *In Covenant* not to make, do, or *ſuffer* any Act or Thing to incumber, *&c.* The Breach aſſigned was, that the Defendant *ad Seſſionem Ceſtriæ tent', &c. Anno* 4 *Jac.* 2. *utlegat' fuit*; and upon a *Demurrer* to this Declaration, becauſe the Plaintiff did not ſet forth *in what Term* the Outlary was had, it was moved to amend it; but adjudged, that if the Defendant had pleaded in *Abatement*, or to the Right, it might be reaſonable to amend the Declaration, but never where he *demurs*, becauſe this Fault might be the Reaſon of the Demurrer. 1 *Salk.* 50. *Cox* verſus *Wilbraham*. See 1 *Cro.* 147.

15. *Debt qui tam, &c.* for 100*l.* againſt a Juſtice of Peace, for refuſing to grant his Warrant to ſuppreſs a Conventicle; after Iſſue joined, and the Cauſe ſet down to be tried at the *Niſi prius*, the Plaintiff moved to amend a Word in his Declaration, which was, that he had laid the Conventicle to be at *Mr. Turner's Manſion-houſe*, when in Truth it was not, but at a little Diſtance from it: *Sed per Curiam*, after Iſſue joined, *&c.* and this Information being on a Penal Statute it ſhall not be amended. 2 *Mod.* 144. *Sir William Turner's* Caſe.

16. *Debt* was brought in *Michaelmas-Term*, 1 *Jac.* 2. upon a Judgment obtained in *B. R.* 34 *Car.* 2. ſetting forth the ſaid Judgment, *ſicut per Recordum & proceſſum inde remanen' in eadem Curia nuper Domini Regis coram ipſo Rege apud Weſtm'* (leaving out the Words, *Sed jam coram Domino Rege nunc reſiden'*) *plenius liquet*, and upon a Demurrer to this Declaration, *per Curiam*, tho' 'tis only Matter of Form, yet 'tis not amendable upon a Demurrer. 3 *Mod.* 235. *Franſhaw* verſus *Bradſhaw*.

17. *Writ of Error* to reverſe a Judgment upon a *Mutuatus*, the Error aſſigned was, for that the *Memorandum* was *Die Veneris*, on ſuch a Day, which was before the Debt became due, it was moved for Leave to amend the *Memorandum*, and to make it another Day, that it might agree with the Judgment; but *per Curiam*, it was denied. 4 *Mod.* 367. *Ruſh* verſus *Tory*.

(E)

Records of Niſi prius **and** Poſteas, **and other Records amendable.** See *Error*. (I) 1. *Feofails*. (B) 2.

1. IN a Writ of Partition between *Wotton* Plaintiff, and *Anthony Cook* and *Temple* Defendants, *Temple* confeſſed the Partition, ſo there was a Judgment againſt him with a *Ceſſat Executio, &c. Anthony Cook* pleaded to iſſue, and in the Record of *Niſi prius* the Clerk had omitted *Anthony's* Name, for it was *& prædict' ſimiliter*; the Plaintiff had a Verdict, and this Matter was moved in Arreſt of Judgment, but becauſe the principal Record was Right; and tho' the Iſſue was *inter Wotton querentem, & Cook & Temple* Defendants, when *Temple* was no Party to the Iſſue, yet it was amended. *Paſch. 9 Eliz. Dyer* 260.

2. In *Blackamore's* Caſe it was adjudged, that at Common Law a *Variance* from any Part of the Record was amendable. 8 *Rep.*

3. The Negligence of a Clerk or Officer in Keeping the Records, or in voluntary defacing them, by which the Record becomes imperfect or erroneous, ſhall be amended by the Statute 8 *H. 6. cap.* 12. 8 *Rep.*

4. In *Treſpaſs, &c.* after a Verdict for the Plaintiff it appeared, that the *Venire facias* and *Habeas Corpora* were *de placito Debiti*; and upon a Motion it was amended and made *de placito tranſgreſſionis. Hob.* 246. *Harris* verſus *Ap John.*

5. *Caſe* againſt Husband and Wife for Words ſpoken by the Wife, the Plaintiff had a Verdict, and the Judgment was entered thus, *Et præd'* (the Wife) *in miſericordia*, when the Husband ought likewiſe to be amerced; upon Error brought, the Record was certified in *B. R.* and becauſe upon View of the Prothonotary's Book of Judgments it was right entered, there it was amended by the Court. *Hob.* 127. * *Scaife* verſus *Nelſon.* Moor 869. 2 Brownl. 16. * Antea (A) 21.

6. In an Action upon the *Statute of Winton of Hue and Cry*, the Plaintiff had miſtaken to alledge the *very Day* on which the Robbery was done, but ſhewed, that it was committed in *September, &c.* and that he gave Notice to the Hundred, when in Truth it was committed in *October*, ſo that by this Record it would appear, that Notice was given before the Robbery committed, the Record was made up for Trial, but it was not put in to the Clerk of the Aſſiſe, becauſe of this Miſtake; and thereupon the Court was moved, that it might be amended, which was granted. 1 *Brownlow* 156. *Camblyn* verſus *Hundred of Tendring*. Antea (C) 19. S. P.

7. In a *Quo Warranto*, the Plaintiff had Judgment by Diſclaimer of the Liberties, *Virtute vel prætextu literarum patentium geren' dat' Decimo ſeptimo Anno Jacobi Regis*, which laſt Words were written in the Margin of the Paper-Book, but there being a Line drawn croſs, they were left out by the Clerk in engroſſing the Judgment, therefore it was moved, that the Words *geren' dat' Anno decimo ſeptimo Jacobi* might be interlined in the Record, againſt which it was objected, that it could not be amended, it being now *another Term* after the Judgment was entered; but adjudged, that it was amendable, as well in *another Term* as in the ſame Term, and that by the Common Law, for 'tis no more than the Miſpriſion of the Clerk, as where a Special Verdict is miſtaken it ſhall be rectified by the Notes of the Clerk. *Cro. Car.* 101. *Sir Humphrey Tufton* verſus *Sir John Aſhley*.

8. *Caſe, &c.* for an *Eſcape* of one in Execution, reciting the Judgment to be obtained in *Trinity-Term*, 2 *Car.* upon Not guilty pleaded, the Parties were at Iſſue, and upon the Trial it appeared by the Record of *Niſi prius*, that the Judgment was obtained, *Trinity* 3 *Car.* and thereupon the Plaintiff was Nonſuit; it was moved, that by Reaſon of this Miſpriſion the Record of *Niſi prius* was not warranted by the *Roll*, and if ſo, then the Nonſuit muſt be void, and by Conſequence the *Poſtea* ought not to be recorded, therefore a *Venire facias de novo* was awarded. *Cro. Car.* 147. *Aquila Week's* Caſe.

9. *Aſſault* againſt the Defendant, in which the Plaintiff declared againſt *W. Malin of Langley*; and the Record of *Niſi prius* was *W. Langley of Malins*; the Plaintiff had a Verdict, and it was

moved in Arreſt of Judgment for that Reaſon; but adjudged, that it ſhall be amended, for 'tis a plain Miſtake of the Clerk, and the Record of *Niſi prius* ſhall be amended by the *Roll*. *Hetley* 64. *Malins's* Caſe, 1 *Brownl.* 133. *Coffe* verſus *Randall*. *S. P. Dyer* 260. *S. P.* 2 *Cro.* 129. *Wood* verſus *Smith*. *S. P.* *Poſtea* Trover. (B) 2. *S. C.* and *Antea* Amendment. (C) 9. *S. C.*

Poſtea (G) 7. 2 Cro. 631. 2 Roll. Rep. 251.

10. In Ejectment againſt four Defendants, the Jury found two Not guilty and one of the other guilty as to *one Meſſuage, ten Acres of Land, and ten Acres of Paſture*, and the other as to ſixty Acres of Land and fifteen Acres of Paſture; and in entering up the Judgment, the *Clerk* miſtook the Parcels, and entered, that the *firſt* was guilty as to the *ſixty Acres*, and the other as to the *Meſſuage, &c.* and upon a Writ of Error in *B. R.* the Queſtion was, whether this could be amended, and adjudged that it might, becauſe 'tis only the *Miſpriſion of the Clerk in Matter of Fact*, when he had the Record before him, by which he might be directed, but if it had been *Miſpriſion in Matter of Law* it could not be amended. *Palm.* 258. *Maſon* verſus *Molineux*.

11. Error of a Judgment in Ejectment, for that in the Record a *Space* was left to inſert the Coſts, which were not yet taxed, but becauſe the Record was not *certified*, the Plaintiff had Liberty to get the Coſts taxed and make the Record perfect; but *per Hale* Ch. Baron, if *it had been certified*, it had been amended by Rule of Court, and if it ſhould afterwards be removed by Writ of Error, the Court there muſt amend it; for if a Record is removed out of the *C. B.* into *B. R.* by Writ of Error, and afterwards amended by Rule of that Court, it muſt likewiſe be amended in *B. R.* becauſe 'tis in Affirmance of the Judgment, and therefore favoured in Law. *Hardres* 505. *Freind* verſus *Duke of Richmond*.

(F)

Records of Niſi prius and Poſteas, and other Records not amendable.

1. IN Ejectment, the Caſe upon the Pleadings was, that *I. W. Biſhop of Glouceſter*, being ſeiſed of a Barn and Tithes, demiſed the ſame to the Plaintiff, reciting the Confirmation of the *Dean and Chapter*, but that was of a Leaſe made by *R. W.* upon the Trial the Jury did not find *de facto*, that the *Dean and Chapter* did confirm any Leaſe made by *I. W.* but they found expreſly, that he did make a Leaſe of this Barn, and Tithes to the Plaintiff, who now moved the Court, that the Confirmation of the Dean and Chapter of a Leaſe made by *R. W.* might be amended, and made *I. W.* the Plaintiff, ſuggeſting that the Jury intended to find it ſo, which might appear by the Notes of the Clerk of Aſſiſes; but the Court would not amend the Verdict upon ſuch a Suggeſtion, it being returned to the Court, and now too late to have it amended. *Cro. Eliz. Normington* verſus *Try*.

2. Error of a Judgment in *C. B.* and after a *Certiorari* and Error aſſigned, the Court of Common Pleas amended the Record; adjudged, that they * could not do it, becauſe after the *Tranſcript* they have not the Record before them; but where a Writ of Error is brought in the *Exchequer-Chamber* upon a Judgment in *B. R.* the Court of King's Bench may amend the Record, becauſe it always remains with them. *Mich.* 15 *Car.* in *B. R. Ibid.*

* 4 Leon. 51. Curtis's Caſe. S. P.

3. *Error* on a Judgment, *&c.* and the Error aſſigned was, that there was a Day given to the Parties from *Eaſter* to *Michaelmas-Term*, and *Trinity-Term was wholly omitted*; it was inſiſted, that this was only a *Miſpriſion of the Clerk*, and a *Miſcontinuance*, but adjudged that it was a *Diſcontinuance*, which cannot be amended. *Style* 339. *Trin.* 1652. *Freind* verſus *Baker*.

4. After a Verdict for the Plaintiff at the Aſſiſes, it was moved to amend the *Jurata* in the Record of *Niſi prius*, which was thus, (*viz.*) *ponitur in reſpectu coram Domino Rege & Domina Regina apud Weſtm', &c. Niſi Juſticiar', &c. Ad Aſſiſas capiend' aſſign' prius die, &c. viceſimo die Martii*; now here were two Miſtakes, for the *Queen died in December* before, ſo it could not be *coram Domina Regina*, and the Aſſiſes were on the 23*d Day*, and not on the 20*th Day of March*; the Record was right in both theſe Matters, and therefore it was inſiſted, that the *Jurata* in the Record of *Niſi prius* might be amended by it, as it was in * *Merchant* and *Reaſon's* Caſe, and in † *Aquila Week's* Caſe, but it was denied; for in all Caſes where the Record of *Niſi prius* hath been amended by the *Roll*, the Writ of *Diſtringas* hath been Right, which, together with the *Niſi prius* is a ſufficient Authority for the Judge to try the Cauſe, but here the *Diſtringas* was wrong, for it was *Gulielmus & Maria Dei Gratia*, when the Queen was at that Time dead; 'tis true, the Miſpriſion of the Clerk in a *Writ of Niſi prius*, is amendable by the Statute 8 *H. 6.* according to *Blackmore's* Caſe, but then it muſt have ſufficient Matter to authorize the Judge to try the Iſſue, for without that Writ he cannot try it; now in this Caſe there could be no Authority from the *Queen*, for ſhe was dead, and the Cauſe was tried three Months after her Death, for which Reaſon it was not amendable. 5 *Mod.* 211. *Martin* verſus *Monke*.

* *See* Trial. (E) 6.

† Amendment. (E) 8.

(G)

Iſſues, Verdicts and Judgments amendable.

1. ERror, *&c.* in a *Writ of Annuity*, wherein the Judgment was, that the Plaintiff ſhould recover the Arrears before and pending the Writ, *Quæ quidem Arreragia in toto ſe attingunt ad* 75 l. which in Truth was a Quarter's Rent more than was in Arrear; and this was aſſigned for Error; but adjudged, that becauſe it appeared upon the Record to what the Arrears did amount at the Day of the Writ brought, and becauſe the Judgment had been perfect, if the Clerk had not put it into a certain Sum, which was not his Buſineſs to do; therefore this was only his Miſtake, and ſhall be amended. *Dyer* 55. *Trewynyard* verſus *Skewes*. See *Gayer* verſus *Goater*. Surpluſage. (B.) 4. *S. P.*

2. *In Blackamore's* Caſe it was adjudged, that the Court in the ſame Term, may as well amend their own Judgment, as any other Part of the Record; for in the ſame Term the Judgment is given, the Record is in the Breaſt of Judges, and not in the Roll. 8 *Rep.*

3. Error of a Judgment againſt *Edward Seymour* at the Suit of *Sir John Clifton*; and the Error aſſigned was, that the Judgment was entered thus; (*viz.*) *Quod recuperet verſus Edwardum Seymour*, leaving out the Word *prædictum*; but adjudged, that it was amendable. *Goldſ.* 113. *Seymour* verſus *Clifton*.

4. *Error of a Judgment in Debt*; the Error was, that the Entry of the Bail was *Subpœna executionis*, when it ſhould be *Subpœna Condemnationis in adjudicatione Executionis*; but it was amended. 2 *Cro.* 272. *Hampton* verſus *Courtney*. 1 Bulſt. 107.

5. Error of a Judgment in an Action on *the Caſe for Words*, brought by the Plaintiff againſt *John Morgan Wolfe*; and the Judgment was, *quod recuperet verſus prad' Morganum*, which was neither the Chriſtian or Surname of the Defendant; but adjudged, that if 'tis the Name by which he was known, and tho' but Part, and not the Whole of his Surname, 'tis well enough; but if it was otherwiſe 'tis only the Miſtake of the Clerk, and ſhall be amended. *Cro. Eliz.* 865. *John Morgan Wolfe* verſus *Stepney*. Moor 620. S. C.

6. The Defendant was indicted at the Aſſiſes for a *Nuſance*, which he traverſed, and in joining Iſſue upon the Traverſe, it was, *Et de hoc ponit ſe ſuper patriam, & prædict'*; the Plaintiff leaving out the Word *ſimiliter*, the King had a Verdict, and the Clerk of Aſſiſe was ordered to come into Court and amend it. 2 *Roll. Rep.* 59. *Delbridge's* Caſe.

7. Two Plaintiffs brought an Ejectment in *C. B.* againſt two Defendants: Upon Not guilty pleaded, the Jury found one of the Defendans guilty as to the Lands in *D.* and the other Defendant guilty, as to the Lands in *S.* and in entring the Judgment there was a Miſtake by the Clerk, who enter'd it quite contrary to the Finding of the Jury; for that the Defendant which was found guilty as to the Lands in *D.* the Entry was, that he was guilty of the Ejectment of the Lands in *S.* and ſo *e converſo*; and upon a Writ of Error brought in *B. R.* the Queſtion was, whether this could be amended after the Record removed? the better Opinion was, that upon a Writ of Error in *B. R.* upon a Judgment in *C. B.* the Entry is *mittitur tranſcriptum Recordi*; but upon a Writ of Error in the Exchequer-Chamber, upon a Judgment in *B. R.* the Record remains ſtill in *B. R.* and therefore that Court may amend it after ſuch Writ of Error brought; but this muſt be in a Miſtake, and not in Point of Judgment, where there is Matter of Law. 2 *Roll.* 252. *Maſon* verſus *Denny*. 2 Cro. 621. Antea (E) 10. Palm. 258.

8. Upon a *Demurrer* to a Declaration in *C. B.* Judgment was given againſt the Plaintiff, who brought a Writ of *Error* in *B. R.* for that the Judgment was entered thus, (*viz.*) That on ſuch a Day the Plaintiff being *exactus non venit*, *Ideo nil capiat' per Breve*, and thereupon a Writ of Inquiry was grounded, and this was aſſigned for Error, for that this Judgment was entered upon a *Nonſuit*, when it ſhould have been upon a Demurrer: *Sed per Curiam*, there is a little Difference between Judgments in both thoſe Caſes; for the Judgment in both is, that *Nil capiat per Breve*; ſo that this being only a *Miſ-entry of the Clerk*, when he had the whole Record before him, it was amended, tho' the Error and Miſ-entry was in another Court. 1 *Roll. Rep.* 309. *Wheden* verſus *Sugg*.

9. In Ejectment the Plaintiff had a Verdict for ten Meſſuages, fifteen Acres of Land, fifteen Acres of Meadow, and fifteen Acres of Paſture, and as to the Reſt in the Declaration the Jury found the Defendant Not guilty, and the Entry of the Judgment was, that the Plaintiff ſhould recover *the Meſſuages and the Greater Number of Acres in the Verdict*; and thereupon the Defendant brought a Writ of Error, and aſſigned Errors; and upon a *Scire facias ad audiendum Errores*, the Defendant in Error pleaded *in nullo eſt Erratum*, and moved in *C. B.* to amend the Judgment: It was objected, that the Time was paſt after the Aſſignment of Errors to amend the Judgment, and if it was not, yet the Judgment could not be amended, becauſe 'tis the Act of the Court: *Sed per Curiam*, the Time is not paſt ſo long as *Diminution* may be alledged, or a *Certiorari* awarded; and this being a plain Miſtake in the Clerk, in entering the Judgment not according to the Verdict, it was amended. *W. Jones* 9.

10. Adjudged, that a General or Special Verdict may be amended by the Notes of the Clerk of Aſſiſe, in Civil, but not in *Criminal Actions*; a Special Verdict may be alſo amended by the Notes

Notes of the Counſel in the Cauſe, after Error brought. 1 *Salk.* 47. *The King* verſus *Keat.* See 3 *Cro.* 149. 4 *Rep.* 52. *Cro. Car.* 145, 338. 2 *Cro.* 185. 1 *Salk.* 53. *Bold's* Caſe. *S. P.*

(H)

Verdicts and Judgments and Executions, not amendable. See *Warrant Attorney.* (B) 4.

1. ADjudged in *Blackamore's* Caſe, if any Error is in the Judgment; as if the Entry is *Ideo in* * *miſericordia*, where it ought to be *quod capiatur*, the ſame ſhall not be amended. 8 *Rep.*

* *Altered per Stat. Car.* 2.

2. Debt, *&c.* by *Thomas Welcome*, againſt *B. B.* in which the Plaintiff had a Verdict, and the Judgment was entered *Quod præd' B. B. recuperet*, when it ſhould have been *Quod præd' Thomas recuperet*; it was moved, that the Record might be amended, this being only the Miſpriſion of the Clerk; but adjudged, that it ſhould not be amended, becauſe the Judgment is the Act of the Court, and not of the Clerk. *Goldsb.* 104. *Welcome's* Caſe.

Moor 366.

3. Error of a Judgment, *&c.* and the Error aſſigned was, that the Judgment was entered, that the Plaintiff ſhould recover 20 *l.* aſſeſſed to him *per Juratores necnon* 10 *l. per Jur'* when it ſhould be *Cur'*, ſo that there was only a Miſtake of a Letter, (*viz.*) *J.* for *C.* but becauſe it was Part of the Judgment, it could not be amended. *Goldsb.* 151. *Harecourt's* Caſe.

4. An Attorney directed his Clerk to make a *Ca. ſa.* returnable in *Trinity Term*, the laſt Return whereof was on the 25*th of June*, and the Clerk by Miſtake wrote the 25*th of July*; adjudged, this was not amendable, becauſe of the Miſchief which might enſue; for if 'tis amended and made returnable the laſt Return of *Trinity Term*, it may happen that the Party may be in the Company of the Sheriff after the Return, and before 'tis amended. 2 *Sid.* 7, 12. *Smithſly* verſus *Lenthall.*

5. *Debt* upon Bond to ſave the Plaintiff harmleſs, from *M. S.* the Defendant pleaded, that he did ſave him, (the Plaintiff) harmleſs, *& hoc petit quod inquiratur per patriam, & præd' M. S. ſimiliter*, inſtead of the Plaintiff: After a Verdict for the Plaintiff this was amended. *Palm.* 524. *Rigg* verſus *Wharton.* *See* Trial. (H) 4. *S. C.*

6. In the Year 1676. The Earl of *Strafford* gave a Warrant of Attorney to one *Simpſon* to conſeſs a Judgment at the Suit of the Plaintiff, *&c. Simpſon* ſent the Warrant to one *Wall*, his Entering Clerk, who enter'd the Judgment, that the Plaintiff *recuperet debitum & damna ſua*, but left a Blank for the *Damages*; *Wall* died, and this Warrant of Attorney was loſt, but *Simpſon*, who was ſtill living, made *Affidavit* of the Fact, and thereupon a Motion was made to inſert a Sum certain for the Damages and Coſts; for that at Common Law, before any Statute of Amendments, the Court had Power to amend their own Judgments, and in this Caſe the Words omitted are the Act of the Court; they might likewiſe amend it if it had been the Miſpriſion of the Clerk; all which is very true, but in this Caſe there is nothing to amend it by, for the Warrant of Attorney being loſt, 'tis incertain what Sum ſhall be allowed for Coſts; beſides, admitting that this is amendable, yet it muſt be in the *ſame Term* in which the Judgment was entered, for ſo long, and no longer, the Court hath Power to amend their own Judgments; but here the Judgment was enter'd above 19 Years paſt, and ſo not amendable. 5 *Mod.* 147. *Wentworth, Mil'*, verſus *Earl of Strafford.*

5 Mod. 332.

7. In Ejectment, the Plaintiff declared on a Demiſe 10 *Aprilis* 1697, inſtead of 1696, ſo that at the Trial the Year 1697, was not come: There was a Verdict for the Plaintiff, and now he moved to amend it; but it was denied, becauſe if it ſhould be granted it altered the Iſſue, and made a new Title in the Plaintiff. 1 *Salk.* 48. *Puleſton* verſus *Warburton.*

8. Two as Principals, and one as Acceſſary, were *indicted for the Murder of a Woman*; one of the Principals confeſſed the Fact, the other Principal and Acceſſary were convicted; both the *Principals* were hanged, and *Sampſon* the *Acceſſary* was pardoned, and brought a Writ of Error to reverſe his Attainder; and upon a *Certiorari* to the Clerk of the Aſſiſe to certify the Record, he returned, that at the General Gaol-Delivery, *&c.* held 18 *die Martii*, in ſuch a Year, before ſuch Judges, the Defendants were indicted, *&c.* and afterwards, 20 *die Martii* aforeſaid, *coram præfat' Juſticiariis*, they were tried, convicted, and had Judgment, *&c.* The Error inſiſted on was, that there was not *Continuance* by *Adjournment from the* 18*th to the* 20*th of March*; 'tis true, 'tis *coram præfat' Juſticiariis*, but they may ſtill be the ſame Juſtices by another Commiſſion; that this Record thus certified is ill, and cannot be amended neither by the Common Law, or by any Statute. *Jones* 420. *Sampſon's* Caſe.

(I)

Fines and Common Recoveries, amendable. See *Fines.* (C) 15.

1. IN a *Formedon* for the Manor of *Ilfeild*; the Defendant pleaded in Bar a *Common Recovery* againſt the Donee in Tail of the ſaid Manor; the Plaintiff replied, *Nul tiel Record*, which being certified, it appeared, that the Recovery was of the Manor of *Iſfeild*; adjudged, this

being the Miſtake of the Clerk in one Letter, it ſhall be amended, eſpecially it being in the Caſe of a Common Recovery, which is ſuffered by the Aſſent of both Parties. 5 *Rep.* 46. *Cook's* Caſe.

2. Upon a *Fine levied in Michaelmas Term* 11 *Eliz.* the *Proclamations* ingroſſed by the Chirographer were Right; but in the Note of the Fine delivered to the *Cuſtos Brevium*, the ſecond Proclamation was entered to be made 20 *Maii*, where it ſhould have been 23 *Maii*; adjudged, that it ſhall be amended, becauſe the Engroſſment by the *Chirographer* is the Foundation, and that being Right, 'tis a ſufficient Warrant to mend the other; but the Court held it to be a good Fine without any Amendment. *Hut.* 122. *Stuiley's* Caſe.

(K)

Fines and Common Recoveries not amendable.

1. THE Writ of Covenant was *Teſte* ſix Months after the *Dedimus*; the Court of *Grand Seſſions in Wales* ordered it to be amended; whereupon the *Earl of Pembroke* petitioned the Houſe of Peers for a Bill to ſet aſide this Amendment, whereby he had loſt the Benefit of a *Writ of Error*, the Matter was referred to the Judges, to certify whether this Amendment was warranted by Law; and *Holt Ch. Juſt.* certified it was not, becauſe the *Writ of Covenant* was an *Original*, and not amendable either by the *Common Law, or by any Statute*; that as to Amendments there is no Difference between an amicable and an Adverſary Action; that a *Fine and Common Recovery* are as much an Aſſurance as a Deed, and no Body pretends to amend a Miſtake in a Deed; that *Gage's* Caſe in the 5th *Rep.* 45. is miſreported, and no Law; hereupon a Bill was allowed by the Lords, but rejected by the Commons. 1 *Salk.* 52. *Earl of Pembroke* verſus *Lord Jefferies.*

(L)

Indictments and Popular Actions amendable, and not amendable.

Appeal. (B) 9.

1. AN Action was brought, upon the Statute of *Hue and Cry*, againſt the *Hundred of Cheſſam*; the Plaintiff had a Verdict; and upon Error brought, and all the Record certified, the Plaintiff prayed, that the Title of the Action might be amended, for upon the *Roll* it was an Action on *the Caſe*, when it ſhould have been, an Action on *the Statute*; but adjudged, that it could not be amended, becauſe the Statute 18 *Eliz.* did not extend to Amendments upon Popular Actions, upon Penal Statutes or Indictments. *Winch* 66. *Harvey* verſus *Hundred of Cheſſam.*

2. Two were indicted of Felony, and found guilty, but the Indictment was only in the Singular Number, tho' both their Names were in it; nine of the Judges were of Opinion, that it was amendable; it being doubted by *Juſtice Yelverton* at the Aſſiſes, before whom the Felons were tried, and therefore he deſired the Opinion of the Judges, who agreed, as aforeſaid, and the Parties were executed. 2 *Bulſt.* 35. *In Odington and Darby's* Caſe.

3. An Indictment was removed into *B. R.* by *Certiorari*, and the Court was moved, that the Word (*Publice*) might be inſerted, but it was denied, becauſe it was of another Term. *Hill.* 1651. *Style* 321.

4. The Defendant was indicted for *Barretry in Middleſex*, and upon a *Certiorari* brought, two or three Lines of the Indictment were left out, and the Clerk of the Peace of *Middleſex* attending, it was moved to amend it by the Record; adjudged, that if this had been to remove an Indictment out of *London*, it might be amended, becauſe they have Power by their Charter to certify *tenorem Recordi*, ſo that the Record ſtill remains with them, and the Court may amend by it; but it cannot be amended in any other County, becauſe the Law ſuppoſes the Record it ſelf to be removed, and ſo there is nothing remaining for them to amend it by. *Sid.* 155. *The King* verſus *Alcock.* See 2 *Cro.* 276. *Thornie's* Caſe, *contra.*

5. The Defendant being indicted for Murder, pleaded, that he is *Earl of Banbury, &c.* The Attorney General replied, and then the Defendant moved to amend his Plea; which was granted, becauſe not entered on the Roll, but only filed. 1 *Salk.* 47. *The King* verſus *Knolles.* The like Rule in an Information for Perjury. 1 *Salk.* 47. *The King* verſus *Harris.* 1 *Salk.* 50. *S. P.*

Amerciaments in Inferior Courts. See *Copyhold.* (E) per Totum.

Amerciaments.

Amerciaments in Courts at *Weſtminſter* and Sheriffs Courts. (A)

Of a Town and County, and for what Cauſe. (B)

(A)

Amerciaments in Courts at Weſtminſter, and Sheriffs Courts.

1. *Amerciaments* are uſually aſſeſſed in *Courts of Record* for ſeveral Faults done either by the Plaintiff or Defendant; and 'tis to be obſerved, that where there are ſeveral Plaintiffs in Perſonal Actions, if they are amerced, in ſuch Caſe every Amerciament ought to be *ſeverally* and reſpectively aſſeſſed upon them, for their ſeveral Offences; for the Nature of the Word *Miſericordia* imports, that a Man ſhall not be puniſhed ſo much as his Offence requires, therefore 'tis unreaſonable he ſhould be puniſhed for the Offence of another, which he muſt be, if the Amerciament was aſſeſſed upon him jointly with another; and in theſe Courts there is not any certain Sum aſſeſſed on the Offenders, as there is in *Inferior* Courts; but the Entry is thus, *Ideo, &c. in miſericordia pro falſo clamore.*

2. In all Actions *Quare vi & armis*, as in *Reſcous*, *Treſpaſs*, *vi & armis*, *&c.* if Judgment is given againſt the Defendant, he ſhall be *fined* and impriſoned, for *Impriſonment* is incident to a *Fine*; and when the Judgment is *quod Capiatur*, it muſt be intended *capiatur* till he pays the Fine; if the Defendant plead a Falſe Deed, or denies his own Deed, and 'tis found againſt him, or if *relicta verificatione* he confeſſeth the Action, he ſhall be *fined*; but if he pleads the Deed of his Anceſtor, or denieth it, and it is found againſt him, he ſhall be only *amerced*; if the Defendant in *Replevin* claimeth a Property, where in Truth he hath none, and 'tis found againſt him, he ſhall be *fined.* In an *Appeal of Robbery*, *Death*, *Felony*, or *Maihem*, if the Plaintiff be *Nonſuit*, *barred*, or his Writ *abate* by his own Default, he ſhall be *fined*, and ſo in *Attaint*; ſo likewiſe for any *Contempt* done to a *Court of Record*, and alſo in all Caſes where a Thing is prohibited by any Statute: Thus much concerning *Fines.*

Now for *Amerciaments* theſe Rules were agreed, *(viz.)* In all Writs of *Præcipe quod reddat*, *Formedon*, *Quod permittat*, *&c.* if the Plaintiff be barred or nonſuit, or his Writ abate, either for Matter or Form, he ſhall be *amerced*; but if there are two Plaintiffs, and the Writ abate for the Death of one of them, in ſuch Caſe the other ſhall not be amerced. *(2.)* In all *Perſonal Actions without Force*, as in *Debt*, *Detinue*, *&c.* if the Plaintiff be *Nonſuit*, *barred*, or his Writ *abate for Matter or Form*, he ſhall be *amerced*; but if the Writ abate for the *Death of one Plaintiff*, or if one of them is *Nonſuit*, which in Law is a *Nonſuit of both*, he who ſurviveth ſhall not be amerced, nor he who was not nonſuited, but the other who was. In all *Judicial Proceſs*, if the Plaintiff be *Nonſuit*, *Barred*, or his *Writ abate*, he ſhall *not be amerced*, becauſe 'tis a Proceſs founded on a Judgment and Record, and in thoſe Actions *he ſhall not find Pledges.* In all *Real and Perſonal Actions*, if Part be found for the Plaintiff, and Part for the Defendant, or Part againſt one Defendant, and Part or nothing againſt the other Defendant, where there are two, in ſuch Caſe, neither the Plaintiff nor Defendant ſhall be amerced; and
Dyer 312. therefore, in * *Aſſault* brought againſt *Huſband and Wife*, ſuppoſing the *Battery* to be done by *both*, and the Wife is only found guilty, the Plintiff ſhall not be amerced; *one Defendant* ſhall not be *twice amerced*, but one Plaintiff may: Upon a *Diſcontinuance* in any Action, the Plaintiff ſhall not be amerced, becauſe 'tis the Act of the Court; and ſo 'tis where the Court hath no Juriſdiction. In all Actions, *&c.* where the Defendant appeareth the firſt Day, and *tendereth* the Thing in *Demand*, he ſhall not be amerced, becauſe he doth what the King commanded by his Writ; but in all Actions in which the Offence is ſuppoſed to be done *by Force*, if the Defendant at the firſt Day *confeſſeth* the Action, yet he ſhall be *fined*, becauſe his Confeſſion is not a Satisfaction, but a Declaration of the Offence. In all Actions, *&c.* where the *Writ doth abate* for want of *Form* or *Subſtance*, or if the Plaintiff or Defendant is barred, the Judgment for the Defendant is, *Quod querens nihil capiat per Breve ſuum, &c. ſed ſit in miſericordia pro falſo clamore ſuo, &c.* and that the Defendant *eat inde ſine die*; but if the Plaintiff be Nonſuit, then the Judgment is *Ideo conſideratum eſt per Curiam quod* (the Plaintiff) *& plegii ſui de proſequendo ſint in miſericordia.* 8 *Rep.* 61. *Beecher's* Caſe.

3. In

3. In Treſpaſs, *&c.* the Defendant juſtified the Taking, *&c.* for at the Sheriffs *Torn* the Plaintiff was preſented for not appearing there, being duly ſummoned, and thereupon he was *amerced by the Jury*, which was *aſſered* by four of the Jurors to 40 *s.* which was certified to the next Quarter-Seſſions, and there it was confirmed, whereupon the *Steward of the Sheriffs Court* made a Warrant to the Defendant to levy the 40 *s.* by Vertue whereof he took the Bullock, *&c.* upon Demurrer to this Plea it was inſiſted for the Plaintiff, that the *Amerciament* ought to have been aſſeſſed *by the Court and not by the Jury*, as the Defendant had pleaded, becauſe 'tis a judicial Act; beſides, it ought not to be levied by the Defendant as Bailiff, by a *Warrant from the Steward*, *&c.* becauſe 'tis expreſly provided by the Statute * 1 *Ed.* 4. that no Fine or Amerciament in a *Torn* ſhall be levied, unleſs 'tis certified to the next Seſſions by Indenture, and there inrolled; and *by Proceſs made from the Seſſions to the Sheriff himſelf*, ſo that it cannot be levied by *Warrant from his Steward to the Bailiff*, for that is directly contrary to the Statute, and ſo it was adjudged. *Cro. Car.* 260. *Griffith* verſus *Beedle*. W. Jones 300. *Other Exception there.* * Cap. 2.

4. *In Dower*, the Defendant confeſſed as to Part, and Judgment againſt him *quod ſit in miſericordia*, and pleaded in Bar as to the reſt; and upon Demurrer to that Plea, Judgment againſt him *quod ſit in miſericordia* again; upon a Writ of Error brought it was inſiſted, that he could not be twice *amerced* in the ſame Action; but adjudged, that he may, where both the Judgments are final and independant on one another, as in this Caſe, but not where one is interlocutory. 1 *Salk.* 54. *Lord Gerrard* verſus *Lady Gerrard.*

5. Upon a *Capias* directed to the Sheriff of *Yorkſhire*, he iſſued a Warrant to the Bailiff of the Liberty of *Pomfret*, to take the Defendant *Smith*, who (not returning the Writ) was amerced at ſeveral Times to 50 *l.* which was *eſtreated into the Exchequer*; afterwards the Parties agreed, that upon producing a Certificate from the Plaintiff's Attorney that the Debt was paid, theſe Amerciaments ſhould be diſcharged, which was accordingly done upon Motion, tho' it was ſaid that there ought to be a *Conſtat of the Eſtreat*, and that Amerciaments are not uſually diſcharged upon Motion, but that the Court in ſuch Caſes gives the Sheriff Leave to compound them. 1 *Salk.* 54. *Eyres* verſus *Smith.*

6. *Iſſues* were returned upon the *Diſtringas*, and ſo upon a ſecond and third; and upon a Motion for a Rule to eſtreat them, it was denied, becauſe 'tis the Courſe of the Court to ſend twice in a Year into the Exchequer, (*viz.*) on the laſt Day of the two iſſuable Terms; but in extraordinary Caſes there may be a Rule to eſtreat them ſooner. 1 *Salk.* 55. *The King* verſus *Mayor of Hereford.*

(B)

Of a Town and County, and for what Cauſe.

1. THE Town ſhall be amerced for an *Eſcape of a Murderer*, tho' it was committed in a Field or a By-Lane, if the Eſcape was in the *Day-time*. *Hill.* 4 *Eliz. Dyer* 210.

2. The Town of *Green in Suſſex* was amerced for the *Eſcape of a Felon*, which Amerciament was grounded upon an Inquiſition taken before the Coroner, thus, (*viz.*) that the Felon, 10 *January*, 30 *Eliz. circa horam quartam poſt meridiem* ſtruck *B. B.* with a Pitchfork, who died of that ſtroke at *eight in the Evening* of the ſame Day, and then the Criminal *eſcaped*; it was inſiſted, that the Town ought not to be amerced for this Eſcape, for the Stroke being about four of the Clock in the Afternoon on the *tenth of January*, and the Party dying at *eight of the Clock in the Evening of the ſame Day*, and the Felon afterwards eſcaping, this muſt be *in the Night*; for tho' the Town might have ſeiſed the Offender in the Afternoon when the Stroke was given, yet they were not bound to it, and the Man was no Felon till the other died, the Caſe was not adjudged. *Paſch.* 30 *Eliz.* 1 *Leon.* 107.

3. But in *Milburne*'s Caſe it was adjudged, that at Common Law, if a Man be killed in a Town in the Day-time, ſo long as there is full Day, if the Murderer eſcape, the Town ſhall be amerced, but if it was done in the Night, and the Felon eſcape, the Town ſhall not be amerced, becauſe in ſuch Caſe it ſhall not be preſumed that they neglected to apprehend him. 7 *Rep.* 4. *Milburne*'s Caſe. *Poſtea* Hue and Cry. (A) 2. *S. C.*

Annuity.

What it is, and how it differs from a Rent-Charge. (A)
What Action is to be brought for it, and for the Arrears. (B)
Of Annuities *pro consilio impenso*, good. (C)

(A)

What it is, and how it differs from a Rent-Charge. See *Rent-Charge*. (G) per totum.

1. AN *Annuity* is an yearly Payment of a certain Sum of Money granted to a Person either *in Fee*, *for Life*, or *for Years*, by which the *Person of the Grantor is charged*, for it is not expressed in the Grant, *that it shall issue out of any Lands or Tenements*, nor that any *Distress* shall be taken for Non-payment, then 'tis an *Annuity* and not a *Rent-Charge*, and the Grantee hath no Remedy to recover it but by a * Writ of Annuity.

* *See* Postea (B) 8.

2. Grant of a Rent-Charge for Life, provided that the Grantee shall not Charge the *Person of the Grantor*, the Rent was afterwards arrear, and the Grantee died; adjudged, that his Executors shall have an Action of * Debt against the Person of the Grantor, otherwise they would be without Remedy. *6 Rep.* 41. *Sir Anthony Mildmay's* Case. *7 Rep.* 34. *b. S. P.*

* Postea (B) 8. S. P.

(B)

What Action is to be brought for it, and for the Arrears.

1. AN *Abbot*, with the Assent of his Covent, granted to a Man and his Heirs, so much, *&c.* to find one of his Monks to say Mass *every Holy-day* in such a *Chapel*, and that as often as he should fail therein, that they would forfeit to him and his Heirs 5 *l.* adjudged, that in this Case a Writ of Annuity did not lie, because the Thing granted was not annual. *Mich.* 28 *H.* 8. *Dyer* 24.

2 And. 1. Poph. 86. Moor 301.

2. Tenant *for Years* of Lands determinable upon the *Life* of another, granted a *Rent of* 10 *l. per Annum* to *B. B.* issuing out of the same for fifteen Years, with a Clause of Distress, the Life died; adjudged, that a Writ of Annuity may be brought by the Grantee for the Arrears of the Rent, because the Rent-charge did determine by the Act of God, besides, an Interest was immediately vested in the Grantee, and therefore it was in his Election to make it a Rent-Charge, and so to charge the Land with it, or a personal Thing to charge the Person of the Grantor in a Writ of Annuity. *2 Rep.* 37. *Fullwood* versus *Ward* in *Sir Rowl. Heyward's* Case.

3. There was a Grant of a Rent out of certain Lands to a Man and *his Heirs*, but the Grantor did not bind *his Heirs* in the Grant; he died, and the Grantee brought a Writ of Annuity *against his Heir*; but adjudged, that he was not chargeable, but the Land; but if the Writ of Annuity had been brought against the *Grantor* himself in his Life-time, this would have turned the Rent-Charge in Fee into an Annuity only for the Life of the Grantor. *Mich.* 17 *Eliz. Dyer* 344.

4. An Annuity was granted to a Feme Sole *for Life*, who afterwards married, there were Arrears due in her Life-time, and then she died, so that the Annuity was determined; adjudged, that her Husband might have an Action of Debt at Common Law for these Arrears, for an Annuity is more than a Thing in Action, for it may be granted over. *Pasch.* 26 *Eliz. Owen* 3.

* 5 Mod. 142.

5. Judgment in a Writ of Annuity granted to the Plaintiff for exercising the Office of a *Steward*, and afterwards the same was behind again, whereupon the Plaintiff brought a * *Scire facias* upon the Judgment, to which the Defendant pleaded, that pending the Writ the Plaintiff had refused to execute the Office of a *Steward*, (*viz.*) to hold a Court, *&c.* tho' he was required; adjudged a good Plea, for by his Refusal the Annuity was determined, and then he could only have an Action of Debt for the Arrears. *Trin.* 25 *Eliz. Dyer* 377, and 270. *Walton's* Case. *S. P.*

6. The *Bishop of Rochester* brought a Writ of Annuity against the *Dean and Chapter of Rochester*, and declared for an Annuity by Prescription from the *Prior of St. Andrews in Rochester*, which Priory was dissolved *Anno* 28 *H.* 8. and about three Years afterwards their Possessions were given by the said King to the *Dean and Chapter of Rochester*; the Chief Justice *Anderson* was of Opinion, that the Annuity was determined, because 'tis the Nature of an Annuity to charge only the Persons; and in this Case the Corporation of the *Priory* were the Persons granting, which being now dissolved, the Annuity is gone; but if any Land had been charged with the Payment, or if

the *Priory* had been changed into an Abbey, the Annuity ſhould continue. *Paſch.* 38 *Eliz. Owen* 73. *Biſhop of Rocheſter*'s Caſe.

7. *An Annuity* was brought by the *Dean and Chapter* of *S.* againſt the *Maſter of St. Bartholomew's Hoſpital*, in which the Plaintiffs demanded an *Annuity by Preſcription*, to be paid to them yearly at *S.* the Plaintiffs had Judgment, and afterwards they brought a *Scire facias* upon that Judgment againſt the Succeſſor of the ſaid Maſter, for Arrears of the ſaid Annuity, which became due after the Judgment was given, and adjudged good. 35 *H.* 8. *Bendlos* 23. *The Caſe of the Maſter of St. Bartholomew's Hoſpital. Cro. Eliz.* 810. *Trinity-College in Cambridge* verſus *Tonſtall. S. P.*

8. The Grantor by Deed granted an Annuity of 5 *l. per Annum* to the Grantee for two Years, payable at *Michaelmas, or ſixteen Days after*, the Grantee brought an *Action of Debt* for this five Pounds, in which he declared, that it was in arrear *& adhuc aretro exiſtit*; and upon Demurrer to the Declaration it was inſiſted, that an Action of * Debt would not lie for it, but a Writ of Annuity was the proper Remedy; but adjudged, that Debt would lie upon the Contract, it being in a Grant for Years and by Deed. *Cro. Eliz.* 268. *Brown* verſus *Pendlebury.* * Antea (A) 2. S. P.

9. Where a Man hath an Annuity by *Preſcription*, and he brings a Writ of Annuity for the Arrears, and recovers, he ſhall never afterwards have another Writ as long as that Judgment ſtands in Force, becauſe the *Preſcription* is altered by the Judgment, and changed into a Thing of a higher Nature, but he ſhall have a *Scire facias* on that Judgment. *6 Rep.* 7.

10. The Declaration was *de placito debiti*, and the Plaintiff declared for 10 *s.* arrear *de annuali redditu*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the * Declaration was ill, for as 'tis an Action of Debt the Plaintiff cannot have Judgment, becauſe it appears by the Declaration that it was an Annuity, and ſo it was adjudged. 2 *Bulſt.* 15. *Lucas* verſus *Fullwood.* Yel. 108. * 5 Mod. 143. Davis & Speed. S. P.

11. In a Writ of Annuity the Parties were at Iſſue upon a *Preſcription*, and the Jury found for the Plaintiff, but *no Damages*, but before Judgment the Plaintiff releaſed the *Damages*, and had Judgment to recover the Annuity; and upon a Writ of Error brought it was aſſigned for Error, that the Jury had given no *Damages*, which ought to be given as well in an Annuity *by Preſcription as by Deed*, but the Judgment was affirmed, becauſe 'tis an Advantage for the Defendant, that *Damages* were not given againſt him, and the not finding Damages doth not alter the Judgment. 1 *Roll. Rep.* 88. *Bent* verſus *Marſh.*

12. The Plaintiff brought an Annuity by *Plaint* in the *Grand Seſſions in Caermarthen*, and declared, that it was granted to him for Life by the Defendant, and had a Verdict and Judgment againſt him, and the Defendant brought a *Writ of Error*, and the Error aſſigned was, that by the Statutes 34 *&* 35 *H.* 8 All real Actions brought in *Wales*, and mixt Actions, ſhall be ſued by Writ, and all perſonal Actions by *Plaint*, and that an Annuity is a mixt Action, therefore not to be brought by *Plaint: Sed per Curiam*, 'tis a perſonal Action, and Charges the *Perſon* only and not the Land. *W. Jones* 214. *Bodvill* verſus *Bodvill.* Cro. Car. 170.

13. In an Action *of Debt* for the Arrears of an *Annuity for Years*; upon *Nihil debet* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that * *Debt* would not lie for theſe *Arrears*, but he ought to have brought a Writ of Annuity, becauſe the Term was not expired, but the Annuity ſtill continued. 4 *Rep.* in *Ognell*'s Caſe. *Style* 162. *Tindall* verſus *Harrington.* * 5 Mod. 143. S. P.

(C)

Of Annuities pro conſilio impenſo, good.

1. IN *Replevin*, the Defendant avowed for an Annuity granted to him *pro conſilio impendendo*; the Plaintiff replied, that the Defendant was accuſed of *Treaſon* and committed to the Tower, and that he had Buſineſs which required his Counſel, but could not be admitted to him; and upon Demurrer, Judgment was given for the Plaintiff, becauſe he might give Counſel in Priſon as well as when at large. *6 H.* 8. *Dyer* 2.

2. *An Annuity* was granted to an Attorney *pro conſilio impenſo & impendendo*, and afterwards there being a Difference between the Grantor and a Stranger, the Attorney not being required to give Counſel to the Grantor, was of Counſel with his Adverſary; adjudged, that his Annuity was not determined by this Misbehaviour. *Dyer* 369. *Plummer*'s Caſe.

3. A *Writ of Annuity* was brought for an Annuity *pro conſilio impenſo, &c.* the Defendant pleaded in Bar, that he carried a Bill in Chancery, and deſired him to *ſet his Hand to it*, and becauſe he refuſed, he detained the Annuity; adjudged no good Plea, for tho' the Plaintiff was bound to give his Advice, yet he was not bound to ſet his Hand to every Bill brought to him. *Poph.* 135. *Mingie*'s Caſe.

4. *An Annuity* was granted for Life *pro conſilio impenſo, &c.* and in a Writ of Annuity brought for the Arrears, the Defendant pleaded, that before any were due, he required the Plaintiff to *do him Service*, and he refuſed, *&c.* the Plaintiff replied, that before any Refuſal, the Defendant on ſuch a Day and Year did Diſcharge him the ſaid Plaintiff from his Service; adjudged, that the Defendant's Plea was not good, becauſe he ought to have ſhewed for what Manner of Service the Plaintiff was retained, and the Annuity granted, and then what Service he required

of him, and what he refuſed; neither is the Replication good, for the Diſcharge from the Service was not an abſolute Diſcharge, ſo that the Defendant could never afterwards require it, becauſe the Annuity being granted to the Plaintiff for his Life, he ought to continue his Service ſo long as the Annuity continueth, but where the Retainer is *for Years*, then a Diſcharge is peremptory and abſolute. 1 *Leon.* 209. *Bagſhaw* verſus *Earl of Shrewsbury*. *Hill.* 4 & 5 *M. Dyer* 156. *Lucas*'s Caſe. *S. P.*

5. *Debt, &c.* for the Arrears of an Annuity *pro conſilio impenſo* brought by the Aſſignee of the Grantee; and upon a Demurrer to the Declaration it was adjudged good, and that the Action was well brought by the Aſſignee, tho' it was due *pro conſilio impenſo*, for ſuch was the Grant, and not *pro conſilio impendendo*. *Moor* 5. *Baker* verſus *Brook*.

Hob. 248. 6. In a Writ of Annuity the Plaintiff declared, that whereas the King by Letters Patents had granted to the Defendants certain Privileges concerning making *Allom, &c.* that they the ſaid Defendants, as well for the Counſel given by the Plaintiff to them concerning the ſaid Letters Patents, and before they were drawn, as afterwards, *&c. granted* to him an annual Sum of 40 *l.* for ſo many Years, *&c.* The Defendants confeſs the Annuity as aforeſaid, but ſay it was granted to the Plaintiff to be taken out of the *clear Profits and Gains* which ſhould accrue to them by making Allom; and averred, that no ſuch Gains did accrue to them ſince the Grant; and upon Demurrer it was adjudged a good Grant of an Annuity to charge their Perſons. *Hutt.* 33. *Smith* verſus *Bouchier*.

Antient Demeſne.

What it is, and how to be tried. (A)
By what Acts the Tenure of the Land may be altered, and of Fines levied. (B)
Privileges of Tenants allowed, and not. (C)
Pleadings, good, and not good. (D)

(A)

What it is, and how to be tried.

1. THE Lands which were in the Poſſeſſion of *Edward the Confeſſor*, or *William* called the Conqueror at the Time of the Making the *Domeſday-Book*, which was in the 20th Year of his Reign, are called Lands in *Antient Demeſne*, and in that Book the Lands which were in the Poſſeſſion of the one, are called * *Terræ Regis Edwardi*, and thoſe in the Poſſeſſion of the other are called *Terræ Regis*, and where the Demeſnes of *St. Edward* were aliened before the Making of the *Domeſday-Book*, they are ſtill called Lands in *Antient Demeſne*, and all ſuch Lands are holden in Socage.

* Poſtea 8.

2. The *Tenant* pleaded *Antient Demeſne* held of the Manor of *Sudbury* in the County of *Suffolk*, and Iſſue being taken, whether that Manor was *Antient Demeſne*, or not; the Book of *Domeſday* was brought into the Court of Common Pleas at the Trial, and this was by a *Certiorari* out of the Chancery directed to the Treaſurer and Chamberlain of the Exchequer, and by *Mittimus* ſent to the Common Pleas. 8 *Eliz. Dyer* 150. *b.*

Hob. 188. 3. Iſſue was taken, whether the Manor of *Bowden* in the County of *Northampton* was *Antient Demeſne*, or not; and the *Book of Domeſday* being brought into Court, it appeared, that the Manor of *Bowden* in the County of *Leiceſter* was *Antient Demeſne*, but not the Manor of *Bowden in the County of Northampton*. 1 *Brownl.* 43. *Griffin* verſus *Palmer*.

4. *Antient Demeſne* is pleaded as to ſuch a Manor, and Iſſue be taken whether 'tis ſo or not, this ſhall be tried by the Book of Domeſday as aforeſaid, but if Iſſue be taken, that *certain Acres are Parcel of the Manor of H.* which is Antient Demeſne, that ſhall be tried by a Jury, for * Parcel or not Parcel is Matter of Fact, which cannot be tried by that Book, 9 *Rep.* in the Caſe of the *Abbot de ſtrata Marcella*.

* Poſtea, (D) 11.

5. Where a *Writ of Right* is directed to a Lord of a Manor in *Antient Demeſne* in ſuch Caſe, tho' the Plea is held before him by Vertue of that Writ, yet not he but the Suitors are Judges, and the Reaſon why the Writ is directed to him is, becauſe 'tis his Court, but tho' ſuch Court hold Pleas by *Writ of Right*, yet they retain of the former Court; for upon a Judgment given therein, a Writ of Error will not lie, but a Writ of falſe Judgment. 6 *Rep.* 11. *Gentleman*'s Caſe.

1 Lev. 106. 6. In Ejectment for Lands in *Longhope* in the County of *Gloceſter*, the Iſſue was, whether it was *Antient Demeſne* or not, and at the Trial the *Domeſday-Book* was brought in by an Officer of the Exchequer, by which it appeared, that *Hope* was *Antient Demeſne*, but nothing of *Longhope*, thereupon they offered to prove it by Witneſſes that it was the ſame Place, that it was formerly

called *Hope*, and lately *Longhope*; but the Court would not allow this Proof; ſo they failed to prove the Iſſue, for if the Truth was as 'tis ſuppoſed, they might have helped it in pleading, that it was known by the one Name and the other; and that *Longhope* and *Hope* were the ſame. *Sid.* 147. *Holdy* verſus *Hodges.*

7. *Tenant in Antient Demeſne* brought a *Monſtraverunt* againſt the Lord, who prayed, that the Tenant might make it appear to the Court, that the Manor is *Antient Demeſne*, and thereupon he produced the Book of *Domeſday*, under this Title, (*viz.*) *Terra Sancti Stephani*, and not *Terra Regis Edwardi*, or *terra Regis*; he offered alſo to prove, that this Manor was in the King's Hands, by producing a Grant of *Ed.* 1. in which there was an *Inſpeximus* of the Grant of *H.* 1. in which there was another *Inſpeximus* of the Grant of *William the Conquerour*, who had granted this Manor to *G. D.* in which there was alſo an *Inſpeximus Chartam Edwardi Regis*; ſo that it appeared, that this Manor was in the Poſſeſſion of *William the Conquerour and Edward the Confeſſor*; but adjudged, that the Lands under the Title of *Terra Sancti Stephani* could never be intended to be in the Poſſeſſion of either of thoſe Kings, it being ſo long after the Conqueſt; and as to the *Inſpeximus* in thoſe Grants, 'tis only a Word of Form, and therefore did not prove that the Lands were ever in the Poſſeſſion of thoſe Kings. 43 *Ed.* 3. 23. 49 *Ed.* 3. 22. See 1 *Salk.* 57. *S. P.*

8. The Iſſue was, whether the Manor of *Otterbury* was *Antient Demeſne*, or not? and the Court awarded, that the Plaintiff *habeat recordum libri de Domeſday hic in Octab. Sancti Hillarii*, at which Day the Porter brought the Book into Court, and it appeared, that *Edward* the Confeſſor *Anno* 28 of his Reign, had given this Manor to the Abbot of *R.* and that it was not under the Title * *Terra Regis*; for all Lands held in Antient Demeſne, and which the Confeſſor had, were Written in the Book of *Domeſdy* by *William the Conqueror*, *Anno* 20 *of his Reign*, under the *De Terra Regis*, and theſe are now Antient Demeſne; but thoſe which were given away by the Confeſſor, and not witten in *Domeſday* under that Title, are not Antient Demeſne. 1 *Salk.* 57. where the Caſe is cited between *Sanders* and *Welch* in *C. B. Paſch.* 9 *Jac. Rot.* 3165.

* Antea 1.

(B)

By what Acts the Tenure of the Land may be altered, and of Fines levied, &c.

1. IF a Man levieth a *Fine* at Common Law, of Lands in *Antient Demeſne*, the Lord of the Manor ſhall have a *Writ of Deceit* againſt the *Cogniſor*, and the Tenant, and thereby ſhall not make the Fine void; but if after the levying the Fine, and after the Cogniſee is in Poſſeſſion, the Cogniſor releaſeth all his Right, and confirms the Eſtate of the Cogniſee in ſuch Caſe; tho' the Fine be avoided he ſhall retain the Land againſt the Cogniſor and his Heirs. 10 *Rep.* 50. *In Lampitt's* Caſe.

2. Where there is a *Cuſtom*, that Lands in *Antient Demeſne* ſhall be divided between Heirs Males, and a *Fine* is levied at *Common Law* of thoſe Lands, in ſuch Caſe the *Cuſtom* is gone, becauſe the Land is changed by the *Fine* from that which was *Antient Demeſne* to Lands at *Common Law*, and the *Cuſtom* doth not run with the Lands ſimply, but *quatenus* they were *Antient Demeſne*; but 'tis otherwiſe where a *Fine* is levied of Lands held in *Gavelkind*, for there the Cuſtom of dividing it runs with the Lands. *6 Ed.* 6. *Dyer* 60, 72.

3. Where a *Fine* is levied according to the Cuſtom of the Manor of Lands held in *Antient Demeſne*, by him who is Tenant in Tail in Poſſeſſion, and without any Proclamations; this ſhall bar the Iſſue in Tail. *Mich.* 23 *Eliz. Dyer* 373. 1 And. 71. Elme's *Caſe.*

4. If the Lord of a Manor in Antient Demeſne, confirms the Eſtate of his Tenant to hold by certain Services at Common Law, the Quality of his Eſtate is by this Means changed, tho' there is no Tranſmutation of Poſſeſſion; for the Tenant is now diſcharged from the Cuſtoms of the Manor, and ſhall never be impleaded by a *Petit Writ of Droit-Cloſe.* 9 *Rep.* 40. *In Beaumont's* Caſe.

5. *Writ of Deceit*, for a Fine levied of Lands in *Antient Demeſne*; the Defendant pleaded a a *Releaſe* made by the Lord of the Manor, in the Reign of *Ed.* 2. by a Fine then levied to one who was then Tenant of thoſe Lands, which *Releaſe* was of one Meſſuage and one Yard-Land, and of *all Services and Cuſtoms, &c.* except 2 *s.* for one Acre of Land, Suit of Court and Reliefs; the Queſtion was, whether the *Seigniory*, as to the Cuſtom of Antient Demeſne, was extinquiſhed by this *Releaſe of the Cuſtoms and Services*; and adjudged, that it was; but that by the *ſaving* the Rent, the Suit of Courts and Reliefs ſtill continued. *Moor* 143. *Griffith* verſus *Clerk.*

6. Tenant in Fee made a Feoffment of Lands in *Antient Demeſne* to the Uſe of himſelf and his Wife, for Life, Remainder to the Uſe of his Daughter *Mary Andrews, and the Heirs of her Body to be begotten by one John Gwillim*, with divers Remainder over; afterwards the ſaid *John Gwillim* married *Mary Andrews*, by whom he had Iſſue *Thomas Gwillim*, and he and his Wife, after the Death of his Father and Mother, levied a Fine *in placito Conventionis* in the Court of the Manor, by which Fine *conceſſerunt* the ſaid Lands to *three Perſons during their reſpective Lives*, under the yearly Rent of ſix Pounds, by Vertue whereof they entered; and afterwards the ſaid *Thomas Gwillim*, and his Wife, levied another Fine in the ſaid Court, to the Uſe of 1 Salk. 57, 144.

the ſaid *Thomas and his Heirs*, and at the next Quarter-Seſſions he by Bargain and Sale there enrolled, conveyed the *Reverſion* to *Thomas Payne* and his Heirs, to whom he likewiſe releaſed all his Right, and then died, leaving Iſſue *Thomas*, who had Iſſue *Richard*, the Leſſor of the Plaintiff; it was inſiſted againſt him, that he was barred by the Statute of Limitations, becauſe this Fine levied by his Grandfather, being only a *Diſcontinuance* of the Eſtate Tail, his Father was entituled to a *Formedon*, and he having neglected to proſecute it for twenty Years, *Richard* his Son, tho' an Infant, is now barred by that Statute; but adjudged, firſt, that a Fine may be levied in the Court of the Manor, where the Lands are Antient Demeſne, tho' 'tis enacted by the Statute *de modo levandi Fines Anno* 18 *Ed.* 1. that they ſhall be levied in the Common Pleas, and not elſewhere, becauſe a *Writ of Deceit* lies againſt him, who levies a Fine of Lands in Antient Demeſne, in any other Court but that of the Manor; therefore that Statute muſt extend to invalidate Fines levied in *Borough-Courts*, and other baſe and inferior Courts; and a Fine thus levied is no *Bar* to the Eſtate-Tail, for that muſt be a Fine with Proclamations, by Vertue of the Statue 4 *H.* 7. but 'tis a *Diſcontinuance*, and in this Caſe only during the Lives of the three Grantees for Life: Now the Father of the Plaintiff could not enter, becauſe the Eſtate for Lives was not determined whilſt he was living; but a Title of Entry commenced in his Son, the now Plaintiff, upon the Death of the Survivor of the three Grantees for Life, and he having made an Entry *within twenty* Years after his Title did accrue, by Conſequence he is not barred by that Statute, 1 *Lutw.* 770. *Hunt* verſus *Bourne*.

1 Salk. 210. 7. A Fine was levied of Lands in *Antient Demeſne*, and the Cognizor, and Cognizee and *his Wife*, being all dead, a *Writ of Deceit* was brought againſt the Heir of the one and the other, and againſt the Tertenant and the Purchaſer under the Fine; and it was objected, that this Writ did not lie againſt *the Heir of the Cognizor*, becauſe the levying the Fine was a *Perſonal Wrong* in the Anceſtor, and *moritur cum perſona*; but adjudged, that it was not a Perſonal Wrong alone, but a total Diſinheriſon to all ſucceeding Lords of that Manor, and it ſeems unreaſonable, that by the Act of God, (*viz.*) by the Death of the Cognizor, they ſhould be defeated of the proper Remedy: Then it was objected, that this Writ ought to be brought as well againſt the *Heirs of the Wife*, as the Heirs of the Husband, they being *both Cogniſees in the Fine*; but adjudged, that the *Tertenant* is the proper Perſon againſt whom this Writ lies, and that all others may be brought in by *Scire facias*, if there ſhall be Occaſion. *Hill.* 7 *Will.* 3. *C. B. Rot.* 1832. *Zouch* verſus *Thompſon*. 3 *Lev.* 417.

*Poſtea (D) 6. * 2 Cro. 559. S. C. 8. *Writ of Deceit* againſt the Defendants, wherein the Plaintiff ſet forth, that he was ſeiſed in Fee of the Manor of * *Bromſegrove in Com. Wigorn.* which Time out of Mind was *Antient Demeſne*, and that all the Lands held of the ſaid Manor are *pleadable in Curia Manerii* there * *per parvum Breve de Recto Clauſo*, that the Defendants intending to Defraud the Plaintiff of the Profits of the ſaid Manor, had levied a Fine in the Court of Common Pleas, of certain Lands, Parcel thereof; and that by Reaſon of the ſaid Fine thoſe Lands were now become *Frank-Fee*, and pleadable at Common Law *in exhæreditationem* of the Plaintiff, and to his Damage of 40 *l.* The Objection made to this Declaration, was, that the Plaintiff had ſet forth, that the Lands were *placitat' & placitabilia in Curia Manerii*, but did not ſay before whom the Court was held, *viz.*) *coram Ballivis & Sectatoribus*; but this Objection was diſallowed: Then the Queſtion was, whether the Fine ſhould be reverſed *quoad* the Benefit of the Lord of the Manor, as in the Whole; and adjudged, that it ſhould be intirely reverſed, becauſe it was levied *coram non Judice*, which makes it wholly void. 1 *Lutw.* 711. *Counteſs Plymouth* verſus *James*. *Ibid.*

(C)

Privileges of Tenants allowed, and diſallowed.

1. WHERE a Sheriff returns Tenants in Antient Demeſne upon any Jury, they may have a Writ *de non ponendis in Aſſiſis & juratis* againſt the Sheriff, or any one who hath Return of Writs, and if notwithſtanding ſuch Writ, *de non ponendis*, *&c.* the Sheriff will return them in ſuch Caſe, they may have an Attachment againſt him; ſo where the Defendant pleaded *Antient Demeſne*, and the Sheriff returned Perſons, who held in Antient Demeſne, they may be challenged and withdrawn. 1 *Rep.* 105. *In Albanie's* Caſe.

2. Where the *Tenants in Antient Demeſne* are diſtrained to do the Lord other Services or Cuſtoms than they or their Anceſtors have formerly done, they may have a Writ of *Monſtraverunt* directed to the Lord, commanding him not to diſtrain for other Services, *&c.* and if he will ſtill diſtrain, *&c.* then by a Writ directed to the Sheriff, he may command him not to demand or diſtrain for other Services; and if he ſtill perſiſts, then he may raiſe the *Poſſe Comitatus*, or command the Neighbours to reſcue and reſtore the Diſtreſs; but the uſual Courſe is, that if after the Writ to the Sheriff, the Lord will ſtill diſtrain, then an Attachment lies againſt him returnable in one of the Courts of Record at *Weſtminſter*, to anſwer for the Contempt. *Plow. Com.* 129.

3. Upon a Special Verdict in Ejectment, the Queſtion was, whether *Lands in Antient Demeſne* were extendable upon a *Statute-Staple or Statute-Merchant*, or not; and adjudged, that they

they were extendable. *Moor* 211. *Martin* verſus *Wilks*, and *H.* 11 *Jac. Com. B. Rot.* 2541. *Cox* verſus *Barnaby*. *S. P. Poſtea* (D) 6. *S. C.*

4. The Tenants in *Antient Demeſne* are called by *Bracton*, *Villani privilegiati*, they are free as to their Perſons, but not as to their Eſtates; and the Privileges which thy have muſt be ſuppoſed to commence by Act of Parliament, for they cannot be created by Grant at this Day, and they are coeval with the Government it ſelf, or at leaſt as Antient as any Eſtates or Tenures whatſoever. *Per Holt*, *Ch. Juſt.* in the Caſe of * *Hunt & Bourne*. 1 *Salk.* 57.

* Antea (B) 6. S. C.

(D)

Pleadings, good and not good. See *Aſſiſe*. (B) 2. *Audita querela*. (B) 15.

1. A *Writ of Right* was brought in a Court of *Antient Demeſne*, and the Plaintiff made Proteſtation to ſue there in Nature of a *Writ of Right at Common Law*; the Tenant joined the *Miſe* upon the meer Right, and thereupon the Record was removed by an *Accedas ad Curiam*; but adjudged, this is no ſufficient Cauſe of Removal, and therefore a *Procedendo* was awarded. *Hill.* 2 *Mar. Dyer* 112. *Sir Humfrie Stafford*'s Caſe.

2. *In Aſſiſe for a Rent*, *Antient Demeſne* is a good Plea, becauſe that Court hath Authority to hold Plea of the Land out of which the Rent iſſueth, and therefore of the Rent. 28 *H.* 8. *Dyer* 8. *Buckingham*'s Caſe.

3. *In Ejectment*, the Defendant pleaded *Antient Demeſne* to the Juriſdiction, *&c.* and upon Demurrer it was inſiſted for the Plaintiff, that this was no good Plea, becauſe this Action is in Nature of an Action of *Treſpaſs*, and in ſuch Action, 'tis not a good Plea; but adjudged, that it is a good Plea in *Ejectment*, becauſe by Common Intendment the Right and Title of the Land may come in Queſtion, and ſo it may in *Replevin*, and in *Accompt againſt a Guardian in Soccage*; and therefore 'tis a good Plea. 5 *Rep. Alden*'s Caſe. 2 And. 178.

4. The Demandant recovered in a *Writ of Right-Cloſe*, which was directed to the *Bailiffs* of the Manor, and the Tenant brought a *Writ of Falſe Judgment* to reverſe it, and aſſigned for Error, that the Writ of *Right-Cloſe* was directed to the *Bailiffs* when the Court was held *coram Sectatoribus*; but the Judgment given in the Manor Court was affirmed, becauſe it ſhall be *intended* that the *Bailiffs* were likewiſe *Suitors*; for none elſe can be Judges of that Court. 3 *Leon.* 63.

5. The Plaintiff brought an Action for Taking a *Cable Rope for Toll*, ſetting forth, that *Loſtocke* is a Village and Antient Demeſne, and that the *Tenants of Antient Demeſne* are to be quit of * *Toll in all Places*; that he was an Inhabitant and Tenant there, *&c.* The Defendant juſtified the Taking by Vertue of a Cuſtom to take *Toll* for any Goods brought by Sea to *Merchandiſe*, and that the Plaintiff brought thither Goods by Sea, twenty Hundred Weight of Cable *to Merchandize*; and for that Reaſon it was held a good Plea. *Cro. Eliz.* 227. *Ward* verſus *Knight*. Toll. (A) 2. *S. C.*

* Poſtea 9 S. P.

6. *In Treſpaſs*, upon Not guilty pleaded, the Jury gave a Special Verdict, that the Defendant was ſeiſed of the Lands in Queſtion, and that he held the ſame of the Manor of * *Bromeſgrove*, which is *Antient Demeſne*; and that the Plaintiff having obtained a Judgment againſt him, took out Execution by *Elegit*, by Vertue whereof the Sheriff delivered the Lands to him, and he entered, upon whom the Defendant re-enter'd, and now the Plaintiff brought an Action of Treſpaſs, *&c.* The Queſtion was, whether Lands held in *Antient Demeſne*, might be delivered in Execution upon an *Elegit*? adjudged, that a *Freehold in Antient Demeſne* could not be recovered in any of the Courts of Common Law; and even where the *Poſſeſſion* is to be recovered, Antient Demeſne is a good Plea, but not in *Treſpaſs*, tho' the Freehold ſhould come in Queſtion, becauſe the Iſſue is upon the *Wrong done*: Now in this Caſe, tho' the *Poſſeſſion* is recovered by the Act of the Sheriff, in Purſuance and by Vertue of a *Judgment obtained in a Court of Common Law*, yet the Land it ſelf was never directly in Queſtion; and ſince the Judgment is good, and in Force, the *Elegit* doth Warrant the Extending a Moiety of the Defendant's Lands, and thoſe held in *Antient Demeſne* are his Lands, as well as thoſe which are not ſo held; therefore neither the Sheriff, nor he to whom he delivered Poſſeſſion of thoſe Lands, are liable to an Action of Treſpaſs. *Hob.* 47. *Cox* verſus *Barnſly*. *Poſtea* Aſſiſe. (B.) 2. *and* Elegit. (B) 8. *S. C.*

* Antea (B) 8.

7. *In Ejectment*, there was a Judgment obtained for Lands held in *Antient Demeſne*, and a Writ of *Procèdendo ad executionem Judicii* iſſued out of the King's Bench, to the *Suitors of the Court of Antient Demeſne*, who returned, that they could not execute it, becauſe the Land was *Frank-fee*, as it appeared to them by a Tranſcript of a *Fine* levied of the ſame; but this Return was diſallowed, becauſe the Parties had allowed the Juriſdiction of the Court before; and if the Land had been *Frank-fee*, it ought to have been pleaded, but now after Judgment 'tis too late to ſay, that 'tis *Frank-fee*. *Moor* 451. *Gybon* verſus *Bowyer*.

8. *In Ejectment*, after an *Imparlance*, the Defendant pleaded *Antient Demeſne*; and upon Demurrer it was inſiſted by the Plaintiff, that this Plea came too late; but adjudged, that ſince the Land is not impleadable at Common Law, and the Defendant hath pleaded no other Plea, 'tis ſoon enough after an *Imparlance*. *Cro. Car.* 6. *Marſhall*'s Caſe. *Latch* 83. *S. C.* By the Name of *Marſhall* verſus *Allen*. *Paſch.* 4 *Jac. Clerk* verſus *Hanſon*.

9. *In*

1 Leon. 231. S. C. 9. *In Replevin, &c.* the Defendants made Cogniſance, *&c.* for *Toll* in *Highworth* Market, which being demanded, and the Plaintiff refuſing to pay, they juſtified the Taking the Cattle, *&c.* The Plaintiff replied, that ſhe is *Tenant* of the Manor of *Hanningdon*, which is *Antient Demeſne*, and that the Tenants of *Antient Demeſne* Lands are quit of * *Toll in all Places* in the the Kingdom; and upon Demurrer to this Replication, it was objected, that the Plaintiff had not well entituled her ſelf to this Privilege, for ſhe ſays, that ſhe is *Tenant* of the Manor, *&c.* ſhe ſhould have ſaid, that ſhe is ſeiſed in Fee of ſuch Lands, *&c.* which he held of *J. F.* as of his Manor of *Hanningdon*, which is *Antient Demeſne*; but adjudged, 'tis not neceſſary to mention what Eſtates ſuch Tenants have, but that *homines & tenentes de antiquo dominico, &c.* ought to be diſcharged of *Toll, &c.* Then it was objected, that the Privilege was laid too general, for it was to be diſcharged of Toll in *all Places, &c.* when by Law they are not diſcharged of Toll, but only of *ſuch Things* which ariſe on their own Tenements, and which are for the Support and Eaſe of their Families; and the Reaſon is, becauſe in the Beginning they manured the *King's Demeſnes*, which by their Tenure they were obliged to do; and therefore to encourage them in that Labour they had this Privilege, to be quit of *Toll of all Things which did ariſe or grow on their own Lands*; but when they turn Merchants, they are not within the Reaſon of this Privilege; but adjudged, that to be quit of *Toll* in all Places ſhall be intended of *ſuch Things* in *all Places* where he is Tenant. 2 *Lutw.* 1144. *Savery* verſus *Smith*, See *Ward* verſus *Knight*. Toll. (A) 2. *S. S. P.*

* Antea 5. S. P.

* *See* Defence. (A) 6. 10. In *Ejectment*, the Defendent * *venit & dicit*, that the Tenements *in Viſu poſita*, are held of *John Nicholas* Knight, *ut de Manerio ſuo de Gillingham*, and that the ſaid Manor is *de antiquo Dominico* of the Crown of *England*, and Time out of Mind have been *placitat' & placitabilia in Curia ejuſdem Manerii per parvum Breve de Recto, &c.* The Plaintiff replies, *quod bene & verum eſt*, that the Tenements are held of the ſaid Manor, as the Defendant in his Plea ſuppoſeth, but that they are *Copyhold, Parcel of the Manor, &c.* And upon a Demurrer to this Replication, tho' it was repugnant to ſay, that the Tenements are held of the Manor, as the Defendant had ſuppoſed, and then to ſay, that they are Copyhold, yet the Plaintiff had Judgment, for the Plea was ill, becauſe of thoſe Words, *in Viſu poſita*, for the Tenements are not put in View in an Ejectment; this ſeems to be a Plea drawn by a Precedent of Antient Demeſne in an Aſſiſe, and that if it had not been for thoſe Words the Plea had been good; for *Copyhold, Parcel of the Manor*, had been triable at Common Law, and Freeholds held of the Manor are only pleadable in the Lord's Court. 3 *Lev.* 405. *Smith* verſus *Frampton*. See 2 *Cro.* 559.

* Antea (A) 4. 11. *In Ejectment*, the Defendant pleaded in Abatement, that the Lands were *Parcel of the Manor of Bray*, which Manor was Antient Demeſne held of the Crown; and upon Demurrer to this Plea, it was adjudged ill, becauſe * *Parcel or not Parcel of the Manor* is impleadable at Common Law; the Defendant ſhould have pleaded, that the Lands were Antient Demeſne *held of the Manor of B.* which is *Antient Demeſne*, and this had been impleadable in the Lord's Court only, and not elſewhere. 1 *Salk.* 56. *Barker* verſus *Wich.* See 2 *Salk.* 774. *The Pleadings.*

Appeals of Murder.

Of Murder, where it ſhall be abated, or not. (A)
Pleadings in Appeal of Murder and Felony, good and not good. (B)
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(A)

Of Murder, where it ſhall be abated, or not. See *Falſe Latin.* (A) 4. *Indictment.* (V) per totum. *Averment.* (A) 1.

1. A Man was found guilty upon an *Indictment* for the Murder of *B. B.* and immediately his *Wife* brought *an Appeal* of the Death of her *Husband*, to which the Defendant pleaded, that after the Death of her firſt Husband ſhe had married another at *R. &c.* the Plaintiff replied, and the Matter depending a Year, and more, all theſe Proceedings were removed into *B. R.* by *Certiorari*, and the Court demanding of him what he could ſay why Judgment ſhould not be given againſt him upon his former Conviction, he pleaded, that the Appeal was ſtill depending; but it being brought in another County than where the Indictment was laid, and there being no *Continuances* entered from one Term to another,

another, the Plaintiff in Appeal was * *Nonſuit*, and ſo the Court gave Judgment upon the Indictment. *Dyer* 296. *Stanley*'s Caſe. *Dyer* 88. *S. P. Trin. 6 Ed. 6.* * Poſtea 8, 18.

2. A Woman *poiſoned* her Husband, which is *Treaſon* by the Statute 31 *H.* 8. the Heir brought an Appeal *of Murder* againſt his Mother; adjudged, that it did not lie, becauſe it was not Murder, but Treaſon, and the greater Offence drowns the leſs. *Mich.* 33 *H.* 8. *Dyer* 50. *Saccom*'s Caſe.

3. There were *three Brothers*, and the *middle Brother* was killed, the eldeſt died within the Year, and no Appeal brought, it was a Queſtion, whether the younger Brother ſhould have an Appeal; it was not reſolved, tho' *Forteſcue* 20 *H.* 6. 43. held he ſhould not, but 16 *H.* 7. 15. 'tis held he ſhould. 5 *Ed.* 6. *Dyer* 69. *Bell* verſus *Crakenthorp.*

4. A Man was wounded in one County, died in another, and the Heir brought an Appeal in the County where his Anceſtor died; upon Not guilty pleaded it was adjudged, that the *Viſne* ſhould come out of each County. *Mich.* 31 *H.* 8. *Dyer* 46.

5. *Appeal of Murder*, upon Not guilty pleaded a ſpecial Verdict was found, that the Appellee was *Not guilty de felonia & murdro Tho. Newman*, but ſays, that the ſaid *Thomas* and others, firſt aſſaulted the Appellee on his own Ground near the Highway, and drove him to a Wall, ſo that he could go no farther, and thereupon he wounded the ſaid *Thomas* in Defence of his Life, of which Wound he died, *&c.* it was objected againſt this Verdict, that the Jury did not find that the Appellee was aſſaulted near the Highway *ad ipſum murdrandum*, and therefore he ſhall forfeit his Goods, which he ſhould not if thoſe Words had been found, and this by Vertue of the Statute 24 *H.* 8. *cap.* 5. but this Verdict is void and repugnant in it ſelf; for firſt 'tis found, that the Defendant was not guilty of the Felony and Murder, and afterwards Special Matter was found, which proves him guilty, but excuſes it. 1 *And.* 41. *Newman* verſus *Punter.* Moor 12. Poſtea Challenge. (E) 3.

6. In an Appeal of Murder brought by the *Brother* for the Death of his *Brother Henry*; the Defendant pleaded, that he was indicted for *the Death* of the ſaid *Henry* which he ſet forth, upon which he was arraigned, and confeſſed the ſame, and prayed his Clergy, and pleaded over to the Felony and Murder Not guilty; and upon a Demurrer to this Plea the Court conſidered the Statute 3 *H.* 7. *cap.* 1. by which 'tis enacted, that if the Perſon indicted ſhall be arraigned within a Year, *&c.* and *acquitted or attainted*, yet the Party may have an Appeal, but in this Caſe the Defendant was neither *acquitted or attainted*, therefore an Appeal would not lie. 1 *And.* 68. *Burgh*'s Caſe. 4 Rep. 45.

7. In Appeal by the *Wife* for the Death of her *Husband*, ſhe declared, that the Defendant gave him a mortal Wound *at B. &c.* of which he died *at W. &c.* and ſo the Defendant at *B. aforeſaid*, in Manner and Form aforeſaid, murdered her Husband; adjudged, that the Writ ſhould abate, for the *Murder* ought to be laid at the Place *where he died*, and not at the Place where the *Stroke was given. Cro. Eliz.* 196. *Hume* verſus *Ogle.*

8. *Appeal of Murder* againſt four, and all of them appeared at Bar at the Return of the Writ; adjudged, that their *Appearance* there doth not make them *in Cuſtodia Mareſchalli*, unleſs there is a Record *committitur Mareſchallo, or that they put in Bail*, ſo that in this Caſe there being no Appearance, and the Plaintiff being Nonſuit for a Default in the Writ, becauſe there was *no Addition* to one of the Defendant's Names, it was held, that ſuch * *Nonſuit before Appearance* of the Defendants, was peremptory. *Cro. Eliz.* 605. *Holland*'s Caſe. * Antea 1.

9. In *Bullware*'s Caſe, it was held, that if a *Stroke be in one County and the Death in another*; the *Appeal* may be brought *in either County*, for tho' the Defendant did nothing in that County where the Party died, yet the Death ſhall have Relation to the Stroke, and ſhall make it Felony in that County where he died. 7 *Rep.* 2. *Bulware*'s Caſe.

10. *Appeal of Murder* brought by the *Wife*, the Caſe was *Sir Charles Blunt* came to the Houſe of *Clements* the Deceaſed, and demanded a *Dog*, and in entring the Houſe, being oppoſed by *Clements*, they fought, and *Clements* was killed; and this appearing upon Evidence to the Coroners Inqueſt; the Queſtion was, whether the Depoſitions of thoſe Witneſſes ſhould be given in Evidence upon this Appeal; it was objected, that they ſhould not, becauſe not between the ſame Parties, for the Coroner is an Officer for the King, but the Appeal is between Party and Party. 2 *Roll. Rep.* 460. *Clements* verſus *Blunt.*

11. Appeal of Murder, removed by *Certiorari* into *B. R.* and the Appellant moved to waive his old Declaration, and to declare *de novo in Cuſtodia Mareſchalli*; but *per Keeling*, Clerk of the Crown, the Appellee ſhall be arraigned upon the old Declaration. 2 *Roll. Rep.* 478. *Brooks* verſus *Thredder & al'.*

12. In Appeal of *Murder* the Appellant muſt declare the Fact. (2.) In what Place of the Body. (3.) The Year. (4.) The Day. (5.) The Hour. (6.) The Time of the Fact. (7.) The Town or Place where the Deed was done. (8.) With what Weapon, therefore where it was ſaid *circa horam undecimam, &c.* an Appeal of Murder was abated, it ſhall alſo be abated *for falſe Latin*, Omiſſion, or any other Matter of Form, *in favorem vitæ. Egerton* verſus *Morgan.* 1 *Bulſt.* 69.

13. An Appeal is the Purſuing a Subject to Death, and 'tis the niceſt Suit in the Law, for any ſmall Matter will abate it, it muſt be freſhly purſued, the Proceſs muſt bear Date the ſame Day with the Return, for if 'tis but a Day afterwards, 'tis a *Diſcontinuance* of the Proceſs, the Omiſſion of any material Word in the Writ will abate it, and it varies from all other Proceedings, for there can be no *Amendment* of the Writ, neither is the *Diſcontinuance* of it helped by any Statute. *Mich.* 8 *Jac. Bradley* verſus *Banks.*

14. *Appeal*

Cro. Eliz. 464. Indictment. (V) 6. S. C.

14. *Appeal of Murder*, the Defendant pleaded, that another Time he was acquitted of the Murder, but found guilty of *Manſlaughter*; and now the Queſtion was, whether the Plaintiff in Appeal might be nonſuited, and adjudged, that he might not. *Moor* 407. *Peryn* verſus *Corbet*.

15. *An Infant* of the Age of nine Years was admitted *per guardianum*, to bring an Appeal for the Murder of his Brother. *Moor* 461. *Perry*'s Caſe.

16. Appeal of Murder brought by the *Widow* for the Death of her Husband; upon Not guilty pleaded, the Defendant was found guilty of Manſlaughter; then the Queſtion was, whether the Burning in the Hand was pardoned by the General Pardon; adjudged, that it could not be pardoned, either by a general or ſpecial Pardon, becauſe the Conviction was at the Suit of the Party. *Moor* 571. *Shugborough* verſus *Biggin*.

17. In an *Appeal of Murder* brought by the *Widow*, the Caſe upon the Evidence was, one *Calfeild* was a Priſoner in the Counter upon an Execution, and eſcaped; the Keeper of the *Counter* coming to the Place where he was, and endeavouring to retake him, and he reſiſting, was killed, the Keeper not going back as far as he could, this was held *Manſlaughter* only, becauſe the Perſon ſlain was in Execution for Debt; but if he had been in Priſon for Felony, and eſcaped, 'tis Murder, unleſs he went back as far as he could. 1 *Roll. Rep.* 189. *Calfeild*'s Caſe.

18. An *Infant* brought an *Appeal of Murder* by his *Guardian*; and upon the Return of the Writ, the *Guardian* being ſick, the Court was moved to give a farther Day for his Appearance, but it was denied, it never being allowed in an Appeal; and therefore the Plaintiff being demanded, and not appearing, he was * Nonſuit, and the Defendant diſcharged. *Trin.* 2 *Car. Latch* 171.

*Antea 1. 8.

Wales. (A) 9. W. Jones 255. S. C.

19. The *Husband* was killed *at M. in Montgomeryſhire*, the *Wife* brought an Appeal *in Shropſhire*, being the next *Engliſh* County; and upon Not guilty pleaded, it was tried by a *Shropſhire Jury*, and the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Appeal ought to have been brought in *Montgomeryſhire*, where the Fact was done, and ſo it was adjudged. *Cro. Car.* 247. *Southby* verſus *Price*.

20. Appeal of Murder of her *Husband* brought by the *Wife* againſt one *Coſſett*, it appeared by the Evidence, that ſeveral were drinking in the Room when the Man was killed with a Blow on the Head with a Quart Pot, but it was not proved which of them gave the Blow, but that they were all preſent and abetting to the Murder; it was inſiſted, that the *Abettors* were principal Murderers, therefore it was not material, whether *Coſſett* againſt whom the Appeal was brought, gave the Stroke, or not, ſince he was preſent and abetting; it was then moved, that they might all be *indicted*, ſince in an Appeal of Murder the Defendant could not be found guilty of *Manſlaughter*, as he might upon an Indictment, but nothing was done in it. *Paſch.* 2 *Car. Coſſett*'s Caſe. *Latch* 126. *S. C.* reported by the Name of *Baſſage*'s Caſe. See *Bendl. Rep.* 172.

21. *Appeal of Murder* brought by the Widow, and upon the Return of the Writ the Appellee appeared; and it was prayed, that the Appellant might be admitted to proſecute *per Attornatum*, and a Warrant of Attorney under her Hand and Seal was produced and acknowledged by her in Perſon (for otherwiſe it muſt have been proved), and thereupon ſhe was admitted to proſecute accordingly, and the Warrant of Attorney was filed, and the Appeal was arraigned at Bar in *French*, and the Appellee being at the Bar, was arraigned by the Clerk of the Civil Pleas, and pleaded Not guilty, and was bailed *Corpus pro Corpore* to appear the laſt Day of the Term, and *de die in diem*. *T. Jones* 210. *Warren* verſus *Verdon*.

22. In an Appeal of Murder the Appellant declared, that one *Offley* did aſſault her Husband, and wounded him in the County of *Huntingdon*, of which Wound he died in *Cambridgeſhire*, and that one *Lippon* was aſſiſting; the Jury found, that *Lippon* gave the Wound, and that *Offley* was aſſiſting; it was objected, that the Declaration and the Verdict muſt be certain, otherwiſe no Judgment could be given; but here the Verdict found another Perſon gave the Stroke, and not him againſt whom the Appellant had declared: *Per Curiam*, the ſame Objection may be made to an *Indictment*, which ought to be as certain as a *Count* in an Appeal, but he who gives the Stroke and he who aſſiſts, are both equally guilty; then it was objected, that the Trial was by a Jury of *Cambridgeſhire*, when it ought to be of both Counties: *Sed per Curiam*, By the Statute 2 & 3 *Ed.* 6. *c.* 24. an Indictment found by a Jury of the County where the *Death* happens, ſhall be as effectual in the Law, as if the Stroke had been in the ſame County where the Party died. 3 *Mod.* 121. *Banſon* verſus *Offley*.

23. An Infant by *T. S.* his *Prochein Amy* was admitted to bring an Appeal of Murder againſt the Defendant, and this as next Heir to *C. C.* who was murdered, at the Day of the Return *B. R.* was moved againſt the Sheriff, that he might return the Writ, who acquainted the Court, that the *Infant*, who was the Appellant, and ſome of his Relations, required him to deliver the Writ back to them, which he did, and that it was uſual ſo to do, for an *Infant* may diſavow his Guardian or his Suit; but adjudged, that both the Writ and Suit are ſubject to the Direction of the Guardian, and that the Infant can no more diſpoſe the Writ than he can proſecute it; 'tis true, he may be Nonſuit either before or after Appearance, but then the Appellee muſt be arraigned at the Suit of the King; he may likewiſe diſavow the Suit, and then the Court may diſcharge the *Guardian*, but 'tis a Contempt in the Sheriff to deliver the Writ back without any Authority, and he was fined and committed, tho' the Clerk in Court offered to undertake for the Fine, and the Chancery being moved for a new Writ of Appeal, it was denied. 1 *Salk.* 176. *Toler*'s Caſe.

(B)

Pleadings in Appeal of Murder and Felony, good, and not good.

1. IN an *Appeal of Murder*, of the Death of her *Husband*, brought againſt *Margaret Oldcaſtle*, *Spinſter*, ſhe, before the Return of the *Exigent*, appeared and pleaded, that ſhe was a *Gentlewoman*, and not a *Spinſter*, for in Truth ſhe was the Daughter of *Sir Edw. Gorge*, and her Husband was likewiſe a Gentleman; adjudged, this was not a ſufficient *Addition*, but becauſe ſhe had appeared and brought a *Superſedeas* to the *Exigent*, ſhe was now eſtopped to plead this *Miſnoſmer* to the Appeal. *Trin.* 7 *Ed.* 6. *Dyer* 88. *Oldcaſtle*'s Caſe.

2. In an *Appeal of Murder* brought by the *Wife* for the Death of her *Husband*; the Appellee pleaded, that ſhe was never *lawfully married* to her Husband, but did not plead *over to the Felony*; adjudged, that this Plea being to be tried by the *Ordinary upon his Certificate*, whether the Marriage was *lawful or not*, in ſuch Caſe the Defendant need not plead over to the *Felony*, but where the Plea is triable by the *Common Law* he muſt plead *over to the Felony*. *Cro. Eliz.* 224. *Withington* verſus *Delabarre*.

3. In *an Appeal* upon the Death of her *Husband* againſt ſeveral Defendants, who pleaded ſeveral Pleas, and ſeveral Iſſues being joined, the Plaintiff was *Nonſuit* as to one of them; adjudged, that he ſhall be diſcharged, and that the others, who were not tried upon this Appeal, ſhall be arraigned upon an Indictment at the Suit of the King. *Cro. Eliz.* 460. *Curtis* verſus *Saville*.

4. In an *Appeal of Murder* brought by the *Wife* againſt ſeveral Perſons for the Death of her Husband; it was adjudged, that both *Principal and Acceſſaries muſt be joined in the Appeal*, and that there muſt be but *one Appeal*, for if more than one is brought, all but the firſt ſhall abate; and if one Appeal is brought againſt ſeveral, and they all make Default excepting one, yet the Plaintiff muſt declare againſt them all. 4 *Rep.* 47. *Waites*'s Caſe.

5. The *Lady Grey* brought an *Appeal of Murder* of her Husband againſt the *Earl of Southeske*, and it was agreed in this Caſe, that a *Nonſuit* of the Appellant after Appearance in proper Perſon, is peremptory, but not before Appearance; but *Kelynge Serjeant* inſiſted, that there was no Difference, becauſe the Appearance of the Appellant is never entered on Record, for he ought always to be ready in *propria perſona*, and is demandable every Hour, and ſhall be *Nonſuit* if he doth not appear, and therefore prayed that the *Lady Grey* might be demanded. *Sid.* 32. *Grey* verſus *Lord Southeske*.

6. *Tothill* verſus *Yardly* and two more being in a Boat, one of theſe two killed the Waterman, for which they were all indicted and tried at *Maidſtone in Kent*, and *Tothill* and *Yardly* were acquitted, and the other two found guilty of *Manſlaughter*; then the *Widow* of the Deceaſed brought an *Appeal againſt all of them*, upon which they were *outlawed*, and *Tothill* and *Yardly* brought a *Writ of Error* to reverſe it, and *Tothill* alone being brought to the Bar, the Court would not allow him to aſſign Errors till *Yardly* appeared, becauſe they both joined in the Writ of Error, whereupon they both appeared, and having aſſigned apparent Errors, the Court ſtill would not reverſe the Outlary till they brought a *Scire facias againſt the Lords mediate and immediate*, but they were bailed, and appearing at another Day the Appeal was arraigned againſt them *in French* by the Counſel, and then the Counſel for them ſaid *vous aves icy le dit* (the Appellees) *& defend' le Force*, and demanded *Oyer* of the Writ, which was read by the Clerk of the Civil Pleas *in Latin*, and then they pleaded *in French* in Abatement, (*viz.*) that one of them had another *Addition*, and that the other was *Commorant* in another *Vill* at the Time of the Writ, *&c.* and pleaded over, Not guilty; the Appellant cannot imparl, but the Court may adjourn the Cauſe by a *dies datus* till ſuch a Day, which was done, and at that Day *Tothill* and *Yardly* appeared, and the Appellant counted again in *French*, and the Appellees repeated their Plea; then the Appellant joined Iſſue as to the Plea, and at the Trial the Clerk read the Appeal and the ſeveral Iſſues, and the Appellee firſt gave Evidence as to the *Addition*, that *Yardly* was of *Greenwich* and not of *Woolwich*, as the Writ ſuppoſed, and to prove that he was of *Woolwich*, he was indicted with that *Addition*, and had pleaded Not guilty; but adjudged, that neither the Evidence given for or againſt the Parties upon the *Indictment*, ſhall be given in Evidence now; and as to the *Commorancy*, the Evidence was, that *Yardly* was an Inhabitant of *Greenwich*, and that he dined at *Woolwich* and there committed this Fact, and the Court directed the Jury to find that Matter ſpecially, for it may be a Queſtion, whether that is a *Commorancy* within the Statute of *Additions*, or not, and afterwards the Jury found them guilty of Manſlaughter. *Sid.* 316, 324 *Sampſon* verſus *Tothill & al.* See 3 *Cro.* 276. *Dyer* 261. *a.*

7. In an *Appeal of Felony* the Parties appeared in Perſon, and the Appellee, after demanding *Oyer* of the Writ and Record, imparled, and afterwards demurred to the Bill of Appeal, for that the Appellant *non invenit plegios ad proſequendum appellum*, and pleaded over to the Felony; the Appellant joined in Demurrer and reſolved, that *Pledges* might be found at any Time before Judgment, and thereupon the Appellant found Pledges, and Iſſue was taken upon Not guilty. *T. Jones* 154. *Blenkarne* verſus *Osborn*.

8. *In an Appeal of Murder* the Defendant pleaded a Conviction of *Manſlaughter* at the Gaol-Delivery at the *Old Baily*, and that he was allowed his Clergy, but did not ſhew *by what Authority the Court at the Old Baily was held*; and now it was moved to amend it, for Iſſue was not

joined, and there was no Demurrer: *Sed per Curiam*, the Appellant cannot amend, and the Reaſon is the ſame why the Appellee ſhould not, in this Caſe, if he amends, he makes a new Roll, whereas in other Caſes the *Amendments* are all in Paper, and no Statutes extend to Amendments in Appeal. 4 *Mod.* 158. *Hoile* verſus *Pitt.*

3 Mod. 267. S. C.

9. The *Wife* brought an Appeal againſt the Defendant for the Murder of her *Husband*, and it was againſt *W. W.* late of the *Pariſh of St. James's Weſtminſter*; the Defendant in his proper Perſon craved *Oyer* of the Writ and the Return, and then *per T. S. attornatum ſuum* pleads in Abatement, that there is a Pariſh named *St. James's within the Liberty of Weſtminſter*, but no Pariſh named *St. James's Weſtminſter only*; and upon Demurrer to this Plea the Defendant had Judgment, becauſe the Plaintiff by his Demurrer had confeſſed there was no ſuch Pariſh, therefore the Plea is good; but it being pleaded *per Attornatum*, it ought not to have been received, but it being received, 'tis void, and by Conſequence this Cauſe *being adjourned till the next Term*, it was diſcontinued by that Adjournment. 1 *Salk.* 59. *Orbell* verſus *Ward.*

4 Mod. 29.

10. In *Appeal of Murder* the Counſel offered a *Warrant of Attorney* for the Appellant, but it was diſallowed, becauſe he muſt count *in propria perſona*, then the Counſel *arraigned the Appeal in French*, and delivered in the *Roll in Latin*, and it was *per Attornatum*, 'tis true, the Appellant was preſent in Court; but if he had not, he might have been demanded and *nonſuited* for Want of an Appearance *in Perſon*; but it had not been peremptory, becauſe 'tis only a Nonſuit before Appearance; but being preſent, the Court allowed the Words *per Attornatum* to be ſtruck out of the Roll, becauſe it made the Declaration agreeable to the Truth of the Fact. 1 *Salk.* 64. *Loder's* Caſe.

4 Mod. 290. Keiling 89.

11. In an Appeal of Murder againſt *John Laws* brought by *Wilſon* the Brother of the Deceaſed, who counted againſt the Defendant, for that he *in Parochia of St. Giles in the Fields*, &c. on ſuch a Day *circa horam primam*, &c. did Aſſault, &c. and *in & ſuper ſuperiorem partem* of his Belly near his Breaſt, and the middle Part of his Body *percuſſit, pupugit & inforavit, Dans ei vulnus mortale*, &c. The Defendant craved *Oyer* of the Writ and Return, and then demurred in *Abatement*, and pleaded over to the Felony; adjudged, that *circa horam primam* is certain enough, for the Law will not tie a Man up to an exact Minute, that *in & ſuper ſuperiorem partem* was likewiſe a ſufficient Deſcription of the Wound, and that *percuſſit, pupugit & inforavit, dans ei mortale vulnus*, was more certain than * *dedit*; and laſtly, tho' 'tis required by the Statute of *Glouceſter*, that a *Vill* ſhould be ſet forth, yet the Fact is well alledged to be done in a *Pariſh*, for it ſhall be intended a *Vill*, tho' there may be more than one in a Pariſh; but *Trin.* 11 *Annæ*, as to this laſt Point it was otherwiſe; adjudged, in the Caſe of *Widdrington* verſus *Charleton.* 1 *Salk.* 59. *Wilſon* verſus *Laws.*

* *See* Long's *Caſe.*

12. *Liſle* was tried at the *Aſſiſes in Cumberland* for the *Murder* of one *Armſtrong*, and found guilty of *Manſlaughter*, and immediately the Brother of the Deceaſed lodged a *Bill of Appeal* of the Murder, and prayed that it might be filed, and that the Defendant might be arraigned, whereupon *Liſle* prayed the Benefit of Clergy, then the Bill was read by the Counſel, and *Liſle* appeared and prayed to be bailed, but would not plead to it, ſo he was remanded to Gaol *quouſq*; &c. Afterwards all theſe Proceedings being removed by *Certiorari* into *B. R. in Hill.* 8 *Will.* 3. and *Liſle* being brought to the Bar by *Habeas Corpus*, and after the *Return thereof was read*, the *Appellant* moved for a Copy before it was filed, but it was denied till filed; and as ſoon as that was done, *Liſle* prayed his Clergy, to hinder which the *Appellant took Exceptions to the Indictment, Trial* and *Conviction*, but he was not allowed to do it, becauſe this was the *King's Record*, and the *Appellant was no Party to it*, and it did not appear but that *Liſle* might have releaſed Errors to the *King*; then he moved to be *bailed*, which the *Appellant* oppoſed, unleſs he might be permitted to arraign the Appeal, or unleſs *Liſle* would give Bail to it; for if he ſhould be at large before the Appeal arraigned, the Appellant could have no Proceſs to bring him in again; beſides, he was found guilty of *Manſlaughter*, and for that Reaſon could not be bailed, which is very true, by Juſtices of *Oyer and Terminer*, but *B. R.* may Bail him, and accordingly he was bailed on the Crown Side to appear *de die in diem*; and at another Day the King's Solicitor moving for Judgment againſt him upon the Indictment, he prayed his Clergy; adjudged, that if he had prayed it at the * Aſſiſes, it ought not to be denied to him there; 'tis true, it was paid there, but not in a regular Manner, becauſe he was never called by the Court to Judgment, ſo that it being now prayed again, the Court cannot proceed to Judgment without asking him what he hath to ſay why Judgment ſhould not be given; and this being now asked by the Court, his Clergy was allowed, and the Ordinary returned *quod Legit*; whereupon he was burnt in the Hand, and then moved to be diſcharged, but that was denied, for he muſt ſtill ſtand upon his Recognizance, and that he ought to ſue out a *Scire facias* againſt the Appellant, if he would have the Appeal diſcharged, and *Nonſuit* him if he did not appear, whereupon he brought a *Scire facias* returnable on a common Day; and the Sheriff not making any Return, he moved again to be diſcharged, which was denied, till he could procure a Return, or get the Appellant *gratis* to appear, who afterwards appeared accordingly, and then the Appeal was read *de novo in French* by the Appellant's Counſel; and the Clerk of the Crown being likewiſe about to arraign him upon the Roll, he objected, that the Appeal being commenced before the Judges of *Oyer and Terminer at the Aſſiſes*, and not determined by them, it was now *diſcontinued*, and by Conſequence no Appeal depending now in Court, but adjudged that it was not *diſcontinued*, becauſe by the Return of the *Certiorari* it was *continued*, and becauſe it came in by *Certiorari* it was arraigned on the Crown-ſide; and it being a Queſtion in what Manner the *Appellant* ought to appear and proſecute, it was adjudged, that every

* *This is contrary to the Reſolution in* Goring *v.* Deering. Hill. 3 Jac. 2. 3 Mod. 156. *See* Batſcomb's *Caſe.*

ry Appeal muſt be commenced in Perſon, but may be proſecuted *per Attornatum*, for which there muſt be a Special Warrant of Attorney filed; and that if the Plaintiff appear by Attorney, when he ought not, 'tis a *Diſcontinuance*; and now *Liſle* moving again to be bailed, he was committed to the *Marſhall* upon the Appeal, and ruled, that a Recogniſance muſt be taken to the King, in which the Bail muſt be bound Body for Body; but *Liſle* perceiving the Opinion of the Court, deſired to ſtand upon his old Recogniſance till another Day, that he might have Time to find Bail and plead, which was granted, and at that Day he pleaded the Indictment and Conviction of *Manſlaughter at the Aſſiſes*, and that it was removed into *B. R.* no Judgment being given upon it; that at the Time of the Conviction he was, and yet is, a Clerk, and that he then *prayed his Clergy*, and offered to read as a Clerk, if the Court would have admitted him to it, and that *die Lunæ, &c. poſt Craſtinum Pur.* laſt, being demanded by this Court, why Judgment ſhould not be given againſt him, he prayed his Clergy, which was allowed, and that he read as Clerk, and was burnt in the Hand, *prout per Recordum, &c.* with the uſual Averments; and as to the Felony and Murder, he pleaded Not guilty. The Appellant replied, that he demanded the Appellee to plead at the *Aſſiſes*, which he refuſed; and upon Demurrer to this Replication, the Queſtion was upon the Plea in Bar, whether a *Conviction of Manſlaughter, on an Indictment for Murder, and Clergy allowed*, could be pleaded in Bar to an Appeal precedent or concurrent with the Indictment? the Counſel for the Appellee inſiſted, that this was a Caſe at Common Law, and not within the Statute 3 *H.* 7. *cap.* 1. becauſe that Statute extends only to an *Appeal ſubſequent to the Indictment*; but this Appeal is *concurrent with the Indictment*, and precedent to the Conviction, becauſe the Seſſions being as one Day in Law, both the Indictment and the Appeal are returned as of one Seſſions, and this makes one concurrent with the other; but adjudged, that at Common Law *Auterfoits acquit or convict*, was a good Plea in Bar to an *Appeal*, and the Law would ſtill have been the ſame, if it had not been altered by that Statute, by which this is made no Plea, *unleſs Clergy be thereupon had:* Now this Statute extends to all Appeals in general; and *Praying the Clergy, is having* it within the Meaning of the Statute, becauſe by ſuch Prayer the Appellee hath done all in his Power to do, and the Default of the Court, in not granting it when they ought, ſhall not turn to his Prejudice; therefore this Plea was adjudged good. 1 *Salk.* 60. *Amſtrong* verſus *Liſle*.

13. In an Appeal of Murder *by Writ*, there were but eleven Days between the *Teſte* an Return; the Defendant pleaded a Conviction of Manſlaughter, *and Clergy had*, and afterwards would have taken Advantage of this Defect, for that there ought to be *fifteen Days*, between the *Teſte* and *Return*; but adjudged, that this is cured by his appearing and Pleading in Chief; for the Reaſon of the *fifteen Days* is, becauſe the Defendant may have ſufficient Time to come into Court, computing twenty Miles to a Day's Journey, according to which Computation the Defendant may come hither from the moſt diſtant Part of *England*; therefore he ſhould have pleaded this Specially, before he had pleaded *in Chief.* 1 *Salk.* 63. *Wilmot* verſus *Tiler.*

14. The Defendant being *acquitted on an Indictment for Murder*, and and *Appeal* brought, the Judge of Aſſiſe gave the Appellee Time to the next Aſſiſe; but in the mean Time the Appellant brought an *Habeas Corpus* and *Certiorari* to remove the Body, *&c.* and the Record into *B. R.* and afterwards, at a Judge's Chamber, the Parties agreed, and the Appellee was bailed, and appearing upon his Recogniſance, his Counſel produced a *Releaſe* from the *Appellant*, and moved, that he might be diſcharged; and tho' a Counſel appeared for the Appellant to Conſent, yet *per Holt Ch. Juſt.* the *Habeas Corpus and Certiorari* muſt be returned, and then the Court will be poſſeſſed of the Record, and the Appellee muſt be arraigned, and then he may plead the Releaſe; or if the Appellant is not ready at the Return, *&c.* to arraign the Appeal, or doth not appear, he may have a *Sci' fa'* againſt him to compel him to it, and if he doth come in at the Return thereof, he ſhall be *Nonſuit*, and yet the Appellee is not diſcharged; for here being a Record againſt him in Court, he muſt be arraigned at the Suit of the Queen, and then he may plead *Auterfoits acquit, &c. Mod. Caſes* 219. *Culliford's* Caſe.

(C)

Of Burglary.

1. APpeal of Burglary againſt *B. B.* he was found guilty, and before Judgment was given *the Appellant died*; it was moved, that Judgment might be given for the Queen upon that Verdict, and that the Declaration in the Appeal might ſtand inſtead of an Indictment: It was not reſolved 2 *Leon.* 83. *Brook's* Caſe; but my *Lord Coke*, who reports the ſame Caſe, tells us, that it was moved in Arreſt of Judgment, that the Count was inſufficient, becauſe the Appellant had ſet forth, that the Defendant *Burgaliter* did break and enter, which is a Word of no *Signification*, it ought to have been *Burglariter* or *Burgulariter*, and for that Reaſon it was held ill, and that the Party ſhould be diſcharged; reſolved alſo, that if the Count had been ſufficient, and the Defendant had been convicted at the Suit of the Party, upon the Appeal, he ſhall not again be impeached for the ſame Offence at the Suit of the King. *Hill.* 28 *Eliz.* 4 *Rep.* 39. *Brook's* Caſe.

(D)

Of Maihem.

Cro. Eliz. 495. Moor 457.

1. IN *Appeal of Maihem* againſt ſeveral Defendants, one of them pleaded, that there was no ſuch Perſon as one of the Appellees, and if it ſhould be found, that there was ſuch a Perſon, then he pleaded *Not guilty to the Maihem*; adjudged, that the Pleading over was ill, and therefore the Plea of *Not guilty* ſhall ſtand. *Poph.* 105. *Kirton* verſus *Hopton.*

Moor 268.

2. In an *Appeal of Maihem*, the Defendant pleaded, that the ſame Plaintiff had brought an Action of *Aſſault*, *Battery* and *Wounding* againſt him, and had Judgment and Execution, and Satisfaction acknowledged on Record for 200 Marks Damages in that Action, and averred, that the Stroke and Wounding in the Action of Treſpaſs, and that in the Appeal of Maihem, was the ſame: Upon Demurrer to this Plea, it was inſiſted for the Plaintiff, that the Plea was not good, for tho' the Defendant had averred, that the Stroke and Wounding was the ſame, *&c.* he had not averred, that any *Damages* were given for the *Maihem*, or that it was given in Evidence; but adjudged, that in an Action of Aſſault the Jury is to give Damages according to the Hurt which was done, and it ſhall be intended a *Maihem* at that Time; and therefore it was held, that this Appeal did not lie. 1 *Leon* 318. *Hudſon* verſus *Leich*, and ſee *Ryder* verſus *Cobham*, *S. P.* there cited, and *Hob.* 94. *S. C.* 4 *Rep.* 43. *S. C.*

3. In an *Appeal of Mayhem*, the Defendant pleaded, that the Plaintiff had recovered in Treſpaſs againſt him, and had Damages given, *&c.* and this was held a good Plea in Bar of the Appeal, becauſe in both Actions Damages only are to be recovered. 4 *Rep.* 43.

Cro. Eliz. 495. Owen 59, 60. Poph. 115. S. C.

4. In an Appeal of Maihem, the Appellee pleaded in Abatement to the Writ, and likewiſe pleaded over to the Maihem; adjudged, that he hath by this Means loſt the Benefit of his Plea to the Writ, becauſe he ought not to have pleaded over to the Maihem, nor in any Caſe but where his Life is in Danger. *Moor Caſe* 628.

(E)

Of Rape.

Moor 571. contra.

1. IN an *Appeal of Rape*, the Defendant was found guilty, and being in Priſon, ſeveral Exceptions were taken to the Declaration, (*viz.*) for that it ſet forth, that the Defendant on ſuch a Day, *&c. felonice rapuit* the Appellant, *& eam defloravit & carnaliter cognovit*, but did not ſay *felonice & carnaliter cognovit*; beſides, it was not averred, that ſhe did *not Conſent* before nor after the Fact; but thoſe Points were not reſolved; however it was held, that tho' formerly the Defendant might have his Clergy, 'tis now taken away by the Statute 18 *Eliz. cap.* 17. but the Queen may Pardon the Impriſonment and Burning in the Hand. 5 *Rep.* 50. in *Biggin's* Caſe. *Trin.* 3 *Eliz. Dyer* 201. *Ellen Lamb's* Caſe. See 1 *Leon. Leigh's* Caſe. 318. See 12 *Eliz. Dyer* 319.

(F)

Of Robbery.

4 Leon. 47. S. C.

1. A Perſon robbed preferred an Indictment againſt the Robber within a Week after the Robbery was committed, and within a Month afterwards he brought an *Appeal* againſt him for the ſaid Robbery, upon which he was *outlawed*, and thereupon he moved the Court to have Reſtitution of his Goods: *Cook* vouched the Year-Book 21 *Ed.* 1. 16. where the Reſtitution was granted upon an Outlary in an Appeal for Robbery; but the Principal Caſe was not reſolved. 2 *Leon.* 108. *Roper* verſus *Smith.*

2. *Appeal of Robbery*, againſt two Acceſſaries, brought in the *County of W.* where the Robbery was done, in which the Plaintiff ſet forth, that the Principals named in the Writ, and who were attainted, did commit the Robbery in the *County of W.* and that the Defendants did felonioufly abet them *in London*; it ſhould have been in ſome Place in the County of *W.* and for that Reaſon it was adjudged, that the Appeal ſhould abate. 29 *H.* 8. *Dyer* 38. *Gawynn's* Caſe.

3. Adjudged, that an Appeal of Robbery may be brought by the Party robbed twenty Years after the Offence committed, and that he ſhall not be bound to bring it within a Year and a Day, as he muſt do in an Appeal of Murder. 4 *Leon.* 16. *Doylie's* Caſe.

(G) Of

(G)

Of Appeals to Viſitors.

1. THE *Biſhop of Winton* is made *Viſitor of Magdalen College in Oxford* by the Founder, and exempted from Ordinary Juriſdiction; Dr. *Coveney*, who was Preſident of the ſaid College, was deprived by the Viſitor, and from his Sentence the Doctor appealed to the Queen in *Chancery*; adjudged, that the Appeal doth not lie, for 'tis out of the Statutes 24 & 25 *H.* 8. *cap.* 12. and he hath not Remedy but an *Aſſiſe*. *Dyer* 209. *Coveney's* Caſe.

2. The Words in Dr. *Coveney's* Caſe laſt mentioned are, that no Appeal will lie, *ex hoc ſequitur*, that an *Aſſiſe* will lie; but that Conſequence was denied to be Law *per Holt Ch. Juſt.* in the Caſe of * *Phillips* verſus *Bury*, becauſe the Head of a College cannot maintain an Aſſiſe; for he hath no ſole Seiſin, he hath not an Eſtate to maintain a Real Action; he is only a Viſible Perſon of the Body aggregate, but hath not the leaſt Title to the Rents or Profits of the College till a Dividend is made. 4 *Mod.* 112. * 4 Mod. 106, 125. Poſtea 3.

3. A Fellow of a College was deprived, who appealed to the *Biſhop of Exeſter* as *Viſitor*, who came in Perſon to Viſit, and Dr. *Bury*, the Rector of the College, being ſummoned to appear, but he refuſing, was pronounced *Contumax*, and thereupon was *deprived*; and in Ejectment and a Special Verdict found, the Queſtion was, whether this *Deprivation* was examinable in *B. R.* in a collateral Action? and by three Judges it was, *ſed per Holt Ch. Juſt.* it is not; for where a proper Court hath an Original Juriſdiction, no other Court will examine their Judgment after Sentence given; ſo it was reſolved in * *Bunting's* Caſe, and ſo likewiſe in * *Kenn's* Caſe: Now in the Principal Caſe the Viſitor was the proper Judge, and therefore his Sentence is Definitive; the *College* is an Eleemoſinary Corporation, and the Members of it ſubſiſt by the Charity of the Founder, therefore 'tis very reaſonable, that they ſhould receive it ſubject to ſuch Limitations as the Founder hath impoſed: Now he hath appointed a Perſon to viſit them; he hath made ſuch Viſitor *fidei Commiſſarium*, whoſe Sentence ſhall be preſumed to be the Sentence of the Founder himſelf, if he had been living, which cannot be thought unjuſt, eſpecially by thoſe to whom his Charity is extended, and if not unjuſt, then not to be examined elſewhere. There are two Sorts of *Corporations aggregate*, one for the Publick Adminiſtration of Juſtice, the other for private Charities; the one is to be regulated by the Courts of Law *in Weſtminſter*, becauſe it ſubſiſts by Letters Patents, and hath no other Founder or Viſitor; but a *College* is not ſuch a Corporation; the other is for Private Charities, and there the *Founder* and *his Heirs are Viſitors*, where he himſelf hath appointed no particular Perſon; but where he hath appointed a Viſitor, then he is to ſupply any Defective Conſtitution in a Corporation which ſubſiſts by his Charity; and thoſe who are ſupported by it, muſt be regulated by ſuch particular Laws as have been enjoined by him, and not by the Methods and Rules of the Common Law, which ſeldom or never interpoſes in ſuch Caſes; for it hath been the conſtant Method to deny a *Mandamus* to reſtore any Perſon deprived from being a Member of ſuch a Corporation, and there is no Precedent in the *Old Books* of any Reſtitution in ſuch Caſes, either to a *Monk or Prior*; and according to this Opinion of the Chief Juſtice, the Judgment of the other three Judges was reverſed in the Houſe of Peers. 4 *Mod.* 106. *Phillips* verſus *Bury*. * 4 Rep. 29. Moor 169. * 7 Rep.

FH
MVSEVM
BRITANNICVM

(H)

To the Archbiſhop and Delegates.

1. THE Statute 24 *H.* 8. *cap.* 12. gives an Appeal from the Biſhop to the *Archbiſhop of the Province*; a Parſon in the Dioceſe of *Winton* was deprived, and he appealed to the *Archbiſhop in Curia prærogativa ſua de Arcubus*; the Queſtion was, whether this Appeal was well brought, becauſe the Statute mentions only the *Archbiſhop of the Province*, and this Appeal is to the Archbiſhop *in his Prerogative Court of the Arches*, whereas the Statute mentions no Manner of Court; but adjudged, that the Words *to the Archbiſhop* were ſufficient, and the Reſt are only Surpluſage. *Trin.* 7 *Eliz. Dyer* 240. *Heath* verſus *Attworth.*

2. By the Statute before mentioned, Appeals were *from the Archdeacon or his Official, to the Biſhop of the Dioceſe or his Commiſſary, from the Commiſſary to the Dean of the Arches*, and *from him to the Archbiſhop of the Province*, whoſe Determination ſhall be *final*; but in the next Year, (*viz.*) *Anno* 25 *H.* 8. *cap.* 19. Appeals were allowed from the Archbiſhop to the King in Chancery, (*i.e.*) The Lord Chancellor may iſſue out a Commiſſion under the Great Seal to certain Perſons to hear the Cauſe, *from whoſe Sentence there ſhall be no farther Appeal:* and this is called a *Court of Delegates*,

3. The Dean of *Wells* was afterwards made a *Prebend* of the ſame Church, and was deprived of his Deanery by the *Commiſſary* of the Biſhop of *Bath and Wells*, becauſe he could not hold two Dignities *ſimul & ſemel* in the ſame Church, from which Sentence the Dean appealed to the Archbiſhop, who affirmed it, and thereupon he appealed to the King in Chancery, but found no Relief, for the King granted the Deanery to one *Turner*; but *Anno* 1 *Mariæ*, the de-

prived Dean obtained another Commiſſion to the *Delegates*, by whoſe Sentence he was reſtored to his Deanery, and after the Death of *Queen Mary*, (*viz.*) *Anno* 1 *Eliz. Turner* obtained a *Commiſſion of Review*, and he was reſtored, tho' the other objected, that he being reſtored by the *Delegates*, there ought to be no farther Appeal. *Dyer* 273. *Walrond* verſus *Pollard*.

Moor 462. 4. But notwithſtandiug theſe reſtrictive Clauſes, *Commiſſions of Review* have been often granted after a Sentence given by the *Delegates*; as for Inſtance, *Anno* 39 *Eliz.* Sentence was given in an Eccleſiaſtical Cauſe againſt *T. S.* he appealed to the *Archbiſhop*, *&c.* who affirmed the Sentence; then he appealed to the *Delegates*, who repealed both the former Sentences; thereupon the Queen granted a Commiſſion *ad revidendum* the Sentence given by the *Delegates*; and upon a Motion for a Prohibition by *T. S.* ſuggeſting, that this *Commiſſion of Review* was unlawful, Juſtice *Fenner* was of that Opinion, becauſe the Popes Uſurpation being abrogated, and the Statute 25 *H.* 8. providing, that there ſhall be no farther Appeal from the Sentence of the *Delegates*, therefore this *Commiſſion of Review* could not be lawful; but the other Judges were of a contrary Opinion, becauſe the Pope did uſually *Review* after Sentences given by his Legates, therefore the Queen by her Prerogative may do what he did uſually in ſuch Caſes. *Cro. Eliz.* 571. *Hollingworth*'s Caſe. *Moor* 462. *S. C.* By the Name of *Halliwell*'s Caſe.

*Poſtea 7. 5. Adjudged, that the bringing an Appeal is a Suſpenſion of the former Sentence; but if the Appellant dies, * *ante litis conteſtationem*, (i. e.) *before iſſue joined*, the Appeal *abated*, but not *after Iſſue joined*, becauſe then the Right to proſecute is veſted in the *Proctor*, eſpecially where the Appeal is to the *Delegates*; for notwithſtanding the *Death* of either Party, the King himſelf might proceed to determine the Cauſe, and by Conſequence thoſe to whom he hath delegated his Authority, may do the like. 2 *Cro.* 483. *Willoughby* verſus *Willoughby*. *Goldſb.* 119.

6. After an Adminiſtration granted by the Ordinary, the Party who pretended a Right to it, appealed to the Archbiſhop in *Curia prærogativæ ſuæ de Arcubus*, and there the Grant was *affirmed*; in ſuch Caſe it muſt be remitted to that Court from whence the Appeal was made; but if the Adminiſtration had been repealed, then the Court from whence the Appeal was brought, hath no longer any Juriſdiction of the Cauſe, and that Court where it was repealed may grant a new Adminiſtration, for they have Authority by the Statute ſo to do. *Latch* 85. *Reeve* verſus *Denny*. Adminiſtration. (C) 13. *S. C.*

2 Lev. 6. S. C. 7. In a Prohibition, the Caſe was, *H. Pollexfen* died Inteſtate, and the Ordinary granted Adminiſtration to his Brother *Andrew*; one who pretended to be Wife of the Inteſtate, upon a Suggeſtion of *Bona notabilia*, procured a *Prerogative Adminiſtration*; then *Andrew* appealed to the *Delegates*, and *died* pending the Appeal, then *H.* his Son and Heir gets the *Prerogative Adminiſtration repealed*, and *Adminiſtration* was granted to him; thereupon the Wife prayed a Prohibition, ſuppoſing, that the Commiſſion of the Delegates was determined by the *Death of one of the Parties*; 'tis true, if one of them die * *ante litis conteſtationem*, it ſhall abate; but both by the Civil and Eccleſiaſtical Law the Suit ſhall continue after the Death of either Party, for the Commiſſion is to determine the Cauſe. 1 *Vent.* 133. *Pollexfen* verſus *Pollexfen*.

Antea 5.

Appearance.

Where it may be by Attorney. (A)
Where it muſt be in Perſon. (B)

How it ſhall be tried. (C)

(A)

Where it may be by Attorney.

1. INformation for a *Præmunire* upon the Statute 27 *Ed.* 3. for impriſoning one *T. S.* until he ſhould releaſe a Judgment of *B. R.* the Defendant being one of the *Commiſſioners of Sewers*, who committed this Man, and for which he had obtained a Pardon, with a Clauſe, that it ſhould be allowed without appearing in Perſon; *per Curiam*, the Writ ought firſt to be returned, otherwiſe *non conſtat Curiæ de perſona*, this being an *Original Proceſs*; but if it had been a *Judicial Proceſs*, a Man might appear upon a Day on the *Roll* without the Return of the Proceſs, and in the Principal Caſe the Pardon was allowed without the Perſons appearing. 1 *Roll. Rep.* 190. *The King* verſus *Sir Anthony Mildmay*.

2. On a Writ of Error; the Error aſſigned was, that the Defendant appeared *per Wild Attornatum ſuum*, leaving out his *Chriſtian Name*, which *per Coke* Ch. Juſt. is Error. 1 *Roll. Rep.* 381. *Houſe* verſus *Fountain*.

3. One who was *outlawed for Murder* died, and his *Adminiſtrator* brought a Writ of Error to reverſe the Outlary; and upon a Motion it was ruled, that he might proſecute his Writ by Attorney, for the Reaſon why in ſome Caſes a *perſonal Appearance* is required, is, becauſe the Perſon appearing may ſtand *Rectus in Curia* to anſwer the Matter of Fact, which Reaſon fails in this Caſe, becauſe he who committed the Fact is dead, therefore his Adminiſtrator may appear by Attorney. *Trin.* 17 *Car. March* 113.

4. The Court was moved upon an *Affidavit*, that the Defendant might plead and go to Trial, becauſe an Attorney had appeared for him, and he now refuſed to plead, for that the Attorney who appeared was not an Attorney of *B. R.* The Rule was, that if he will not plead, that the Plaintiff might enter Judgment againſt him; and if he had not appeared, but only promiſed ſo to do, the Court would have compelled him to appear. *Style* 208. *Dewick* verſus *Bamber.*

(B)

Where it muſt be in Perſon.

1. A Priſoner in the *Fleet* was brought to the Bar by *Habeas Corpus*, to the Intent that he might appear to an Original filed againſt him in Debt; and being asked if he was the Perſon againſt whom the Original was brought, he confeſſed that he was, but denied to appear to the Action, but becauſe he was there in Perſon, the Court was moved to Record his Appearance, but it was denied, becauſe in Truth it was no Appearance. *Goldsb.* 118. *Tamworth* verſus *Aſcue.*

2. *Sir William Read* was *outlawed* upon an *Indictment* for not *repairing a Bridge*; and upon a *Writ of Error* brought to reverſe the *Outlary*, he moved the Court by his Counſel, that he might proſecute his Writ of Error by * Attorney, and put in Bail; but adjudged, that no Man might aſſign Errors *upon an Indictment*, unleſs he appeared in Perſon and put in Bail, wherefore he being above ninety Years of Age, was brought to the Bar upon Men's Shoulders. 2 *Cro.* 616. *Sir William Read*'s Caſe. * *See* Poſtea 4.

3. If a Man come in upon the * *Outlary*, he muſt appear *in Perſon* to reverſe it, but if he come in upon the Exigent he may appear by Attorney. * Poſtea 4.

4. Perſons outlawed in any Caſe, except for Treaſon or Felony, may appear by Attorney and reverſe the ſame without Bail, except where Special Bail ſhall be ordered by the Court; and where a Perſon is taken upon a *Capias utlagatum*, the Sheriff may take an Appearance under an Attorney's Hand, (where Special Bail is not required) and where Special Bail is required, then he ſhall take the Defendant's Bond, with one Surety in double the Sum for his Appearance; this Act is not to extend to Informations by the King's Coroner or Attorney-General. 4 & 5 W. & M. cap. 18.

(C)

How it ſhall be tried.

1. Debt on a Bond conditioned, that if *B. B.* ſhall not appear at the next Court, *&c.* to anſwer the Plaintiff, then if he ſhall before the *firſt Day of September*, find Sureties to anſwer him, the Bond ſhall be void; the Defendant pleaded, that *B. B.* did appear *on ſuch a Day* at the next Court, *&c.* upon which they were at Iſſue, and it was found for the Plaintiff; it was moved in Arreſt of Judgment, that the *Appearance* ought to be tried by the *Record*, and not by a *Jury*, for every Appearance is *on Record*; but adjudged, that in this Caſe the Trial by Jury was good, becauſe the Appearance was to be *on ſuch a Day, &c.* which may be *tried by a Jury*, but where 'tis to appear generally at ſuch a Court, then it muſt be tried by the Record. *Cro. Eliz.* 131, 466. *Hoe* verſus *Marſhall.* *Poſtea* Trial. (H) 1. *S. C. and* Trial. (H) 2. *Brett* verſus *Sheppard contra.*

2. Debt on a Bond conditioned to appear *Die Jovis poſt. octab. Sancti Martini*; and upon *Nul tiel Record* pleaded, the Defendant produced a Record of his Appearance *die Lunæ prox. poſt Quinden' Sancti Martini*, and this was adjudged to be an Appearance on the Day in the Condition. 1 *Brownl.* 74. *Carter* verſus *Freeman.*

3. Debt upon a Sheriff's Bond to appear, *&c.* the Defendant pleaded, that he did appear, but did not ſay *prout patet per Recordum*; adjudged no good Plea; ſo if he had pleaded there was no *certain Day* limited in the Writ for his Appearance, this had been an ill Plea, becauſe he is eſtopped by the Record to ſay ſo. 1 *Brownl.* 81. *Andrews* verſus *Robbins.*

4. Adjudged, that if a Man is bound to appear on the firſt Day of the Term, it ſhall be intended the firſt Day in common Underſtanding, (*viz.*) The firſt Day in full Term. 2 *Roll. Rep.* 432. *Condall* verſus *Coffin.*

Appendant.

What Things ſhall be appendant, and to what. (A) | What Things ſhall not be appendant, and to what. (B)

(A)

What Things ſhall be appendant, and to what.

1. *Appendant* is a Thing of Inheritance belonging to another Inheritance that is more worthy, and 'tis always by *Preſcription*, but then it muſt agree in Quality and Nature to that to which 'tis appendant, and therefore *Land* cannot be *appendant* to a *Meſſuage*. *Mich.* 2 & 3 *Mar. Plow. Com.* 168. *Dyer* 130. *S. P.* 4 *Rep.* 37. In *Tyrringham*'s Caſe.

2. Lands may be appendant to a *Grange* or to a *Farm*. *Dyer* 331 and 374.

3. *An Advowſon* may be appendant to a *Manor*, and ſo may one *Manor to another*; an *Advowſon* may be likewiſe appendant to an *Acre of Land*, *Parcel of the Manor*, or to the *Demeſnes* of a *Manor*. *Dyer* 44 and 70. *Iſham*'s Caſe.

4. An Advowſon of a *Vicarage* may be appendant to a *Rectory*, and therefore by a Grant of the *Rectory*, & *omnia hereditamenta* to the ſame Appertaining, the Advowſon of the *Vicarage* did paſs. 18 *Eliz. Dyer* 350.

5. One *Office* may be appendant and incident to another Office, as the Office of *Exigentor of London* to the Office of *Chief Juſtice* of the Common Pleas, and therefore a Grant thereof made by *Queen Mary* was adjudged void. 2 *Eliz. Dyer* 175. So the Office of County-Clerk is appendant and incident to the Office of *Sheriff*, and a Grant made thereof by *Queen Eliz.* was likewiſe adjudged void for that Reaſon. 26 *Eliz.* 4 *Rep.* 32. *Mitton*'s Caſe.

6. *Common of Turbary* may be appendant to *Houſe*, and ſo *Eſtovers* out of a Wood may by *Preſcription* be appendant to a *Houſe*; and if he alter the Rooms, the *Eſtovers* are ſtill appendant; but if he build new Chimnies, or make a new Addition to his Houſe, he cannot ſpend the Eſtovers in that new Part, or in thoſe new Chimnies. *Hob.* 39.

7. *Waifes* and *Eſtrays* may be appendant to a *Leet*, and a *Leet* may be appendant to a *Manor*. 4 *Rep.* 36. 10 *Rep.* 64. A *Fair* may be appendant to a *Manor*, and a Court of *Piepowders* to a *Fair*. 4 *Rep.* 31.

(B)

What Things ſhall not be appendant, and to what.

See *Common* per tot'.

* Hob. 34. Style 279. S. P.

1. *Tithes* cannot be appendant to a * *Manor*, becauſe they are Spiritual Things, and therefore cannot be appendant to a Manor which is *temporal*, unleſs ſome Special Matter be alledged, *Winchcomb*'s Caſe vouched in 2 *Rep.* The Biſhop of *Winton*'s Caſe.

2. *Common of Turbary* cannot be appendant to *Land*. 4 *Rep.* 37. In *Terringham*'s Caſe.

3. An Advowſon in *Poſſeſſion* cannot be appendant to a *Reverſion* expectant upon an Eſtate for Life. *Hob.* 161. 11 *Rep.* 46. *Liford*'s Caſe.

Appertaining.

(A)

What ſhall be ſaid to be appertaining and appurtenant. See *Advowſon.* (A) 9. *Appropriation.* (B) 3.

1. ADjudged, that where a Man hath a Thing appertaining to a Houſe or Mill, the moſt durable Thing is the Land, being the Foundation on which 'tis built, therefore tho' the Houſe or Mill falls by the Act of the Owner or another, yet becauſe the moſt durable Part remains, he may build it again without the Loſs of the Appendancy or Appurtenance, but then it muſt be built upon the old Foundation. 4 *Rep.* 86. *Lutterell's* Caſe.

2. The Teſtator being ſeiſed of ſeveral *Tenements* in the Pariſh of *H.* and likewiſe in *O.* which was only a *Lien conus* in the ſaid Pariſh (and to which ſeveral *Lands did belong*, which lay both in the Pariſh of *H.* and in *O.*) deviſed all his *Tenements in O. with the Appurtenances*, *&c.* adjudged that the *Lands* in the Pariſh of *H.* which did appertain to the Tenement in *O.* did paſs by this Will. *Goldsb.* 99. *Butcher* verſus *Samford.* *See* Poſtea 10.

3. So a *Deviſe* of an *Houſe, with the Appurtenances*, and the Deviſee claimed ſome *Land in the Field* by Vertue of this Deviſe, and adjudged that he might have it, if it had been uſed with the Houſe for the Space of * *ten Years*, or more, for that ſhall be a ſufficient Time to make it appertaining to the Houſe. *Cro. Eliz.* 704. *Yates* verſus *Clanrickard.* *Moor* 221. *Higham* verſus *Horwood. S. P.* 1 *Leon.* 34. *S. C. Godbolt* 40. *S. C. Cro. Eliz.* 16. 6 *Rep.* 64. *a. contra.* 3 *Leon.* 214. *Chard* verſus *Tuck. S. P. Cro. Eliz.* 89. *S. P.* Godb. 353. * Cro. Eliz. 16. Cro. Car. 8.

4. In Replevin, *&c.* the Defendant avowed, that *G. D.* was ſeiſed of an Houſe in *C.* in Fee, and of ſeveral Lands, *&c.* to the ſame *appertaining*, whereof the *Locus in quo* was Parcel; Exception was taken to this Avowry, becauſe *Land* cannot properly be ſaid to *appertain to an Houſe*; 'tis true, it may paſs by ſuch Words in a *Deed*, but in Pleading it ought not to be ſo alledged, and ſo it was adjudged. *Cro. Eliz.* 919. *Wilmott* verſus *Carne.*

5. Three *Coparceners* of a Manor to which a *Leet* did appertain; the King purchaſed two Parts of the Manor *with the Appurtenances*; adjudged, that the *Leet* is not extinguiſhed, but remains appendant to the other third Part, for the King had not all the *Leet* by the Alienation of the two Siſters, but ſhall hold Court with the Third. 1 *And.* 26.

6. *Treſpaſs* for entring his Cloſe, and taking and carrying away his Hay; the Defendant juſtified under a Title to the Land where the Hay did grow; for that there was a Chapel diſſolved in the Reign of *Ed.* 6. and the Poſſeſſions thereof (of which this Land was Parcel) deſcended to the Queen, who in the 32d Year of her Reign made a Leaſe thereof by the Name of all that Chapel *de A. fundatum in Eccleſia de B. cum pertinentiis*, under which Leaſe the Defendant claimed *the Tithes*; and upon a Demurrer to this Plea it was objected, that it was ill, becauſe 'tis not, that the Tithes did grow on the Lands belonging the Chapel: *Sed per Curiam*, by the Grant of the Chapel *cum pertinentiis* all the Tithes belonging to it ſhall paſs. 2 *Roll. Rep.* 150. *Grubham* verſus *Grate.* Poph. 94. S. C.

7. A Copyholder *for Life*, who had Right of *Common* in the Lord's Waſte, purchaſed the *Freehold*, which was granted to him *with the Appurtenances*; adjudged, that by making it a *Freehold* the Common which was annexed to the Cuſtomary Eſtate was deſtroyed, and that by his own Act, and that it ſhall not be revived by thoſe general Words in the Grant *cum pertinentiis*, without ſome ſpecial Words to paſs it again. 2 *Cro.* 253. *Marſham* verſus *Hunter.* *Poſtea* Common. (E) 2. *S. C. Cro. Eliz.* 794. *contra.* 1 Brownl. 175. Yel. 189. S. C.

8. Certain Lands came to *H.* 8. upon the Diſſolution of a Priory, who demiſed the ſame to *B. B.* for Years, the Leſſee built an Houſe upon theſe Lands, which afterwards came to *Queen Elizabeth*, and ſhe granted all that Meſſuage, and the Lands *thereunto belonging*; adjudged, that tho' the Houſe was not built on the Lands when demiſed by *H.* 8. but afterwards, and before the Queen granted the ſame, yet the Grant is good, and the * *Lands may be properly ſaid to be appertaining to a Houſe when they have been let and enjoyed with the Houſe a convenient Time.* *Cro. Car.* 120, 168. *Jennings* verſus *Lake.* *Poſtea, pl.* 8. *S. P.* * Poſtea 11. contr.

9. In Ejectment, *&c.* the Caſe was, a *Copyholder in Fee* of a Tenement called *Heyſham's*, built a *new Building on ſix Foot of the Waſte*, which he did by *Encroachment*, and afterwards the Lord of the Manor made a *Leaſe of the ſix Foot*, ſo built on by the Copyholder for 100 Years; this Leaſe was made *Anno* 33 *Eliz.* and afterwards the Copyholder *Anno* 1 *Jac.* ſurrendred the ſaid Tenement called *Heyſham's*, to the Uſe of *B. B.* and his Heirs, and *Anno* 5 *Jac.* aſſigned all his Term in the ſaid *ſix Foot* to the ſaid *B. B.* who by Indenture, *Anno* 19 *Jac.* made a Leaſe of the ſaid Tenement called *Heyſham's*, *with the Appurtenances*, to *E. W.* for ſeventy Years; adjudged, that the *new Building on the ſix Foot of waſte Ground* did not paſs by the Word *Appurtenances*; for it being built *Anno* 33 *Eliz.* and it being not found that it had been uſed

uſed altogether with the Tenement, or reputed as Parcel thereof, nothing paſſed but what was Parcel of the Tenement at that Time, but in a *Deviſe* it might have been otherwiſe. *Cro. Car.* 12. *Brian* verſus *Witherhead.*

2 Roll. Rep. 347. 10. By the latter Authorities *Lands* will not paſs by the Word *Appurtenances*, but only ſuch Things which do properly belong to the Houſe; as where a Man was ſeiſed of two Houſes and of eighty Acres of Land belonging to one of them, known by a *particular Name*, and made a Feoffment of the Houſe and the eighty Acres to *B. B.* who made another Feoffment to the ſaid Feoffor, by which he took back the ſame Houſe and Lands, and *forty Acres more by another Name*; and about ten Years afterwards he deviſed this Houſe and all the *Lands thereunto appertaining*, to his youngeſt Son; adjudged, that tho' *he uſed thoſe forty Acres with the Houſe for ten Years and more*, yet it would not paſs by thoſe Words *thereunto appertaining*, becauſe they were conveyed to him by a new Name. *Palm.* 375. *Loftus* verſus *Baker. Godb.* 352. *S. C.* reported by the Name of *Knight's* Caſe. *Cro. Car.* 57. *Hearn* verſus *Allen. S. P. Hutt.* 85. *S. C. Litt. Rep.* 8. *S. C.*

11. Upon a Demurrer to an *Engliſh*-Bill, in the Exchequer it was held by *Hale* Chief Baron, that *Return of Writs* may be claimed by Preſcription as appertaining to a *Manor*, but more eſpecially it may as appertaining to an *Honour*, becauſe thoſe have larger Incidents than *Manors*, and that where the Pernor of the Profits is ſued, the Plaintiff need not ſhew how he claims this Privilege; but in a *Quo Warranto*, where the Defendant muſt make a Title, he muſt ſhew how he claims it. *Hardres* 423. *Counteſs of Pembroke* verſus *Lord Burlington.*

Sid. 211. 12. The Teſtator had an *Houſe* and a *Kiln* built upon diſtant Parts of a *Cloſe*, and alſo two Mills to make Oat-meal adjoining to the ſaid Cloſe, which were *uſed with the Houſe for ſeveral Years*, but were lately divided, then he ſold the Houſe *with the Appurtenances* and Part of the Cloſe to one, and deviſed the *Mills with the Appurtenances to* another; adjudged, that the *Kiln* did not paſs, for by the Grant of the *Houſe with the Appurtenances*, nothing paſſed but what properly belonged to the Houſe. 1 *Lev.* 131. *Archer* verſus *Bennet.*

13. Treſpaſs for digging Turfs in his Soil, the Defendant juſtified by a Grant of the Lord of the Manor to *T. S. and his Heirs, to dig Turfs* there to be burned in his *Houſe*, and that *T. S.* granted the Houſe *cum pertinentiis* to the Defendant and his Heirs; adjudged, that the *Turbary* paſſed by theſe Words, without being ſpecially named, as *Common appurtenant* may, becauſe it paſſes with the Lands to which 'tis appurtenant. 3 *Lev.* 165. *Solmes* verſus *Bullock.*

14. In a Special Verdict in Ejectment the Caſe was: *ſſ.* That 1 *Aug.* 1606. *King James* was ſeiſed in Fee in Right of the Crown of a *Pool of Water* and three Gardens, in the Pariſh of *St. Margaret, Weſtminſter*, and that a *Water-work* was then erected in the ſaid Gardens, and that the *Pool was uſed with the Water-work* till 12 *March*, 11 *Jac.* and then the King by Letters Patents did grant the Gardens and Waterworks with *the Appurtenances, & omnia ſtagna, Gurgites, &c.* to the Premiſſes *appertaining*; the Queſtion was, whether the Soil paſſed by the Words *Stagnum* or *Gurgites*, or either of them, if it did, then whether it paſſed as *appertaining* to the Water-work, built *Anno 6 Jac.* and paſſed away with the *Pool as appertaining to it*, *Anno* 11 *Jac.* or as appertaining to the Gardens, which ſeems a ſhort Time to gain a *Reputation, as appertaining, &c.* Adjudged, that by the Word *Stagnum* the Water and Soil paſſeth, and as to the Word *appertaining*, a Thing may be ſaid to be appertaining in Relation to the *Extent of the Grant*, or in Relation to the *Nature of the Thing granted*; and firſt as to the *Extent of the Grant*, as where an *antient Meſſuage* is granted with the *Lands thereunto appertaining*; now, if ſome Lands were of *late Years* occupied with that Meſſuage, it may be a Queſtion, whether thoſe Lands paſs by the Word *appertaining*, but 'tis a Queſtion only what was intended to paſs, and that relates to the Extent of the Grant, but in the principal Caſe the Word *appertaining* relates to the Thing granted, and without which it could not be uſed, and in ſuch Caſe 'tis *appertaining* immediately, and as ſoon as 'tis annexed to it; and therefore the Jury having found that the Water-work could not Work *ſine ſtagno prædict'*, they find that the Water and Soil, which is comprehended by the Word *Stagnum*, was neceſſary for the Work, and that it could not work without it. *Vaugh.* 107, 110. *Price* verſus *Braham.*

Appoztionment of Rent. See *Rent.* (A) per totum.

Apportionment.

Of Commons. (A) | Of Conditions and Contracts. (B)

(A)

Of Commons.

1. COmmon *appendant* may be apportioned, becauſe 'tis of *Common Right*, and therefore, if a Man purchaſe *Part of the Lands* to which the *Common is appendant*, the Common ſhall be apportioned to *that Part*; but *Common appurtenant* cannot be *apportioned* by the *Act* of the Party, and therefore by the Purchaſe of Part of the Lands, the whole Common is extinct. 4 *Rep. Terringham's* Caſe. 8 *Rep.* 79. *Wyat Wild's* Caſe. *Hob.* 25. *S. P.*

2. And yet it hath been adjudged, that where a Man hath *Common appurtenant* to ten Acres of Land, for all his Beaſts *Levant and Couchant* on the ſame, and afterwards he ſells Part of thoſe ten Acres, that the Common ſhall be apportioned, and the Vendee ſhall have Common on that Part which he purchaſed; for theſe Things are intire in ſeveral Degrees, (*i. e.*) ſome Things are ſo entire, that they cannot be divided by the * Act of the Party; ſuch as *Warranties*, *Conditions*, *&c.* tho' they may be apportioned by Act of Law; but Commons are not ſo ſtrictly entire, but that they may be apportioned, it being a Common Caſe, and therefore ought to be extended for the general Good. *Hill.* 15 *Jac. Hob.* 235.

* Poſtea (B) 1.

(B)

Of Conditions and Contracts.

1. CONditions generally Speaking are *entire*, and cannot be apportioned by the Act of the Party; as for Inſtance, the Maſter and Scholars of *Corpus Chriſti in Oxford*, made a Leaſe of Lands; *Proviſo*, the Leſſee ſhould not Alien, *&c.* without ſpecial Licenſe; afterwards they gave the Leſſee a ſpecial Licenſe to alien, who aſſigned his Term to *B. B.* and he by Will deviſed the Lands to his Son, and the Leſſor entered for the Condition broken; adjudged, that the Licenſe given to *B. B. to alien*, had deſtroyed the Condition, for the Leſſors could not *diſpenſe with it*, *as to him*, and retain it, *as to others*; for a * Condition being an intire Thing, cannot be apportioned by the Act of the Party, tho' it may be by Act of Law. 4 *Rep.* 119. *Damport's* Caſe.

* Antea (A) 2. S. P.

2. An Agreement in Writing between the Teſtator and *T. S.* that he ſhould receive all the Teſtator's Rents, for which Service he promiſed to pay to *T. S.* 100 *l. per Ann.* and in an Action of Debt brought againſt the Executor, the Plaintiff ſet forth, that the Teſtator died three Quarters of a Year after this Contract made, during which Time the Plaintiff ſerved him, and ſo demanded 75 *l.* for his Service for three Quarter's of a Year; the Defendant pleaded to Iſſue, and the Plaintiff had a Verdict and Judgment in *C B.* but upon a Writ of Error brought in *B. R.* it was reverſed, becauſe this Agreement was in Nature of a Condition precedent, and that nothing was due without a full Years Service; 'tis like a Leaſe for Years, rendring 20 *l.* Rent yearly, and before the Year is ended, the Leſſee is evicted, the Leſſor ſhall have no Rent, for that cannot be apportioned in Reſpect of Time. 1 *Salk.* 65. *Counteſs of Plymouth* verſus *Throgmorton.* See 2 *Salk.* 778. *The Pleadings.*

3 Mod. 153.

Apprentices.

(A)

Concerning Aliens and Apprentices. See *King.* (K) 1. *Trade* per Totum.

Moor 599. 1. INformation upon the Statute 4 & 5 *Ph. & Mar.* for weaving *Woollen Cloth and Kerſies*, not being an Apprentice, nor uſing that Trade for ſeven Years, by Reaſon whereof he forfeited the Cloth, or the Value of it: After a Verdict for the Plaintiff, a *Writ of Error* was brought, and the Error aſſigned was, that the Statute 5 *Stat. cap.* 4. had taken away the Penalty of this Act; but adjudged, that both Acts may ſtand together, and the rather, becauſe the latter Act is in the *Affirmative*, and the firſt is *Particular* and the latter *General.* 5 *Rep.* 19. *Gregorie's* Caſe.

2. An Information upon the Stat. 5 *Eliz.* for uſing the Trade of a *Spurrier in London*, not being Apprentice to it for ſeven Years; three Juſtices of Opinion, that by the Stat. 21 *Jac. cap.* 4. it ought to be brought in the * County or City where the Offence was committed. 2 *Cro.* 85. *Keen* verſus *Drake.* *Naylor* verſus *Aſh.* *Style* 223. *S. P.*

* Poſtea 10, 19.

3. *ſſ.* An Information upon the Stat. 5 *Eliz.* in the *Exchequer*, for exerciſing the Trade of a *Brewer*, not being an *Apprentice*, *&c.* it was objected, that the Art of a * *Brewer* is not within the *Stat.* and that the Information ought to be brought in the * *County* where the Offence was done; but adjudged, that a *Brewer* is within the Statute, and that the Stat. 21 *Jac.* is not in the Negative. 2 *Cro.* 178. *Shoyle* verſus *Tayler.*

* Poſtea 5.

* Poſtea 10, 19.

4. Information upon the Statute 5 *Eliz. for Receiving an Apprentice*, who departed out of his *Maſter's Service*, and for retaining him without a *Teſtimonial*; the Queſtion was, whether that Clauſe in the Statute did extend to Apprentices, or to other Servants mentioned therein; adjudged, that ſince an *Infant* may by Law be an Apprentice, it was never the Intent of the Statute to make an Apprentice in Danger of the Puniſhment, which is, that *he ſhall be whipped as a Rogue*, which plainly ſhews, that the Statute intends only thoſe who are of full Age; for if any other Conſtruction ſhould be made of it, then the Son of a Gentleman may be puniſhed as a Rogue, if he depart from his Maſter after he is an Apprentice. *Mich.* 19 *Jac. Winch* 25.

5. Information againſt the Defendant for exerciſing the Tade of an *Upholſterer*, not being Apprentice for ſeven Years; the Defendant pleaded a Cuſtom in *London*, to which it was objected, that the Law requires Skill in every one who exerciſes a Trade: but the Chief Queſtion was, whether an *Upholſterer* was a Trade within the Statute 5 *Eliz. cap.* 4. it was admitted, that a * *Brewer* was, becauſe it was for the Support and Livelihood of Man; but a *Pippin-Monger* is not, becauſe it doth not require much Skill, neither doth an *Upholſterer*; *Adjornatur.* 1 *Roll. Rep. The King* verſus *Tollin.*

*Antea 3.

6. *W. R.* put himſelf Apprentice to a Mercer in *Nottingham*, and afterwards he entered into a Bond to his Maſter, not to exerciſe that Trade within four Miles of *Nottingham*; afterwards he ſet up his Trade there, and the Maſter put the Bond in Suit; adjudged, that the Action did not lie. *Moor* 115.

7. One of the Age of *ſixteen Years* put himſelf Apprentice in *London* by Indenture, with the uſual Covenants, and afterwards run away with his Maſter's Money, whereupon he brought an Action of Covenant; the Defendant pleaded *Nonage*; the Plaintiff replied, that by the * Cuſtom of *London* an Infant might bind himſelf Apprentice, and in ſuch Covenants as are compriſed in this Indenture, and that he ſhould be bound, *&c.* as if he was at full Age, *&c.* And upon Demurrer to this Replication, it was objected, that this Cuſtom was pleadable only in the Court of *London*, and not in the Common Pleas, or elſewhere; but adjudged otherwiſe. *Moor* 135. *Stanton's* Caſe.

* Poſtea 9, 11, 14. S. P.

8. Reſolved by all the Judges upon Peruſal of the *Statute* 5 *Eliz. cap.* 4. That all *Aliens* and *Denizens* are reſtrained by that Statute to uſe any *Handicraft or Trade* mentioned therein, unleſs they had ſerved ſeven Years Apprenticeſhip within the Realm. *Hutt.* 132.

9. *Covenant* againſt the Defendant, being an Apprentice, for imbezilling his Maſter's Goods: The Defendant pleaded *Infancy* when he became bound; the Plaintiff replied, that the * *Cuſtom of London* is, that one may bind himſelf Apprentice at the Age of *fourteen Years*, *&c.* The Defendant rejoined, that the Cuſtom is, that if one bind himſelf Apprentice at that Age, and the Indenture is enrolled in *Guild-Hall*, then it ſhall bind, and traverſed the Cuſtom as alledged by the Plaintiff, upon which they were at Iſſue, and the Court ſent to the Lord Mayor and Almen, who certified by the Mouth of their Recorder, that the Cuſtom was as the Plaintiff had declared. *Palm.* 361. *Code* verſus *Holmes.*

* Antea 7. S. P.

* Poſtea 11. S. P.

10. *ſſ.* Error of a Judgment, upon the Statute for uſing a Trade, not having ſerved an *Apprenticeſhip*, *&c.* The Action was brought in * *Newberry*, and the Error aſſigned was, that it ought to be brought in one of the *Courts at Weſtminſter*; and for that Cauſe the Judgment was reverſed. *Style* 383. *Hodge's* Caſe, and 424. *Child's* Caſe. 5 *Rep. Gregorie's* Caſe. *S. P.*

* Antea 2, 3.

11. *Covenant* upon an Indenture of an Apprentice, wherein he bound himſelf to ſerve the Plaintiff for ſeven Years; the Declaration ſet forth the * *Cuſtom of London*, that any Perſon above *fourteen and under twenty-one*, and unmarried, might bind himſelf Apprentice, *&c.* according to the Cuſtom, and that the Maſter might have *tale remedium* againſt him, as if he had *been twenty-one*, and alledges, that the Defendant did depart from his Service *per quod*, he loſt his *Service for that Term*, which was not yet expired: The Defendant pleaded a frivolous Plea; and upon a Demurrer, it was adjudged, that tho' ſuch a Covenant would not bind an *Infant*, either at Common Law, or by the Statute 5 *Eliz.* yet by *Cuſtom* it ſhall bind him; 'tis true, here the Plaintiff declared for the Loſs of the Defendant's Service for *ſeven Years*, Part of which was yet to come, which had been naught after a Verdict, but 'tis good upon a Demurrer, becauſe the Plaintiff may take Damages for the Departure only, and not for the Loſs of the Service during that Time. 1 *Mod.* 271. *Horne* verſus *Chandler.* * Antea 7. 11.

12. It was formerly a Queſtion, whether Juſtices of Peace had Power to put a poor Apprentice to any Perſon? and the better Opinion was, that they had ſuch a * Power; but Juſtice *Twiſden* was always againſt it; for if they had ſuch a Power, then they might place an Enemy, or the Son of an Enemy, on any Maſter; the Pariſh ought to raiſe a Stock, to put out the Poor to thoſe who are willing to receive them; but ſome Years afterwards they refuſed to deliver any Opinion, whether the Juſtices had ſuch Authority, in the like Caſe, and directed the Party complaining to bring his Action againſt the Juſtices, if he thought himſelf grieved by the Order, but would not quaſh it. *Sid.* 99. *The King* verſus *Pariſh of Eginton.* *Sid.* 411. *contra.* * Poſtea 15.

13. *Covenant* by an Apprentice, for that the Defendant's * Teſtator had covenanted to inſtruct him (the Plaintiff) in the Art of a *Sadler* for ſeven Years, and to find him in *Meat and Drink* during that Term, and aſſigned the Breach, for that after the Death of the Teſtator, the Defendant, who was his Executor, turned him (the Plaintiff) out of Doors, and out of his Service, *Et ſic* did not find him *Meat and Drink*; and upon Demurrer, the Court inclined at firſt, that *Et ſic* was not a ſufficient Averment of the Breach of Covenant; but afterwards they held, *Et ſic* to be only Matter of Form, and that the *Apprentice* remains to the Executor; for tho' he might not inſtruct him, yet he muſt find him in Meat and Drink. 1 *Sid.* 216. *Wadſworth* verſus *Gee.* * Poſtea 18. S. P.

14. The Plaintiff declared upon an Indenture of Apprenticeſhip; the Defendant pleaded, that at the Time of the executing the ſaid Indenture he was an *Infant*; the Plaintiff replies, that by the * *Cuſtom of the City of London*, if one under Age binds himſelf Apprentice, it ſhall oblige him; and upon Demurrer to this Replication, it was objected, that it was ill, becauſe a *Departure* from the Declaration, for that is at *Common Law*, and by the Replication he hath enabled himſelf by a *Cuſtom*; and ſo is the *Abbot of Bokefaſt*'s Caſe. *Keilw.* 75. *B.* But adjudged no *Departure*, for the Action is founded on a *Covenant*, and in the Replication he only anſwers the Diſability in the Plea. *Raym.* 16. *Mould* verſus *Wallis.* See *Hutt.* 63. *Jennings* verſus *Pitman.* and * *Gilbert* verſus *Fletcher.* See *Yelv.* 14. *Godb.* 122. *S. C.* See *Stanton*'s Caſe. * Antea 7, 9, 11. S. P. * Infant. (A) 30. S. C.

15. *An Order* was made, for the Defendant to take a poor Child Apprentice, upon the Statute 43 *Eliz. cap.* 2. and upon an *Appeal that Order was confirmed*; and it being removed by *Certiorari* into *B. R.* the Queſtion was, whether the Defendant was * compellable to take an Apprentice? and the Judges were divided in Opinion about it; for if he ſhould be compellable, then a poor Boy at *York* might be placed upon an *Alderman of London*, for the Act extends all over *England*; but by a late Act, this is now remedied. *Raim.* 65. *The King* verſus *Gilliflower.* 1 Lev. 84. * Antea 12. Poſtea 36.

16. Covenant by an Infant *per Guardinum*, for that he being Apprentice to the Defendant by Indenture, he did not keep, maintain and teach him the Trade of a *Woollen-draper*, as he ought by his Covenant, but turned him away: The Defendant pleaded an *Order of Seſſions*, by which he was diſcharged from the Plaintiff for his diſorderly Living, and that the Order was enrolled; and upon Demurrer to the Plea, it was held, that the Maſter might be diſcharged from his Apprentice by an Order of Seſſions; but it was a Queſtion, whether he ought firſt to make Application *to one Juſtice*, and not to the Seſſions *per ſaltum.* 1 *Vent.* 174. *Watkins* verſus *Edwards.* 1 Mod. 286. 1 Saund. 314.

17. *In Covenant*, the Plaintiff declared on the Cuſtom of *London*, that Time out of Mind, every *Freeman ſolebat* to take an Apprentice, who by *Cuſtom*, *&c.* are bound by their Covenants faithfully to ſerve; and that he (the Plaintiff) took the Defendant Apprentice by Indenture, in which he covenanted to ſerve ſeven Years, which he had not done; upon which they were at Iſſue, and the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that the Declaration was ill, becauſe it was in the *ſolet* alone, when it ought to be in the *debet* and *ſolet*; for if he is bound to ſerve, it muſt be by the * *Cuſtom*, becauſe he is an *Infant*; and if by the Cuſtom, then it muſt be *debet & ſolet*; but adjudged, that he is bound by the *Covenant*, and that the Cuſtom is only *Inducement.* 1 *Lev.* 12. See *Trade* (A) 8. *S. P.* *Antea 7.

18. The Teſtator covenanted to teach an Apprentice his Trade; and in an Action of Covenant againſt his * Executor, it was inſiſted, after a Verdict for the Plaintiff, that the Covenant was Perſonal, and did not oblige the Executor; but adjudged, that it did, and if the Executor is not of the ſame Trade, he ought to provide another Maſter, who is. 1 *Lev.* 176. *Walker* verſus *Hull.* * Antea 13. S. P.

19. *Debt* upon the Statute 5 *Eliz.* for *uſing a Trade*, *&c.* not being an *Apprentice* to it for ſeven Years: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this Action ought not to be brought in the *Courts at Weſtminſter*, but that an *In-*

* Antea 2' 3, S. P.

Information ought to be brought in the proper * County, by the expreſs Words of the Statute 21 *Jac. cap.* 4. (viz.) *That all Offences againſt Penal Statutes ſhall be proſecuted, tried, recovered and determined by Information or Indictment, at the Aſſiſes or Seſſions in that County wherein ſuch Offences are committed, and not elſewhere.*

Now, before this Act, where an Offence was created by a Statute, which was not ſo at Common Law, and the Penalty was appointed by the Statute to be recovered *in any Court of Record by Action of Debt*, there it muſt be in one of the *Courts at Weſtminſter*; ſo is *Dyer* 336. and *Cro. Eliz.* 737. But a little Time after the making the *Act* 21 *Jac.* ſome Judges were of Opinion, that an *Action of Debt* upon a Penal Law might be brought in the *Court of King's Bench*, becauſe that Court was not named in the Act; beſides, by the Statute it was intended only to prohibit *Informations and Indictments* to be brought in that Court, and it did not extend to *Actions of Debt*, becauſe thoſe Actions muſt be brought in one of the Courts at *Weſtminſter*, and cannot be commenced before a Judge of *Aſſiſe*; 'tis true, the Defendant may remove an *Information* out of the County into the Courts at *Weſtminſter*, becauſe the Statute was made for the Eaſe of the Defendants, but an Informer cannot bring an *Information* in theſe Courts ſince the making that Statute. The Principal Caſe was not adjudged. 1 *Lutw.* 164. *Gay* verſus *Welch.* See *Latch* 192. *Style* 210, 223. *Sid.* 400.

20. Debt upon Bond, conditioned to perform Covenants in an Indenture of Apprenticeſhip for ſeven Years, to the Trade of a *Mariner*; the Defendant pleaded the Statute 5 *Eliz.* by which 'tis enacted, that all Owners of Ships, *&c.* may take an Apprentice for ten Years or under, being above ſeven Years old, ſo as the Covenant or Bond be in Writing indented, and enrolled where the Apprentice ſhall be then living, if in a Town Corporate, and if not, then to be *enrolled in the next Corporation Town to the Habitation of ſuch Apprentice*; then he pleads, that the Apprentice lived in a Village not Corporate, and that *Scarborough* was the *next Corporation*; that the Maſter was a *Mariner*, and the *Apprentice* above ſeven Years old when he was bound; and that the Indenture was *not enrolled there, nor in any other Corporate Town:* The Plaintiff replied, that the Apprentice deſerted his Service before the End of the Term: There was a Demurrer to this Replication, but it was not argued. 1 *Lutw.* 474. *Helme* verſus *Hill.*

21. *Debt* upon the Statute 5 *Eliz.* for uſing the Trade of a *Tiler*, not having ſerved an Apprentice to it for ſeven Years: The Defendant pleaded, that his Father was a *Freeman of London*, and that he was his eldeſt Son, and that *jure Patrimonii* he might uſe that Trade: And upon a Demurrer to this Plea, it was not relied on to be good, but that the Declaration was ill, becauſe the Plaintiff did not aver, that the Trade of a *Tiler* was an Art or Myſtery uſed in *England* at the Time of making the Statute. *Sed per Curiam*, 'tis a Trade mentioned in the Statute it ſelf, therefore it muſt be then uſed. 4 *Mod.* 145. *White* verſus *England.*

22. *T. S.* took an *Apprentice in Husbandry*, according to the Statute 5 *Eliz.* and died before the Apprenticeſhip was ended; the Seſſions ordered the *Executor* to keep the Apprentice; but this Order was quaſhed in *B. R.* becauſe *per Juſtice Eyre*, Apprenticeſhip is a Perſonal Truſt between the Maſter and Apprentice, and determined by the Death of either; for the Deſign of it is loſt if the Maſter die, becauſe the Executor may be of another Trade; but the *Chief Juſtice Holt* was of Opinion, that the Death of the Maſter did not diſcharge his Covenant *quoad* the *Maintenance*, tho' it might *quoad* the Inſtruction; therefore the * Executor is liable in Covenant as to that; and it hath been adjudged, that he is liable in an Action of Covenant, if he doth not inſtruct him, or find another Maſter for him. 1 *Salk. 66. The King* verſus *Peck.* See 2 *Lev.* 17.

* Antea 13, 18.

* Antea 12, 15.

23. Adjudged, that the * Juſtices may compel a Maſter to take an Apprentice; for by the Statute they have Power to put them out, and by Conſequence they muſt have Power to compel the Maſters to take them; and if the Maſter turn him away, the Juſtices may order * *Reſtitution of the Money*: They have likewiſe Power to diſcharge an Apprentice; and if their Order is obeyed by the Maſter, then the Seſſions have no Power; if 'tis diſobeyed, then the Juſtices, upon Complaint made thereof, may bind the Maſter over to the Seſſions, and if he doth not appear, 'tis not only a Forfeiture of his Recogniſance, but the Seſſions may proceed to make an Order againſt him; ſo that *per Holt Ch. Juſt.* The Seſſions have not an original Power to diſcharge Apprentices. 1 *Salk* 67. *Dillan's* Caſe. *Hill.* 11 *Will.* 3. See 1 *Lev.* 91.

* 1 Mod. 2.

24. But two Years afterwards it was otherwiſe adjudged, *(viz.)* that if it had been a new Queſtion they held, that a Prior Application to a Juſtice of Peace had been neceſſary; but after ſo many Orders affirmed in *B. R.* wherein the Seſſions have been adjudged to have an original Juriſdiction to diſcharge Apprentices, the Court would not now unſettle it. 1 *Salk.* 68. *The King* verſus *Johnſon.* See 1 *Mod.* 2. 1 *Saund.* 315.

25. *Indictment* for uſing the Trade of a *Tailor*, not having been an Apprentice to it for ſeven Years *infra regnum Angliæ or Wales*, was quaſhed for that Reaſon, for if he ſerved beyond Sea 'tis ſufficient; and *per Holt*, 'tis ſufficient to excuſe him from the Penalties of the Statute 5 *Eliz.* if he ſerved ſeven Years Apprenticeſhip beyond Sea, tho' he was never bound. 1 *Salk.* 76. *The King* verſus *Fox.* And *Froth's* Caſe. *Ibid.*

Mod. Ca. 89.

26. The Widow of a Waterman took an Apprentice, who went to Sea, and had *Tickets* for his Wages, which came to the Hands of *T. S.* and the Widow brought an Action of Trover againſt him, and had Judgment; for what an Apprentice gains is for his Maſter, and 'tis ſufficient againſt a Wrong-doer, if he was only an Apprentice *de facto.* 1 *Salk.* 68. *Barber* verſus *Dennis.*

27. Where an Apprentice is discharged from his Master, the Discharge must be under the Hands and Seals of four Justices of Peace, but in a *Certiorari* to remove such Order of Discharge, 'tis sufficient to take Notice of the Order so made, but not to certify the Discharge it self. 2 *Salk.* 470.

28. The Case was, *Gately* was a *Mountebank*, and keeping a publick Stage in a Town in *Yorkshire*, *Green* was there bound Apprentice to him, and by the Indenture it was to *Robert Gately* Surgeon, to learn the Art *he now useth*, and immediately *Green* went on the Stage and continued in that Employment ever since, but being with his Master in *Middlesex*, he complained to the Justices, that his Master did not teach him his Trade, upon which they made an Order to discharge him, and then *Green* set up for a Mountebank; but the Order was discharged, because, tho' by the Statute 5 *Eliz.* the Clause which relates to the *Serving an* Apprenticeship is in the general Words, (viz.) *Arts and Sciences*, under which Words a *Surgeon* may be comprehended, yet that other Clause, which relates to the *discharging* Apprentices, reaches only the *Trades therein mentioned*, amongst which there is neither *Surgeon or Mountebank*; and this Point was not stirred in *Hawksworth* and *Hillary's* Case. 2 *Salk.* 471. *The King* versus *Gately*. 5 Mod. 138. *The Pleadings.*

29. By the Statute 5 *Eliz.* 'tis enacted, that *upon the Appearance* of the Master *four Justices, &c.* may *discharge* the Apprentice after *one Justice* hath endeavoured to compose the Matter in Difference; an Order was made to discharge an Apprentice, and it was objected, that the *Master did not appear*, and therefore the Justices could not discharge the Apprentice; but adjudged, that the Statute shall have a reasonable Construction, for if the Master should run away, the Apprentice shall be *discharged*; but the most material Exception was, that it appeared by this Order of Discharge, that the Master was a *Collar-maker*, and this is not a *Trade mentioned in that Clause of the Act, which relates to the Discharge of Apprentices*; it was said in this Case, that the Justices might order the Master to restore Part of the Money. 2 *Salk.* 490. *Ditton's* Case.

30. The Sessions made an *original Order to discharge an Apprentice* without any previous Application to one Justice to compose the Difference, as the Statute directs; adjudged a good Order, for many such have been made and confirmed in *B. R.* 2 *Salk.* 491. *The King* versus *Johnson.*

31. The *Church-wardens and Overseers* of the Poor by an Indenture confirmed by *two Justices*, bound a poor Girl Apprentice to a *Merchant*, he appealed to the Sessions and there it was *discharged*, and *B. R.* confirmed this Order of Sessions, because the late Act having compelled Persons to take Apprentices, and given an Appeal to the Sessions, they are now become proper Judges, what Person is fit to receive a poor Apprentice, or not. 2 *Salk* 491. *Minchamp's* Case.

32. *T. P.* was bound Apprentice for four Years to *W. R.* and served out his Time at *St. Brides*, but the said *W. R.* the Master, was only a *Lodger*, and had no Settlement in that Parish; adjudged, that this Apprentice was settled *at St. Brides*, and was not removeable, and his Settlement doth not depend on his *Master*, but he gains it for himself within the Statute 14 *Car.* 2. *by dwelling in the Parish forty Days*, the Case is the same of an *hired Servant*, tho' the Master had no Settlement in the Parish. 2 *Salk.* 533. *St. Brides Parish* versus *St. Saviours.*

33. *Indictment*, for that the Defendant at such a Day and Place *quendam C. S. servum sive apprenticium cujusdam I. B. extra domum, Shopam & servitium prædicti I. B. magistri sui discedere & seipsum absentare illicite allexit procuravit & causavit & quod adtunc & diversis diebus antea illicite seduxit eundem Carolum ad 200 Carolina Hats, Valoris, &c. de bonis & catallis præfat' I. extra Domum & Shopam ipsius I. illicite capiend' & asportand' & ill' adtunc & ibidem injuste cepit recepit & habuit sciens bona, &c. prædict' & præd' Carolum esse servum præd' I.* The Defendant was found guilty, but the Judgment was arrested, because enticing an Apprentice to leave his Service, is a private Injury, for which an *Action on the Case, per quod servitium amisit*, and not *an Indictment*, will lie; but an Enticing to embezil Goods is indictable, but then there is no *Venue* laid where the Goods were taken away. 1 *Salk.* 380. *The Queen* versus *Daniell.* See *Noy* 105. Mod. Cases 99. 182.

34. Indictment, for that a poor Boy being put out an Apprentice to the Defendant, pursuant to the * Statute, he *Vi & Armis* refused to provide for him; adjudged, that the Indictment was good, and that the *Vi & Armis* was *Surplusage*, for since the Justices have † Power to put out Apprentices, the Court will allow an Indictment for Disobedience, in not receiving, not providing, or turning him away. 1 *Salk.* 381. *The Queen* versus *Gold.* Mod Cases 163. * 5 Eliz. cap. 4. † *See* 8 & 9 Will. 3. cap. 30.

35. Indictment for *enticing an Apprentice to take away his Master's Goods*, the Defendant was convicted; but adjudged, that the Indictment was ill, because it did not set forth, that the Apprentice did *actually take away any Goods*, for 'tis not sufficient to lay an *Enticement* without some Act done in Pursuance of it; 'tis true, it sets forth, that the Defendant did *receive* the Goods, which implies they were taken away, but a Charge in an Indictment must be certain and direct, and not by Implication. *Mod. Cases* 288. *The Queen* versus *Collingwood.*

36. In *Covenant* by the Master against his Apprentice for leaving his Service; *Holt* Ch. Just. held, that if the Master gave the Apprentice Licence to leave him, it cannot afterwards be recalled, for, if the Master should bring an Action of Covenant for leaving his Service at *such a Time*, and the Defendant justifies by Vertue of a *Licence at that Time*, upon such a Declaration the Master shall not give Evidence of his leaving him at any other Time, because in this Case the *Time* is material, and not transitory, as in Trespass. *Mod. Cases* 70.

37. A *poor Boy* was put an *Apprentice* to *Husbandry* by Order of two Justices, which Order was confirmed upon an *Appeal* to the Sessions, and being removed into *B. R.* by *Certiorari*, the Question was, whether the * Justices could compel a Man to take such an Apprentice; before the Statute 5 *Eliz.* no poor Children were put out to *Husbandry*, the usual Way was to put them out * Antea 12, 15, 23. 5 Eliz. cap. 4.

out in Cities and great Towns to *Trades* and particular Employments; afterwards, by the Statute † 43 *Eliz.* the *Church-wardens and Overſeers of the Poor* were to raiſe *competent Sums* for putting out poor Children (with the Aſſent of two Juſtices) *where they ſhall ſee convenient*, (*i. e.*) to ſuch *Tradeſmen* who were willing to receive them with Money, for if they could compel them to receive a poor Child without Money, what Occaſion was there for *raiſing Money*: In *Price*'s Caſe, *Hill.* 30 *Car.* 2. it was reſolved, that the Juſtices had not ſuch a Power; 'tis true, in the * *King* and *Gilliflower*'s Caſe, it was reſolved to the contrary; and of that Opinion was *Holt* Ch. Juſt. in this Caſe, but the Order was quaſhed, for that the Church-wardens were not mentioned in it. 3 *Mod.* 269. *The King* verſus *Fairfax.*

† 43 Eliz. cap. 2.

* Antea 25.

Appropriation.

What it is, and by whom to be made, and how they came to the King. (A)
Where, and by what Acts 'tis good. (B)
Where 'tis not good, and not to be granted over. (C)

(A)

What it is, and by whom to be made, and how they came to the King.

See *Penſion.* (A) 7.

1. NO Man can make an Appropriation but he who hath Eccleſiaſtical Juriſdiction, and therefore it muſt be made by the Biſhop or Ordinary, in theſe or the like Words, (viz.) *Authoritate noſtra ordinaria Eccleſiam parochialem de B. Priori & Conventui de W. annectimus, appropriamus & Unimus per præſentes:* but the *King* is ſuch a Spiritual Perſon, that he may appropriate any Church, becauſe he hath the ſupreme Eccleſiaſtical Juriſdiction. 5 *Rep.* 10. in *Cawdrie*'s Caſe. 11 *Rep.* 10, 11. in *Pridle* and *Napier*'s Caſe.

2. When the King made an Appropriation, the Form was in theſe or the like Words, (viz.) *Licentiam dedimus Priori & Conventui de W. quod ipſi Eccleſiam Parochialem de B. appropriare conſolidare incorporare, &c. & quod eam ſic appropriatam conſolidatam & incorporatam in manus & uſus ſuos proprios retinere poſſunt*, by both which Caſes it appears, that the Appropriation muſt be made to a ſpiritual Perſon. 11 *Rep.* 9. *a. Pridle* verſus *Napier*, but this muſt be underſtood where the King is Patron of the Church, but an Appropriation cannot be made by a common Perſon alone, tho' he is Patron, for it muſt be done by the Ordinary. *Popham* 144. *Ward*'s Caſe.

3. All *Appropriations to Priories* or other Religious Houſes, which were under the Value of 200 *l. per Annum*, were given to the King by the Statute 27 *H.* 8. as well as thoſe Appropriations to Abbies, above the Value of 200 *l. per Annum* were given to him by the Statute 31 *H.* 8. for the Statute 27 *H.* 8. gives him the *Churches, Chapels, Advowſons and Patronages* of theſe Monaſteries, *&c.* which muſt be underſtood the *Churches* appropriate as well as the Advowſons and Churches which were preſentative, for the Words *Eccleſia* and *Rectoria* are *Synonymous*; beſides, the Statute gives the King all thoſe Monaſteries whereof the *Poſſeſſions* did not exceed 200 *l. per Annum*, ſo that whatever contributed to the yearly Revenue was given to the King; now 'tis plain, that a great Part of their Poſſeſſions and yearly Profits did conſiſt in *Appropriations*, for it was eaſy for them to get Advowſons, and as eaſy afterwards to get them *appropriated*, and *Appropriations*, tho' they were only ſo *in Reputation*, paſſed to the King by both theſe Statutes; ſo adjudged 11 *Rep.* 13. in *Priddle* and *Napier*'s Caſe, and in *Hob.* 306. *Wright* and *Gerrard*'s Caſe, and 148. *Colt* and the Biſhop of *Coventry*'s Caſe.

4. The Parſonage of *Bulbenham in the County of Leiceſter* was *Anno* 22 *Ed.* 4. appropriated to the Abbey of *Sudbury*, but there was no *Vicarage endowed*, as it ought to be upon every Appropriation expreſly by the Statute 4 *H.* 4. but yet the Rectory ſtill continued appropriate, and there was a Vicar there, now both the Appropriation and the Vicar were only ſo in *Reputation*, for the *Appropriation* was not good, becauſe there was no *Vicarage endowed*; and where there is no Vicarage there could be no Vicar, yet both paſſed to the King by the Statute of Diſſolution. *Trin.* 30 *Eliz. Grimes* verſus *Smith.*

* Poſtea (B) 3.

5. So where the Church of * *Kimbolton* was appropriated, and there was a Defect in the Appropriation, for that the *Earl of Hereford*, who made it, was but Tenant in Tail; yet adjudged, that the Rectory was given to the King. *Hill.* 4 *Jac. Beadle* verſus *Bear*, both theſe Caſes vouched in *Priddle* and *Napier*'s Caſe. 11 *Rep.*

(B)

Where, and by what Acts 'tis good.

1. THE *Abbot of S.* held the Parſonage of *L.* appropriate, which came as ſuch to *H.* 8. by the Statute of Diſſolutions, *&c.* the King granted it in Fee to *B.* under which Grant the Plaintiff claimed, the Defendant had obtained a Preſentation to the Church of *L.* from the King, ſuppoſing it to be void by Lapſe, and to deſtroy the *Appropriation*, he ſet forth the Original of it, which was *Anno* 22 *Ed.* 4. with a Condition, that a *Vicarage ſhould be perpetually endowed*; and alledged, that there never was any *Vicarage endowed*, and therefore the Appropriation was void, and by Conſequence the Rectory could not come to King *H.* 8. as appropriate to the Abbot of *S.* but adjudged, that ſince it had been taken to be appropriate ever ſince the Reign of *Ed.* 4. and a *Vicar* had ever ſince been inſtituted and inducted, it ſhall be preſumed that the Vicarage was endowed originally. 12 *Rep.* 4. *Grimes* verſus *Smith.* 2 *Cro.* 210. *Hunſton* verſus *Cocket. S. P. Lea* 15. *Stafford's* Caſe. *S. P.*

2. *King Ed.* 1. *Anno* 12. of his Reign, granted to the *Biſhop of St. Davids* and his Succeſſors, thirty-four Churches in his Dioceſe in *Wales*, ſo as he or they might *appropriate* them, or any of them, to the *Church of St. Davids*, or make new Prebends in any of the ſaid Churches; afterwards the Biſhop, with the Aſſent of the *King*, and the *Dean and Chapter of St. Davids*, erected a *Collegiate Church* out of one of the *thirty-four Churches* ſo granted to him as aforeſaid, and made *thirteen Prebendaries*, and appropriated *thirteen of the ſaid Churches* to the ſaid *Prebendaries*, *King Ed.* 3. confirmed the Premiſſes, *&c.* adjudged, that theſe *Appropriations* were well made, and that this was a good *College* and given to the King by the Statute 1 *Ed.* 6. for tho' there was no *Endowment of a Vicar*, which ought to be upon every *Appropriation*, yet that Statute gives the Commiſſioners Power to eſtabliſh a *Vicar* in every College, which was formerly a parochial Church. 4 *Rep.* 107. in *Adams* and *Lambert's* Caſe. *Mich.* 10 *Eliz. Dyer* 267. *S. P.*

3. King *Ed.* 1. being ſeiſed of the Manor of * *Kimbolton*, to which the Advowſon of the Church was appendant, granted the ſaid Manor *cum pertinentiis* to *H. B.* in Tail, after the Death of the Tenant in Tail, his Iſſue in Tail, *Anno* 4 *Ed.* 3. granted the ſaid Advowſon to the *Prior of Stonely*, who, after the Death of the Incumbent had the ſame *appropriated* to him and his *Convent*, and ſo it continued till the Diſſolution *Anno* 27 *H.* 8. then the King granted the Impropriation to another in Fee; afterwards, *Anno* 37 *Eliz.* one *Beard* obtained from the *Queen* a Preſentation to this Church, ſuppoſing ſhe had a Title *by Lapſe*, for that the Church was not lawfully appropriated to the *Prior of Stonely*; and the Reaſon was, becauſe the Iſſue in Tail had nothing in it, and by Conſequence he could not grant it to the *Priory*, becauſe it did not paſs to his Anceſtor by the Grant of the Manor *cum pertinentiis*; adjudged, that tho' the Advowſon in Strictneſs of Law did not paſs by the Words *Cum pertinentiis*, yet becauſe of the long and continued Poſſeſſion in the *Prior and Convent*, it ſhall be *intended* there was a lawful Grant thereof made by the King to *H. B.* and all ſhall be preſumed to be done which might make this antient Appropriation good, and it ſhall not be drawn in Queſtion after ſo many Succeſſions of Ages, during all which Time it hath been taken, that the Church was rightfully appropriated to the Priory. 12 *Rep.* 5. *Priddle* verſus *Beard & al'.* 12 *Rep.* 3. *Lord St. John of Bletſoe, and Dean and Chapter of Glouceſter. S. P.*

* Antea (A) 5.

(C)

Where 'tis not good, and not to be granted over.

1. KIng *Ed.* 6. being Patron of the Church of *B.* which was then *full of an Incumbent*, granted the ſame to the *Biſhop of Coventry, &c.* and that after the Avoidance it ſhould be *appropriate* to the ſaid Biſhop and his Succeſſors; the Biſhop made a Leaſe thereof for ſixty Years, to commence upon the next Avoidance, which Leaſe was confirmed by the *Dean and Chapter*; adjudged, that this *Leaſe was void*, becauſe the Biſhop had nothing in the Parſonage during the Life of the Incumbent; and the Reaſon was, becauſe the Appropriation was made to him by theſe Words, (*viz.*) That *after the next Avoidance* he ſhould hold the Church *in proprios uſus*, by which it appears, that an Appropriation cannot be made to a Church which is full, but by ſpecial Words. *Mich.* 8 *Eliz. Dyer* 244. *Biſhop of Coventry and Litchfield's* Caſe, and *Jobſon* and *Michael's* Caſe. *S. P.*

2. In a *Quare Impedit* againſt the *Biſhop* and the *Dean and Chapter of Worceſter*, to preſent to the Church of *Dean*; the Biſhop pretended, that he claimed nothing but as Ordinary, and the Dean and Chapter pleaded a Plea, to which the Plaintiff demurred, and the Caſe upon the Pleadings was thus: *King Ed.* 6. was ſeiſed of the Advowſon of the ſaid Church in Fee, and in the firſt Year of his Reign, the Church being then *full of an Incumbent*, granted the ſame to the *Dean and Chapter*, and their Succeſſors, and gave them Licenſe to retain it *in proprios uſus*, upon the next Avoidance; and by the ſame Grant did *appropriate* and incorporate it to them; the *Incumbent* died, then *King Ed.* 6. preſented one *Chamberlaine*, who was admitted, inſtituted and in-

ducted, then the King died, and after his Death *Queen Mary* granted the Advowſon to *B. B.* in Fee, who granted it over to *Tho. Grendon*, and from him it deſcended to *Roger Grendon* the Plaintiff; in this Caſe it was adjudged, that none is capable of an *Appropriation*, but a *Body ſpiritual, corporate or politick*, which hath a Succeſſion; for the Effect of an Appropropriation is to make ſuch a ſpiritual Body perpetual Incumbent, and to have the Rectory with Cure of Souls, and for that Reaſon he muſt be a ſpiritual Perſon, that the Ordinary, Patron and King ought to be aſſenting to every Appropriation where a common Perſon is Patron; but that the King where he is Patron may make an Appropriation without the Aſſent of the Biſhop; and laſtly, that an *Appropriation* may be made, even when the *Church is full*, but not by ſuch Words, as in this Caſe, but by apt and proper Words, ſuch as theſe, (*viz.*) That the Parſon, who is a ſpiritual Perſon, may, after the Death of the Incumbent, *retain the Glebe and the Fruits of the Church to his proper Uſe*, and not by ſuch Words, as in this Caſe, (*viz.*) that the Parſon, after the Death of the Incumbent, *may retain the Advowſon* to his own Uſe. *Plow. Com.* 496. *Grendon's* Caſe.

W. Jones 2. 3. An *Appropriation* cannot regularly be granted over, neither can it endure longer than the Body ſpiritual to which it was at firſt appropriated, becauſe by the Appropriation not only the *Glebe and Tithes* do paſs, which might be granted away if that could be granted over, but it alſo giveth the Perſon, to whom the Appropriation is made, a ſpiritual Function; it makes him Parſon of the Church, and ſupplieth Inſtitution and Induction, which being the higheſt Parts of a Truſt, cannot for that Reaſon be aſſigned over, and therefore every Inſtrument of Appropriation runs thus, (*viz.*) that they and *their Succeſſors* ſhall be Parſons, and not they and *their Aſſigns*, for by the uſual Words, that they ſhall hold the Church *to their own Uſe*, they are made Parſons. *Hob.* 307. *Wright* verſus *Gerrard.*

Appurtenances. See *Appertaining.*

Arbitrament.

Of the Power of Arbitrators, and Revocation of it, and what Actions may be brought on their Award, and of Awards made by Rule of Court. (A)
Where an Award is good. (B)
Where a Submiſſion and an Award ſhall be good in Part, and void in Part, and wholly void. (C)
Award not good, not being final. (D)
Award not good, being on one Side. (E)
Award not good, being incertain, and where 'tis good. (F)
Award not good, being made where the Party is a *Stranger to the Submiſſion.* (G)
Awards on Submiſſions general and conditional, good. (H)
Awards upon Submiſſions general and conditional, not good. (I)
Awards upon ſpecial Submiſſions, good, and not good. (K)
Breach of Award well aſſigned. (L)
Breach of Award not well aſſigned. (M)
Pleadings in Award, good, and not good. (N)
Of the Bond of Submiſſion varying from the Award. (O)
Of Umpirage. (P)
Pleadings in Umpirage, good, and not good. (Q)

(A)

Of the Power of Arbitrators, and Revocation of it, and what Actions may be brought on their Award, and of Awards made by Rule of Court.

1. THE Award of an Arbitrator is definitive, from which there is no Appeal, and being choſen by the Parties, they are not tied to ſuch Formalities of Law as Judges in other Caſes are, and yet they have as great a Power as other Judges have to determine the Matters in Variance, but their Determination muſt be *certain*, and it muſt be according to the Condition of the Bond by which the Parties ſubmit themſelves to their Judgment. *Paſch.* 19 *Eliz. Dyer* 356. 5 *Rep.* 78. *March* 18. *Sammon's* Caſe. *S. P. Paſch.* 17 *Car. Rudſtone* verſus *Yates. S. P. March* 111.

2. Debt upon Bond conditioned, that the Plaintiff and the Defendant, and *W. R.* his Brother, ſhould ſtand to the Award of *L. L.* who made an Award, that *W. R.* ſhould pay to the Plaintiff 30 *l.* (*viz.*) 20 *l.* at *Lady-Day* and 10 *l.* at *Michaelmas* following, which he had not done; the Defendant pleaded, that his Brother *W. R. died before Michaelmas*; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Sum awarded to be paid to the Plaintiff was *now become*

come a Duty, and as if the Condition of the Bond had been for the Payment of that very Sum. *Mich.* 19 *Eliz.* 2 *Leon.* 155. *Kingwell* verſus *Chapman.*

3. Debt upon a *Bond* conditioned to ſtand to an Award; the Defendant pleaded, that the Arbitrator made no Award; the Plaintiff replied, that after the Sealing and Delivery of the Bond, the Defendant by Deed did *revoke the Authority* which he had given in Writing to the Arbitrator; and upon a Demurrer to this Replication, it was adjudged, that the *Revocation* was good, for a Man cannot give ſuch an Authority to another which is not *revocable*, if it may be done by Law, and the Plaintiff in his Replication need not ſhew, that the Arbitrator had *Notice* of this *Countermand*, becauſe it ſhall be implied in the Words *Revocavit omnem Authoritatem*; but then by this Revocation the Bond ſtands ſingle, for 'tis diſcharged of the Condition, which the Obligor by his own Act hath made impoſſible to be performed. 8 *Rep.* 82. *Viner* verſus *Wild.* 2 *Brownl.* 29. *S. C.* By the Name of *Vivian* verſus *Wild.*

4. Adjudged, that where a Man is bound in a Bond to ſtand to the Award of an Arbitrator, and accordingly he makes an Award to *pay Money*, in ſuch Caſe, the Perſon to whom it is to be paid, may have an Action of *Debt for the Money*, and declare upon the *Award*; and afterwards he may have another Action of Debt upon the *Bond*, for not performing the Award. *Mich* 5. *Car. Brownl.* 55.

5. An *Award to make a Leaſe*, and that upon Making thereof the Leſſee ſhall pay 50 *l.* the Queſtion was, whether the Leſſor ought to *give Notice* to the Leſſee when he would make the Leaſe, for otherwiſe he muſt always carry 50 *l.* about him; adjudged, that *Notice* was not neceſſary. 1 *Vent.* 93. *Gallet* verſus *Padwell.*

6. Where an Award is made by *Rule of Court*, it ſhall never be ſet aſide for Informality, nor unleſs there is ſome Practice amongſt the Arbitrators, or ſome * Irregularity, as Want of due Notice of their Meeting; and the Court will compell the Performance of ſuch an Award, as if it was Part of the Rule it ſelf. 1 *Salk.* 71. * *This was denied per Holt, ſee pl.* 10.

7. Bond of Submiſſion, with this Clauſe in the Condition, (*viz.*) *And if the Obligor ſhall Conſent, that this Submiſſion ſhall be made a Rule of Court*, then the Bond ſhall be void; adjudged, that tho' this Conſent was only Conditional, yet, becauſe this Clauſe could be inſerted for no other End than to ſhew the Conſent of the Obligor, it ſhall be a ſufficient Indication thereof, and therefore they made the Award a *Rule of Court*; this was upon a Motion to make the Submiſſion a Rule of Court, according to the new Act of Parliament. 1 *Salk.* 72. *Baily* verſus *Cheeſly.*

8. The Bond of Submiſſion was made a Rule of Court according to the *Act*; afterwards an Award being made, the Plaintiff moved for an Attachment againſt the Defendant, for not performing the Award, which was granted, and he likewiſe brought an Action of *Debt upon the Bond*; and upon a Motion, that he might not proceed both Ways, it was ruled, that he might, becauſe the Plaintiff hath no Satisfaction upon the Attachment; ſo the Defendant was put to anſwer Interrogatories. 1 *Salk.* 73.

9. The Judge of Aſſiſe referred the Matter in Difference to the three Foremen of the Jury, and one of them was ſerved with a *Subpœna* out of Chancery before the Award made; this being done by one of the Parties, it was held a Breach of the Rule, and an Attachment was granted. 1 *Salk.* 73. *Davila* verſus *Almanza.*

10. Upon the like Reference to the three Foremen of the Jury, they made an Award, and the Defendant moved to ſet it aſide, becauſe they proceeded without giving him Time to be heard, or to produce his Witneſſes; but adjudged, that the Arbitrators being Judges of the Parties own Chooſing, he ſhall not be admitted to complain, that they have not done Juſtice, and put the Court to examine the Award, unleſs where they exceed their Authority; however this Award was examined and confirmed; but the Court would not allow the Plaintiff his Coſts. This was againſt the Opinion of *Powell* Juſtice. 1 *Salk.* 73. *Morris* verſus *Reynolds.*

11. Adjudged, that an *Attachment* doth not lie for not performing an Award made upon a Rule of Court, without a *perſonal Demand*, tho' the Award may not be ſtrictly good in Law; but if 'tis impoſſible to be performed, the Party is excuſed. 1 *Salk.* 83. *Foſter* verſus *Burnetti.*

12. A *Rule* was made at the *Aſſiſes* to refer the Matter to the three Foremen of the Jury, and that the Plaintiff ſhould have a Verdict for his Security; after the Award is made, the Plaintiff may either enter upon his Judgment, or pray an Attachment for Non performance; but the Judgment cannot be entered without Leave of the Court, therefore the Plaintiff had an Attachment. 1 *Salk.* 84. *Hull* verſus *Miſter.*

13. By a late Statute 'tis enacted, that Perſonal Actions, and Matters of Equity, agreed by the Parties to be ſubmitted to Arbitration, ſhall be made a Rule of Court, they inſerting ſuch Agreement in the Bond of Submiſſion, and upon an *Affidavit* made by one Witneſs of ſuch Agreement, a Rule ſhall be made by the Court, that the Parties ſhall ſubmit to, and be concluded by the ſaid Arbitration or Umpirage, and the Party diſobeying it, ſhall be liable to a Proceſs for Contempt, which ſhall not be ſtaid by any other Court, unleſs it appear on Oath, that the Award was made by undue Means; for in ſuch Caſe it ſhall be void, and ſet aſide by any Court, ſo a Complaint be made thereof to the Court where the Rule was made, before the laſt Day of the Term, next after ſuch Arbitration made and publiſhed. 8 & 9 W. 3. cap. 15.

(B)

Where an Award is good.

1. DEBT upon Bond, for Performance of an Award; the Arbitrators awarded, that the Defendant ſhould enjoy ſuch an Houſe, of which the Plaintiff had a Leaſe for Years, *and that the Defendant ſhould pay to him yearly* 20*s. during the Term*; afterwards *an Action of Debt* was brought on this Bond, for that the 20*s.* was in Arrear for one Year; and adjudged, that the Action did lie, for it was Part of the Award. *Paſch.* 32 *Eliz. Cro. Eliz.* 211. *Parſons* verſus *Parſons*.

2. And yet where the *Award* was, that the *Obligor ſhall make a Leaſe to the Obligee*, rendring Rent, and a Leaſe was made accordingly, and afterwards the Obligee did not pay the Rent, it was held, that an Action did not lie upon this Bond for the Arrears of Rent, becauſe the Obligor had another Remedy, (*viz.*) by *Diſtreſs*, and that the making the Leaſe was the Effect of the Award; but if it had been, that the Obligee ſhould make a Leaſe, and that for ſuch Leaſe the Obligor ſhould pay ſuch a certain Sum, there the Obligee may recover it upon this Bond. *Mich.* 27 *H.* 8. *Bendl.* 4.

3. The Controverſy was between the Parties, concerning a *Leaſe of Lands*, the Award was, that one of them ſhall *have the Lands*; adjudged, that this was a good Award of the *Intereſt of the Leaſe*; but if it had been, that he ſhould permit the other to *enjoy the Term*, this would not be an Award of the *Intereſt*. *Paſch.* 33. *Eliz. Cro. Eliz.* 223. *Truſtoe* verſus *Ewers*.

2 Roll. Rep. 62. 4. Debt, *&c.* to perform an Award, which was, that the now Plaintiff ſhould not proſecute or proceed in ſuch an Action, and in *ſuch a Term*; this was adjudged a good Award, and that the entering of a *Continuance* from that Term to another, by his Attorney, was no Breach of the Award. 2 *Cro.* 525. *Grey* verſus *Grey*. 2 *Bulſt.* 28. *S. C.*

Brownl. 48. Hutt. 9. Moor 885. S. C. 5. Debt upon a Bond of Submiſſion, dated 13 *January* of all Quarrels depending, *&c.* the Defendant pleaded *nullum Arbitrium*; the Plaintiff replied, and ſhewed an Award made 14 *April de & ſuper Præmiſſis*, that the Defendant ſhould pay him 20 *l. &c.* in full Satisfaction of all Demands *till the Day of the Award*; and upon Demurrer to this Replication it was objected, that the Bond only extended to all *Quarrels and Demands then depending*, but the Plaintiff had Judgment, becauſe it ſhall not be intended that there were any new Demands between the Date of the Bond, and the Day of the Making the Award. *Hob.* 191. *Lea* verſus *Paine*. *Poſtea* 14. *S. P. and pl.* 30. *S. P.*

6. The Award was to pay a certain Sum of Money, but *no Day was appointed* when it ſhould be paid; adjudged, that the Award is good, for it ſhall be paid upon Demand. 1 *Brownl.* 65. *Rayſon* verſus *Windſor*.

1 Roll. Rep. 5. Godb. 255. 2 Bulſt. 38. 7. Two ſubmit to an Award, which was, that one ſhall ceaſe all Suits, and that he ſhall procure a *Stranger* to the Submiſſion to be bound in a Bond with him to make a Feoffment, *&c.* of his Manor of *D.* all which was out of the Submiſſion: Now in this Caſe the firſt Thing was good, (*viz.*) to ceaſe all Suits, but the ſecond was illegal and out of the Submiſſion; yet the Award being good in Part, ought to be performed. *Paſch.* 12 *Jac. Lindſey* verſus *Aſhton*. 2 *Bulſt.* 39.

Poſt. 10. 8. The Submiſſion was to four Arbitrators, and to the *Umpirage* of the fifth, and all five made the Award; adjudged good, and that they might all join in making it; but it had been otherwiſe, if the Submiſſion had been divided, (*viz.*) to the Arbitration of four, and *if they did not agree*, then to an Umpire; for in ſuch Caſe they could not all join in making the Award. *Paſch.* 10 *Jac.* 1 *Bulſt.* 184.

2 Brownl. 309. S. C. 9. The Submiſſion was of *all Suits and Demands, &c.* and in an Action of Debt brought on the Bond, the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, and ſhewed an Award *de & ſuper Præmiſſis*, that whereas there was a Suit depending between them for 20 *l.* which Sum the Defendant had *promiſed to pay*, the Arbitrator did Award, that it being long due, the Defendant ſhould pay to the Plaintiff 22 *l.* adjudged, that this was a good Award on both Parties, for the one received his Debt, and the other, by paying it, was diſcharged of his Promiſe. 9 *Rep.* 97. *Baſpool's* Caſe.

1 Roll. Rep. 5, 6. Godb. 255. S. C. * Poſtea 18, 28. 10. Debt upon Bond, for Performance of an Award; the Defendant pleaded, that the Submiſſion was of *all Actions depending between* him and the Plaintiff, and the Arbitrators awarded, that he (the Defendant) ſhould *releaſe all Suits* to the Plaintiff, which he averred he had done; the Plaintiff in his Replication confeſſed, that ſuch an Award was made, but that the Arbitrators farther awarded, that the Defendant ſhould *pay the Plaintiff* 15 *l.* on ſuch a Day, * *at the Houſe of W. R. a Stranger*, which he had not paid, and traverſed, that they awarded *only* as the Defendant had alledged in his Plea: There was an ill Rejoinder, to which there was a Demurrer, and it was objected, that both the Plea and the Award were naught, becauſe the Submiſſion was of *all Suits depending*, and the Arbitrators awarded a Releaſe of *all Suits generally, whether depending or not*, which Releaſe is not good; and if ſo, the Award is not good for the 15 *l.* but adjudged, that tho' it was void in Part, yet that did not make the whole Award void: Then it was objected againſt the Replication, that the Plaintiff had traverſed that the Arbitrators made ſuch an Award *only* as the Defendant had ſet forth in his Plea, when in Truth he did not alledge any ſuch Thing; and 'tis certainly true, that what is not expreſly alledged, ſhall never be traverſed;

verſed; but adjudged, that the Traverſe was good, for when the Defendant alledged, that the Award was for him *to releaſe all Suits*, that ſhall be intended the *whole Award*; but when the Plaintiff had ſhewed, that ſomething more was awarded, he muſt traverſe what was alledged by the Defendant, and after ſuch a Traverſe he muſt conclude to the Countrey. 2 *Bulſt.* 38. *Linſey* verſus *Aſhton*. *Antea* 7. *S. C.* 17. *S. P.*

11. The Condition of the Bond of Submiſſion was, that the Parties ſhould put themſelves to the Arbitrament of *G. D.* of all Matters between them *till the 9th Day of March* 18 *Jac.* and the Award was, that each of them ſhould *releaſe* to the other all Matters, *&c. till the 9th Day of March, &c.* It was objected, that by this * Releaſe the *Bond*, upon which the Action of Debt was now brought, was diſcharged; but adjudged a good Award, for tho' it was void as to that Part, it was good for the Reſt. *Winch* 1. *Norton* verſus *Lakins*. 2 *Cro. Pitts* verſus *Wardell*. *S. P. Godb.* 164. *S. C.* * Poſtea 29. (C) 8.

12. The Submiſſion was to four Arbitrators, and the Award was made by three of them, and yet adjudged good by all the Judges in the *Exchequer-Chamber*; for it ſhall be taken to be a Submiſſion to four, or any three of them, becauſe the Submiſſion was Conditional, (*viz.*) *ſo that they, or any three* of them, made the Award, *&c. Bridgm.* 90. *Berry* verſus *Berry*. *Sallows* verſus *Girling*. *S. P.* 2 *Cro.* 400. *S. C.* and 577. *Buſfield* verſus *Buſfield*. *S. P.* 1 *Vent.* 50. *Hill.* verſus *Langley*. *S. P.* 1 Roll. Rep. 223, 375. Bulſt. 64.

13. Debt, *&c.* on Bond, for Performance of an Award; the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, and ſhewed the Award, by which the Arbitrator amongſt other Things awarded *Intereſt* to be paid to him for Money, *&c.* and upon Demurrer to this Replication, it was objected, that the Award was void, becauſe it was for Payment of *Intereſt*, and *Uſury* is a Thing unlawful; but the Award was adjudged good, for it ſhall not be taken for *Uſury*, but rather for Damages for Forbearance of the Money; but admitting it was for *Intereſt* in the proper Signification of the Word, yet 'tis good, for by the Statutes, *&c.* Contracts for Intereſt Money are not void, ſo as they did not exceed ſo much as is limitted by thoſe Laws. *Winch* 114. *Gilſon* verſus *Ferrers*.

14. The Bond of Submiſſion was of all Suits, *&c.* and it was dated on the *29th of December*, and the Award was to be made before the *6th Day of January* following; and accordingly on the *5th Day of January* the Award was made *de & ſuper Præmiſſis*, by which the Defendant was awarded to pay 72 *l.* to the Plaintiff, and that each of them ſhould *releaſe* the other of all Suits *before the* 28*th of December* laſt paſt: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Award was void, becauſe there might be Suits depending between the Parties *on the 29th of December*; but adjudged, that the Award being made *de & ſuper Præmiſſis*, it ſhall not be intended, that any new Action did ariſe between the Parties, *after the 28th and before the 29th of December*. *Cro. Car.* 157. *Ward* verſus *Uncorne*. *T.* 43. *Barnes* verſus *Greenway*. *S. P. Hob.* 190. *Goffe* verſus *Brown*. *S. P. Antea pl.* 5. *S. P. Allen* 26. *Gurman* verſus *Hill*. *S. P.*

15. The Parties who ſubmitted to an Award were *jointly* Bound in a Bond, conditioned to pay 50 *l. to G. D.* and the Award was, that one of them ſhould acquit and diſcharge the other from that Bond; it was inſiſted for the Defendant, that this Award was void, becauſe it was to acquit and diſcharge the Plaintiff of a Bond made to a *Stranger* to the Submiſſion, and it was not in his Power to procure ſuch a Diſcharge; but adjudged, that the Defendant might very well diſcharge the Plaintiff from this Bond, if the Money was to be paid at a future Day, not yet come, and ſo the Bond not forfeited, as in this Caſe it ſhall be intended that it was not. *Cro. Car.* 389. *Bardſey* verſus *Clifton*. W. Jones 431.

16. The Submiſſion was of all Demands, ſo as the Award was made before the *10th Day of December, &c.* Upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſhewed an Award made on the *9th Day of December, &c.* that the Defendant ſhould pay to the Plaintiff 14 *l.* at ſeveral Days, and that upon the *laſt Day of Payment* the Parties ſhould give to each other *general Releaſes*: It was objected, that nothing could be releaſed, but what was before the *10th Day of December*, that being the Day on which the Bond was dated; but here every Thing was to be releaſed between the Parties *before the laſt Day of the Payment of* 14 *l.* to which they never ſubmitted, and therefore the Award was void; but adjudged, that it was good, for it ſhall not be intended, that there were any Matters in Controverſy between them after the Date of the Bond, and before the laſt Day of Payment of the Money. *Hutt.* 29. *Allaboyter* verſus *Clifford*. See *pl.* 31.

17. The Award was, that one of the Parties ſhould pay unto the other a certain Sum on ſuch a Day, and that in Conſideration thereof, the other ſhould acquit him of a Bond, in which they were both bound to a third Perſon in an Hundred Pounds, *or thereabouts*; it was objected, that this Award was incertain, it being made to diſcharge a Man of an Hundred Pounds, *or thereabouts*, but adjudged good, becauſe it doth not lie in the Power of the Arbitrator to know the *very Sum*; but if an Award is made, that one ſhall be bound in a Bond to another, and doth not ſhew in what Sum, 'tis void for the Incertainty. *March* 18. *Sammon's* Caſe. *Poſtea* (F) 1. *S C.*

18. Debt on a Bond for Performance of an Award, which was, that all Suits ſhould ceaſe depending between the Parties, and that the Defendant ſhould pay the Plaintiff 20 *l.* * *at the Houſe of G. D.* it was objected, that this Award was void, becauſe it was to do a Thing *upon the Land* of another, which he cannot lawfully do, if he ſhould be denied Entrance; but adjudged, that the Award is good, becauſe he was not to pay the Money *in the Houſe* of another Man, but *at the* * Antea 10. Poſtea 28.

the Houſe, and it might be that the Houſe was adjoining to the Highway; but if it was not, he might come as near the Houſe as he could without being a Treſpaſſer, and there tender the Money, or he might get Leave to come near, or into the Houſe. 10 *Rep. in Osborne's* Caſe. *Cro. Car.* 193. *Taverner* verſus *Skingles*, and 191. *Jennings* verſus *Vandeput. S. P.*

19. Debt upon Bond, for Performance of an Award; the Defendant pleaded no Award made; the Plaintiff replied, and ſet forth the Award, and aſſigned the Breach; the Defendant demurred to the Replication, for that the Award was, that one ſhould pay, and the other ſhall give ſuch a general Releaſe, *&c. as* * *Counſel ſhall adviſe*; ſo as here the Counſel is made the Arbitrator, for a judicial Act is referred to him; adjudged, that was a Miniſterial, and not a Judicial Act, to refer the Form of the Releaſe to Counſel, and ſo the Plaintiff had Judgment. *Style* 217. *Cater* verſus *Starkey.*

20. Debt upon Bond, for Performance of an Award between the Plaintiff and the Defendant and his *Wife*, *&c. or any of them*, ſo as the Award be made, *&c.* and * *ready to be delivered* to the Parties on or before ſuch a Day: The Defendants pleaded, no Award made; the Plaintiff replied, and ſet forth an Award, by which the Defendant was to pay to the Plaintiff * 16 *l. in Recompence of all Charges in ſuch a Suit*, and that the Plaintiff ſhould *Releaſe* to the Defendant all *Demands to the Time of the Submiſſion*, and that the Defendant ſhould *Releaſe* to the Plaintiff *all Demands to the Time of making the Award*; adjudged, that tho' this laſt Part of the Award was void in Law, becauſe the * *Releaſe* would over-reach the *Bond of Submiſſion*; yet becauſe there were other Matters awarded on both Sides which were good, that made the Award ſo too, and that it was good, tho' nothing was awarded as to the Defendant's Wife, becauſe the Words of the Submiſſion were, to an Award to be made between the Parties, and the *Wife* of the Defendant, *or any of them. Hardr.* 399. *Joyce* verſus *Haines. Style* 471. *S. P.*

* *See* (O) pl. 2, 3.

* *Doubted if this was Reciprocal.*

* Poſtea 29.

21. *Debt upon Bond*, for Performance of an Award, which was, that one of the Parties ſhould diſcharge the other from his Undertaking to pay a Debt to *W. R.* who *was no Party to the Submiſſion*, and ſo not compellable to give a Diſcharge; and for this Reaſon it was objected, that the Award was void; but adjudged, that he was compellable in Equity to give a *Releaſe*, and ſo the Award was good. 1 *Mod.* 9. *Becket* verſus *Taylor.*

22. Debt upon Bond conditioned to perform an Award: Upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſhewed an Award, and aſſigned the Breach, and had Judgment; and it was moved in Arreſt of Judgment, that this Award was void, becauſe it was, that the Defendant ſhould pay to the Plaintiff ſuch *Coſts as the Pronotary* ſhould tax in ſuch an Action now depending, *&c.* whereas a Pronotary is not to tax Coſts but upon a Nonſuit or a Verdict; beſides, the Arbitrators cannot Award, that he ſhall do any Act in his private Capacity, nor is there any Means to compel him, if they did; but adjudged, that the Award is good, for the Pronotary is a Publick Officer, and 'tis as well as if they had awarded one of the Parties to execute ſuch a Conveyance as the * Counſel of the other ſhall adviſe; or that he ſhall pay ſuch an Attorney's Bill. *Sid.* 358. *Worrell* verſus *Atworth.*

Vent. 196.

23. Debt upon Bond, for Performance of an Award, by which in the firſt Place it was awarded, that *all Controverſies between the Parties ſhall ceaſe*, this was adjudged a good Award, tho' every Thing elſe was ill awarded. 1 *Lev.* 58. *Harris* verſus *Knipe.*

24. An Award reciting, that ſeveral Differences had been between the Parties concerning an Houſe, and *Arrears of Rent*, they (the Arbitrators) *to make a final End of all*, did award, that the Defendant ſhould pay to the Plaintiff 4 *l. for all the ſaid Arrears* of Rent; and upon Demurrer to this Replication, it was objected, that the Award was not mutual, becauſe it was not of all Differences; but adjudged good, becauſe to *pay* 4 *l. for all Arrears of Rent is mutual*; for 'tis in Satisfaction of the Arrears, and the Defendant is diſcharged thereof. 1 *Lev.* 132. *Hopper* verſus *Hacket.*

25. Debt upon Bond, for Performance of an Award, *ſo as it be ready to be delivered to the Parties* on or before ſuch a Day; the Defendant pleaded, no Award made; the Plaintiff replied, and ſhewed an Award * *ready to be delivered to the Defendant*, that he ſhould pay to the Plaintiff 5 *l.* and aſſigned the Breach in not paying it; and upon Demurrer to this Replication, it was objected, that the Plaintiff ought to ſhew, that it was *ready to be delivered to both Parties*, and not to the Defendant only; but adjudged, it ſhall be intended to be ready to be delivered to both, and that the Defendant ought to have pleaded this Matter at firſt. 1 *Lev.* 133. *Garret* verſus *Weedon.*

* Poſtea 35.

26. Debt upon Bond, for Performance of an Award; the Defendant pleaded no Award made; the Plaintiff replied and ſhewed an Award for the Defendant to pay 20 *s.* upon Condition, that each ſhould acquit the other, *&c.* and that the Defendant ſhould pay the Charge of a Suit now depending, and the Plaintiff gave the Defendant a Bill of the Charges amounting to 40 *s.* which the Defendant had not paid: And upon a Demurrer, it was objected, that this Award was void, becauſe it was Conditional, *(viz.)* upon Condition, that each ſhould acquit the other; beſides, it doth not aſcertain the Charges, but refers them to the Bill; but adjudged, that upon Condition to acquit, is an Award to acquit, and that the Charges are aſcertained by the Bill delivered. 3 *Lev.* 18. *Linfeild* verſus *Ferne.* See *Beal* verſus *Beal.*

27. Debt upon Bond, for Performance of an Award; upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſet forth the Award, which was, that the Defendant, *&c.* ſhould pay the Plaintiff ſo much, * *in, or at the Dwelling-Houſe of T. S.* in *H.* and upon Demurrer to the Replication,

* Antea 10, 18.

plication, the Plaintiff had Judgment, for tho' *T. S.* is a Stranger, yet the Defendant may pay the Money at the Door of his Houſe, if he cannot get Leave to go in. 3 *Lev.* 453. *Holland* verſus *Helwis.* See *pl.* 10. *S. P.*

28. Debt upon Bond for Performance of an Award, dated 1 *Decemb.* 35 *Car.* ſo as it be made before the *laſt Day of Hillary-Term, &c.* upon *Nullum arbitrium* pleaded, the Plaintiff replied, and ſet forth an Award made 8 *Feb. de & ſuper præmiſſis*, that the Defendant within *a Week after the Award*, ſhould pay the Plaintiff 7 *l.* 10 *s. in Satisfaction of all Demands*; and that upon Payment thereof each ſhould give the other a *general Releaſe of all Demands*; and averred, that no new Controverſy did ariſe within *a Week after the Award*; the Defendant rejoined and confeſſed the Award, but ſaid, that after the Submiſſion and before the Award a new Controverſy did ariſe, (*viz.*) *on 6 Feb.* for that the Defendant did break and enter the Plaintiff's Cloſe called *B.* whereof the Arbitrators had Notice, and ſo they made no Award; and upon Demurrer it was objected, that this Award was void, becauſe it was for Payment of Money in Satisfaction *of all Demands generally*, which extends to the Time of Award made, and ſo out of the Submiſſion; beſides, the * *Releaſe* in this Caſe muſt refer to the Time when it was given, and by Conſequence ſhall releaſe the laſt Cauſe of Action which was not within the Submiſſion, and even the Bond of Submiſſion it ſelf: But adjudged, that if the Award had been for Payment of Money in Satisfaction of all Demands till the Award, or a Releaſe of all Demands till the Award, it had been ill; but here it was general, and made * *de & ſuper præmiſſis*, it ſhall be intended *till the Time of the Submiſſion*, and this is *Slainy* and *Wild*'s Caſe. 2 *Cro.* 352. ſo a Releaſe of all Demands generally (without ſaying to what Time) ſhall be intended to the Time of the Submiſſion. 3 *Lev.* 168. *Robinett* verſus *Cobb.* See *pl.* 5, 16, 18. See 3 *Cro.* 861. *Goodman* verſus *Fountaine. S. P.* 3 *Lev.* 344. † *Nicholas* verſus *Chapman. S. P.*

* Antea 11.

*Allen 51. Roſe v. Spark. S. P.

† Amendment. (C) 18. S. C.

29. Debt upon Bond for Performance of an Award to be made by Arbitrators choſen by the Plaintiff and Defendant, and one *Nath. Hilliard* to determine all Controverſies between them, *or either of them, &c.* The Defendant pleaded no Award, the Plaintiff replied and ſet forth an Award, and amongſt other Things, that the Parties ſhould ſign *mutual Releaſes*; and upon a Demurrer to this Replication it was objected, that the Award was void, for by the Bond of Submiſſion it muſt be intended, that there were ſome Controverſies between *all the Parties*, but *Hilliard* is not appointed to do any Thing; and yet he will take Advantage of this Releaſe, if he ſhould be concerned in Intereſt with the Plaintiff or Defendant; but it was held, that the Submiſſion being to determine all Controverſies between the Parties, or *either of them*, by theſe Words it muſt be intended, that an Award ſhould be made between *ſome of them*, tho' it might not be between all, therefore *either of them* in this Place ſhall be taken ſeverally and not jointly; and ſo is *Hungate*'s Caſe, if the Words had been *between* * *any of them*, it had been no Queſtion. 2 *Lutw.* 1625. *Hayne* verſus *Hillborne.*

* Antea 20.

30. *In Aſſumpſit, &c.* The Defendant pleaded in Bar, a Submiſſion of all Demands to the Award of *T. S.* ſo as it be made and *ready to be delivered* by ſuch a Day, then he ſets forth, that on ſuch a Day, before the Day appointed by the Submiſſion, *T. S.* made an Award, that the *Defendant or his Executors ſhould releaſe* to the Plaintiff, *&c.* which he, this Defendant, was always ready to do; adjudged, that this Award was good, for being pleaded to be made before the Day, it ſhall be intended to be always after *ready to be delivered, &c.* and tho' 'tis awarded, that the Defendant ſhould give a Releaſe, and no Time appointed when it ſhould be given, yet the Law will ſupply the Time (*i. e.*) it muſt be done in convenient Time after a Requeſt, if that is neceſſary; and if 'tis not neceſſary, then in convenient Time after a Tender of the Releaſe, and the Award, that *he or his Executors*, in the Disjunctive, ſhall *Releaſe*, is good, for it may extend to Executors, and bind them. 1 *Salk.* 69. *Freeman* verſus *Bernard.* See 2 *Salk.* 783. *The Pleadings.* See 3 *Cro.* 557, 600. 1 *Vent.* 249.

31. The Bond of Submiſſion was of all *Controverſies depending, &c.* The Award was, that all Suits *now depending between the Parties ſhall ceaſe*, and that the Defendant ſhould pay to the Plaintiff 10 *l.* in full of all Demands, and ſhould releaſe all Demands to the Plaintiff *to the Time of the Award*; and that upon Payment of the 10 *l.* to the Plaintiff he ſhould execute a Releaſe to the Defendant; adjudged, upon a Writ of Error in *B. R.* on a Judgment for the Plaintiff in *C. B.* that an Award that *all Suits, &c. ſhall ceaſe, is final*, for if the Suit fails he has no Remedy to come at his Right; that an Award of a *Releaſe of all Demands to the Time of the Award*, is good, becauſe no * new Demands ſhall be intended to ariſe after the Submiſſion and before the Award made, therefore 'tis a good Performance of it to tender a Releaſe of all Demands to the Time of the Submiſſion, for if there were any new Demands afterwards, thoſe are not within the Submiſſion; and laſtly, if the Plaintiff would not receive the 10 *l.* becauſe he muſt then give a Releaſe; in ſuch Caſe, upon the Tender and Refuſal of the Money, he is as much obliged to give a Releaſe as if he had actually received it. 1 *Salk.* 74. *Simon* verſus *Gavill.* See 3 *Lev.* 180. and 1 *Lev.* 58.

Mod. Caſes 33. *by the Name of* Squire *v.* Grevill. Poſtea (H) 8.

* Antea 5, 7, 8.

32. An Award, that a *Suit in Chancery ſhould be diſmiſſed*, it was objected, that this was void, becauſe not final, for the Party may diſmiſs his Bill, and begin again, ſo that 'tis like an Award, that one of the Parties ſhall be *Nonſuit*, which is ill; but adjudged, that a *Nonſuit* is not final in the Nature of the Thing, but a Diſmiſſion ſhall be intended a perpetual Ceſſation. 1 *Salk.* 75. *Knight* verſus *Burton.*

Mod. Caſes 231.

33. *Debt upon Bond* for Performance of an Award, in which the Arbitrators had taken Notice, that there was 72 *l.* in Controverſy, and they awarded only 50 *l.* in Satisfaction, and general Releaſes to be given; and upon a Demurrer, this being objected, that 50 *l.* could not be in Satisfaction

faction for 72 *l.* it was adjudged, that the Award was good, becauſe the Arbitrators might conſider other Matter between the Parties; beſides, it doth not appear that 72 *l.* was due, but that it was in Controverſy. 2 *Mod.* 303. *Godfrey* verſus *Godfrey.*

34. *Debt upon Bond* for Performance of an Award; upon *nullum arbitrium* pleaded, the Plaintiff replied, and ſet forth an Award, that the Defendant ſhould pay the Plaintiff 5 *l. preſently*, and give Bond to pay 10 *l.* more on the *29th of November* following, and now to ſign *general Releaſes*; and upon Demurrer to this Replication it was objected, that the Award was not good, becauſe the * *Releaſe* now given would diſcharge the Bond: *Sed per Curiam*, it ſhall diſcharge only ſuch Matters which were depending at the Time of the Submiſſion. 3 *Mod.* 264. *Rees* verſus *Phelpes.*

* Antea 11, 30.

35. *Debt upon Bond* for Performance of an Award, *ſo as it be made by ſuch a Day and* * *ready to be delivered to the Parties, or to ſuch of them who deſires it*, and the Plaintiff did not ſhew, *that it was ready to be delivered to the Defendant*, which being objected, upon a Demurrer to the Replication; *per Curiam*, this is a conditional Submiſſion, but the conditional Words do not go to the Subſtance of the Award, but only to the Form of the Delivery; now, when an Award is made, 'tis *ready to be delivered*, but here was neither *Day or Place appointed* for the *Delivery*, therefore a *Delivery muſt be deſired* by one, and if refuſed by the other, it ought to be pleaded. 3 *Mod.* 330. *Rowsby* verſus *Manning.*

* Antea 25. Poſtea (C) 20. (H) 7.

(C)

Where a Submiſſion and an Award ſhall be good in Part and void in Part, and wholly void. See (B) 21. (I) 3.

1. THE Award was, that the Plaintiff ſhould make ſuch a *Releaſe* as *one of the Arbitrators* ſhould approve; adjudged, that it was void, becauſe the Authority being given to both, was by this Means divided and given to one of them. *Mich.* 41 *Eliz. Emery* verſus *Emery.*

2. Debt on a Bond for Performance of an Award, the Defendant pleaded *nullum arbitrium, &c.* The Plaintiff replied and ſhewed the Award made, that the Defendant ſhould convey ſuch Lands to the Plaintiff for Life, Remainder in Fee to *W. R.* who was a Stranger to the Submiſſion; adjudged, for that very Reaſon, that the Award was void as to the * *Stranger*, but that it was good as to the particular Eſtate for Life, and ought to be performed. *Hill.* 42 *Eliz. Bretton* verſus *Pratt. Cro. Eliz.* 759.

* Poſtea 5.

3. Debt on a Bond, the Defendant pleaded, that it was with a Condition to perform the Award of *W. R.* who awarded, that the Defendant ſhould pay to the Plaintiff 100 *l.* at ſuch a Day, *or* find two Sureties to be bound with him to pay the 100 *l. by* 20 *l. per Annum*, till the Whole be paid, and that he had performed the Award; the Plaintiff replied, that the Defendant had not paid the 100 *l.* and ſo aſſigned the Breach, to which Replication the Defendant demurred; but adjudged, that the Replication was good, for tho' the Award is in the *Diſjunctive*, yet in Subſtance 'tis but ſingle, for nothing is awarded but the Payment of the 100 *l.* at the Day; and as to the other Part, to find Sureties, *&c.* 'tis void. *Hill.* 30 *Eliz.* 1 *Leon.* 140. *Oldfeild* verſus *Willmere.*

Poph. 15. Poſtea (D) 2.

4. Debt upon Bond for Performance of an Award, which was, that *each of the Parties ſhould give the other, within four Days after the Award,* * *a general Releaſe of all Demands till the Date of the Bond:* Then there followed a Proviſo, that if either of them diſliked the Award within twenty Days after it was made, and ſhould then pay to the other 20 *s.* the Award ſhould be void; adjudged, that the firſt Part of the Award was good, and by Conſequence the not giving the Releaſe within four Days afterwards, made a Forfeiture of the Bond; and that the Proviſo was void, becauſe it was repugnant to the firſt Part of Award, which was good. *Hill.* 39 *Eliz. Cro. Eliz.* 291. *Shorley* verſus *Richardſon. Poſtea* (D) 2. *S. C. Poph.* 15. *S. C.* reported by the Name of *Sherrey* verſus *Richardſon.*

* Poſtea 20.

5. An Award to pay Money, and to do ſeveral other Things, and amongſt the reſt, that the now Plaintiff ſhould pay *G. D.* 6 *s.* 8 *d. for Drawing and Engroſſing the Award*; it was objected, that the whole Award was void, becauſe *G. D.* was a * *Stranger to the Submiſſion*; but adjudged, that tho' it was void as to that, yet it was good for the Reſidue. *Bridgm.* 90. *Berry* verſus *Berry. Antea* (B) 3. *S. C.*

*Antea 2.

6. Where an Award doth conſiſt of ſeveral Parts, and one of thoſe Parts is * *incertain*, 'tis void as to the reſt, becauſe an Award is like a Judgment, which, if it be *imperfect or incertain* in any Part, is void for the Whole, but 'tis otherwiſe if one Part is abſolutely *void. Mich.* 4 *Jac. Markham* verſus *Jennings.*

* Poſtea 14.

7. Where an Award conſiſts of *two Parts*, which are diſtinct, and may be ſevered, in ſuch Caſe, tho' the one is void the other may be good. *Godbolt.* 164. *Pitts* verſus *Wardell.*

8. The Submiſſion was of all Actions and Demands between the Parties to the *Date of the Bond*, ſo as, *&c.* and in an Action of Debt brought on the Bond, and upon *nullum arbitrium* pleaded, the Plaintiff replied and ſet forth an Award, that the Defendant ſhould pay to the Plaintiff 20 *l.* in full Satisfaction of all Money which he claimed of the Defendant as *Adminiſtrator to G. D.* and that upon Payment thereof each of the Parties ſhould make general *Releaſes* of all Demands, to the Day of the *Date of the Releaſe*; adjudged, that the Award was void, becauſe the Arbitrators had no Power to diſcharge any Thing which the Party had as *Adminiſtrator*; beſides, the Sub-

1 Roll. Rep. 437.

Submiſſion being of all Demands to the *Date of the Bond*, and the *Releaſe* being awarded of all Demands to the *Date of the* * *Releaſe*, which was long after the Date of the Bond, it muſt *Releaſe* the very Bond, and for that Reaſon it was alſo void. *Bridgm.* 58. *Vanlore* verſus *Dribley*. * Antea (B) 11.

9. The Submiſſion was to an Award of all Variances between the Parties *concerning Tithes* in ſuch a Place and to ſuch a Time; the Award was, that one pay to the other ſo much Money, and that in Conſideration thereof the other ſhall Releaſe *all Actions*, &c. it was objected, that this Award was void, becauſe the Submiſſion was *particular*, (*viz.*) of all Variances *concerning ſuch Tithes*, &c. and the Award was * general, (*viz.*) to releaſe *all Actions*; but adjudged, that ſhall be intended all Actions of which they had Power by the Submiſſion, and this Judgment was affirmed in the Exchequer-Chamber. *Palm.* 107. *Ingrave* verſus *Webb*. Poſtea 21. 2 Cro. 663. 2 Roll. Rep. 162. * Poſtea 11.

10. Debt upon Bond for Performance of an Award; the Defendant pleaded no Award made; the Plaintiff replied, and ſet forth the Award, that the Defendant ſhould pay ſo much Money to the Plaintiff, and that the *Plaintiff ſhould pay for the Writing* of the Award; this was adjudged a void Award, becauſe only of one Side, for it did not appear that the Plaintiff was bound to pay for the Writings; beſides, it was a Matter ſubſequent to the Submiſſion, and ſo cannot be intended any Recompence to the Defendant. *Allen* 9. *Capell* verſus *Allen*.

11. Debt upon Bond for Performance of an Award to be made to *all Actions, Matters*, &c. and the Award was, that the Defendant ſhould pay to the Plaintiff 100 Marks *for the Coſts of one Suit*, &c. and that he ſhall make an Acknowledgment *before the Mayor of Taunton and three more*, that he had done ſuch Injuries to him (the Plaintiff): After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Award was void, becauſe the Submiſſion was * general of *all Suits*, and the Award was particular, (*viz.*) to pay the Coſts of *one Suit in ſtandring the Plaintiff*, and it did not appear by the Award, that the Words were actionable; it is void likewiſe, becauſe the Defendant was to acknowledge this Injury before the *Mayor of Taunton, and three more*, becauſe the Defendant could not compel *thoſe three*, or any Three, to come before the *Mayor*, and ſo it was adjudged. *Sid.* 12. *Spigurnell* verſus *Jenny*. Poſtea (N) 22. *This Caſe denied to be Law.* *Antea 9.

12. In Debt upon Bond for Performance of an Award, the Caſe was, an Award was made, that one of the Parties ſhould pay to the other ſo much Money, and that the other ſhould give him a general Releaſe; provided, that if the Defendant (who was one of the Parties) *ſhall be diſcharged of any Arrears due to the Soldiers by the Act of Indemnity* (Meaning an Act to be paſſed by the Parliament) *then this Award ſhall be void*; adjudged, that this Award was void, for it being an entire Award, and the *Proviſo being void*, it makes the Whole void, now the Proviſo is void, becauſe it makes the Award void upon a ſubſequent Accident *in futuro*, and by Conſequence all that is awarded to be done *de præſenti*, is void. *Sid.* 59. *King* verſus *Fines*. See *Poſtea* (F), *pl.* 7. See *Poph.* 15. *Shurley* verſus *Richardſon contra*.

13. An Award that one ſhould pay ſo much Money, and that the other ſhould ſign a *Releaſe*; and in an Action of Debt brought for the Money, the Plaintiff ſet *forth the Award*, but did not alledge, that it *was in Writing*; 'tis true, he had a Verdict, but the Judgment was arreſted, becauſe, for ought appeared to the contrary, the Award was void; for the one had no Remedy to compel the other to ſign a *Releaſe* if he ſhould refuſe it, being on a parol Submiſſion. *Sid.* 160. *Tilford* verſus *French*. Lev. 113.

14. Where the *Satisfaction* awarded to one is made any Part of the Conſideration of his paying Money, or doing ſomething for the other; and if by the Award it ſelf he hath no Poſſibility of having or recovering that *Satisfaction* there, the Award being void as to that Part, is void in the Whole, as for Inſtance, in an Action on the Caſe for Work done, the Defendant pleaded an Award, by which he was *to pay to the Plaintiff what was due to him for Task-work and Day-work*; and that the Plaintiff ſhould pay to the Defendant 25 *l.* and that upon Payment of that Money the Parties ſhould execute *mutual Releaſes*; and then he averred, that the whole Work came to 12 *l.* 10 *s.* and no more, which he had paid to the Plaintiff; it was agreed on all Sides, that the firſt Part of this Award was void, becauſe it was * *incertain* how much ſhould be paid for the Work, and therefore it was held, that the other Part of the Award for the Plaintiff to pay 25 *l.* was likewiſe void, for it plainly appeared that the Arbitrators intended him ſomething for the Work he had done, which Part of the Award being void for *Incertainty*, the other Part muſt be ſo likewiſe, for otherwiſe the Plaintiff muſt pay 25 *l.* and have no Manner of Satisfaction for the Work he had done, becauſe, after he had paid the Money he was to give the Defendant a *general Releaſe*, and then he could never have any Satisfaction for his Work: But where an Award is for a Man to do *two Things*, and one of them is *void*, it ſhall ſtand good for the other, as if *W. R.* is awarded to pay 10 *l.* *to L. R.* and 5 *l.* to *H. S. who is a Stranger to the Submiſſion*, the Award is void as to him, but 'tis good as to *L. R.* becauſe it plainly appears that 10 *l.* and no more, was awarded to him, and he can be at no Prejudice if the 5 *l.* is not paid to the other. 2 *Saund.* 292. *Pope* verſus *Brett*. *Antea 6.

15. *Aſſumpſit*, &c. to perform an Award, which was, that the Defendant ſhould pay to the Plaintiff ſeveral Sums of Money on ſeveral Days, and to give Bond in 1800 *l.* Penalty, *with one ſufficient Surety* to pay it accordingly, and that each Party ſhould ſign mutual Releaſes, &c. there was an ill Plea and a Demurrer; it was objected againſt the Declaration, that this Award was void, it being, that the Defendant ſhould give Bond *with one ſufficient Surety*, &c. which is very true, becauſe the Defendant cannot undertake for another; but the Award, that the Defendant himſelf ſhould give Bond, is good, therefore he ought to perform that Part. 2 *Saund.* 337. *Cook* verſus *Whorewood*. *See* Joint and Several. (A) 9. *S. C.* See *Yelv.* 97. *Martham* verſus *Jenix*. *S. P.*

16. An Award, that the Defendant ſhall pay to the Plaintiff 10 *l.* and that the Plaintiff ſhould pay to the Defendant the *Expences in making the Award*; and that upon Performance of all, each ſhould give the other a general *Releaſe*; upon a Demurrer to a Replication in which this Award was ſet forth, it was inſiſted that it was void, becauſe nothing is awarded to the Defendant but the *Releaſe*, and that is not to be made till all be performed, which cannot be, becauſe the Award of the Expences which the Plaintiff is to pay for making the Award, is ſubſequent Matter, and quite out of the Submiſſion; but adjudged, that the *Releaſe* ſhall be made upon the Performance of what is well awarded, and not ſtay till that be performed, which is void. 2 *Lev.* 3. *Pinkney* verſus *Bullock.* 3 *Lev.* 413. *Bargrave* verſus *Atkins.* *S. P.*

17. *Aſſumpſit, &c.* whereas Differences had been between the Parties (but did not ſay what Differences) they ſubmitted to the Award of *T. S.* who awarded *de & ſuper præmiſſis*, that the Defendant ſhould pay to the Plaintiff 30 *l.* in Satisfaction of all Sums *due to him out of the Eſtate of one Woolley*; after a Verdict for the Plaintiff it was adjudged, that this Award was void, becauſe it did not appear that the Defendant was Executor or Adminiſtrator, or any Thing to do for *Woolley*, or that he ſubmitted on Behalf of him, and ſo no Conſideration why he ſhould be charged in reſpect to him. 2 *Lev.* 235. *Adams* verſus *Statham.*

18. Debt upon a Bond of Submiſſion conditioned for the Father and the Son, that each ſhall perform the Award of *T. S. &c.* the Defendant pleads, that his Son was *within Age*; and upon a Demurrer it was objected, that a Submiſſion by an *Infant* is void, therefore the Bond of Submiſſion being void in Part, both that and the Award are wholly void; but adjudged, that the Father's Submiſſion for himſelf is good, and the Award between him and the Plaintiff will be likewiſe good. 3 *Lev.* 17. *Bowyer* verſus *Blockſidge.* See *Rudſtone* verſus *Yates.*

19. The Bond of Submiſſion was dated 2 *Julii*, 7 *Will.* 3. in an Action of Debt, the Defendant pleaded no Award made; the Plaintiff replied and ſhewed an Award, that the Parties ſhould *ſign* * *mutual Releaſes* to each other of all Demands, until the *12th of Auguſt following*; and upon a Demurrer to this Replication it was objected, that the *whole Award* was void, becauſe the Arbitrators had exceeded their Authority, for they were only to arbitrate about all Matters between the Parties to the Date of the Bond of Submiſſion, and they had awarded Releaſes to be executed above ſix Weeks afterwards, which they had not Power to do; but adjudged, that tho' that Part of the Award concerning the *Releaſes* might be void, yet it doth not follow that the whole Award ſhould be ſo too, becauſe it may be void for one Part and good for another; then it was objected, that the Plaintiff had not averred, that the Award was * *ready to be delivered* to the Parties, which is one Part of the Condition of the Bond of Submiſſion; but adjudged, that when the Award is made, 'tis always ready to be delivered. 1 *Lutw.* 520. *Marks* verſus *Marryott.* *Cro. Eliz.* 809. *S. P.* *Moor* 885. *S. P.* *Hob.* 191. *S. P.* 3 *Mod.* 250. *Sid.* 154. *Rous* verſus *Nunn.* *S. P.*

* Antea 4.

* Antea (B) 37. S. P.

20. The Bond of Submiſſion was dated 28 *Novemb. &c.* the Award was, that the Plaintiff ſhould *Releaſe* all Actions unto *or upon* the ſaid 28th Day of *Novemb.* adjudged, that if the Plaintiff ſigns ſuch a * *Releaſe*, the Bond of Submiſſion had been diſcharged. 1 *Lutw.* 545. In *Lee* and *Elkin*'s Caſe. *Poſtea* (L) 4. *S. C.*

* Antea 4.

21. Adjudged, that if *two Things* are awarded to be done, one within the Submiſſion and the other not, this laſt is void, and the Breach muſt be aſſigned on the firſt.

That if there is a Submiſſion of a particular Difference or Controverſy, and there are other Things likewiſe in Controverſy, and a general * Releaſe is awarded, 'tis ill, and thoſe other Things in Controverſy muſt be ſhewed to avoid the Award it ſelf for that Cauſe.

* Poſtea, 22.

That if a Submiſſion be of all Differences till the *tenth Day of Auguſt*, and a *Releaſe* is awarded of all Differences till the *twelfth Day of Auguſt*; if there are no Differences in thoſe two Days, 'tis good, but if there are any, it muſt be ſhewed in Pleading, otherwiſe the Court will never intend any. 2 *Mod.* 309. *Hill* verſus *Thorn.*

3 Mod. 264.

22. Debt upon Bond for Performance of an Award; upon *nullum arbitrium* pleaded, the Plaintiff replied and ſet forth the Award, which was, that the Defendant ſhould pay to the Plaintiff two Sums of Money at ſeveral Times, and that mutual * *Releaſes* ſhould be *preſently* given: *Et per Curiam*, for that Reaſon the Award is void, becauſe, when the Defendant gives the Releaſe there is nothing for the Plaintiff to do. 2 *Mod.* 169. *Adams* verſus *Adams.*

* Antea 21.

23. Debt upon Bond for Performance of an Award, the Defendant pleaded no Award made; the Plaintiff replied and ſet forth an Award, which was, that the Defendant ſhould pay the Plaintiff 50 *l. and ask his Pardon in ſuch Manner and Place as the Plaintiff ſhould appoint*, and that then each Party ſhould execute mutual Releaſes; adjudged, as to that Part the Award was ill, becauſe the Plaintiff was made the Judge in his own Cauſe, he being to appoint the Time and Place and Manner of asking his Pardon. 1 *Salk.* 71. *Glover* verſus *Barrie.* See *Poſtea* (N) 18. *S. C.*

(D)

Award not good, not being final. See (I) 3.

1. THE Award was, that the Defendant ſhould pay to the Plaintiff ſo much Money, and whereas the Plaintiff had alledged, that the Defendant was indebted to him in ſeveral Sums of Money, which the Defendant likewiſe alledged he had paid; if the ſaid Defendant, at, or

or before the Feaſt of St. *Andrew* next, ſhould prove to the Arbitrators, or either of them, that he had paid any of the Sums, that then ſo much ſhould be deducted out of the 9 *l.* now awarded; it was objected in Arreſt of Judgment, that this Award was void, becauſe it was not final, but left the Matter in Suſpenſe, it was not adjudged. *Hob.* 218. *Warley* verſus *Beckwith.*

2. The Award was, that within four Days next enſuing the Parties ſhould execute general and mutual * *Releaſes* of all Demands, *&c.* before the Date of the Bond; *Proviſo, That if either of them ſhall not be contented with the Award within twenty Days after, &c.* that then upon *Payment of* 10 *s. to the other, by him who thinks himſelf grieved, the Award ſhall be void*; adjudged, that this Award was not final, becauſe within the *four Days* in which they were to execute releaſes, the Parties had Power to defeat it by the Payment of 10 *s.* to each other. *Poph.* 15. *Sherrey* verſus *Richardſon.* * Antea (C) 4.

3. The Award was, that the Defendant ſhould *give Bond* to the Plaintiff, that he the ſaid Plaintiff and *his Wife* ſhould have and enjoy ſuch Lands in Controverſy then between them; adjudged this Award was void, becauſe it was to give Bond, not mentioning in what Sum; and becauſe it was, that *the Wife* ſhould enjoy the Lands, and ſhe was no Party to the Submiſſion. *Trin.* 36 *Eliz. Cro. Eliz.* 432. *Sammon* verſus *Pitts. Moor* 359. *S. C.* By the Name of *Samms* verſus *Pitt.* See *March* 77. *contra.* Moor 359. S. P.

4. An Award to give ſuch a Releaſe *as Counſel, &c. ſhould Advice*, is good, for this is only a miniſterial, and not a judicial Act. *Style* 219.

5. An Award to pay all Coſts *which ſhould be taxed by a Pronotary, &c.* not good, becauſe not final. *Sid.* 358.

(E)

Award, not good, being on one Side.

1. THE Submiſſion was by *Word* of all Suits between the Parties, who had Suits then depending in the Spiritual Court, concerning *Tythes*: The Award was, that *the Defendant ſhould pay to the Plaintiff* 10 l. *on ſuch a Day for all the Tythes, &c.* Adjudged, that the Award was void, becauſe there was not any Thing awarded for the Plaintiff to do, or the Defendant to have, ſo as he might be diſcharged of the Tithes. *Mich.* 41 *Eliz. Cro. Eliz.* 904. *Colſton* verſus *Harris.*

2. The Award was, that the *Defendant* ſhould depart out of the Houſe where ſhe then dwelt, and that ſhe ſhould pay the Plaintiff 3 *l.* 10 *s.* adjudged, that it was void, becauſe it was only on the Defendant's Side, and nothing to be done by the Plaintiff. *Hob.* 49. *Nicholls* verſus *Grunnion.*

3. The Condition of a Bond of Submiſſion was, of *all Suits and Demands* between the Parties, ſo as the Award be ready to be delivered to them, *&c.* before the Feaſt of *St. Bartholomew* next, *&c.* Upon *Nullum Arbitrium* pleaded, the Plaintiff replied and ſhewed an Award made *de & ſuper Præmiſſis*, (*viz.*) that the Plaintiff ſhould have a Horſe then in Controverſy, and that the Defendant ſhould pay him 3 *l. before Michaelmas* next; and then, that they ſhould execute general *Releaſes* to each other, of all Matters between the Time of Payment and *Michaelmas* next; and upon Demurrer to this Replication, it was adjudged for the Defendant, for tho' the Plaintiff had pleaded, that the Award was made *de Præmiſſis*; yet, the Words of the Submiſſion being general, (*viz.*) of *all Suits and Demands*, that would not help the Plaintiff, unleſs he had averred, that there was more Matters between them after the 3 *l.* was awarded, and before *Michaelmas* next; for if there was none, then nothing was awarded for the Benefit of the Defendant, becauſe the *Releaſe* which the Plaintiff was to give him ſignified nothing, when there was nothing for him to releaſe. 2 *Cro*, 352. *Staine* verſus *Wild.*

4. The Award was, that the Defendant ſhould *pay to the Plaintiff ſo much Money*, in Satisfaction of all Treſpaſſes done to him by the Defendant before the Day of the Submiſſion: In an Action of Debt brought upon this Award, the Defendant demurred upon the Declaration, and inſiſted, that the Award was void, it being of one Side, for the Plaintiff was to do nothing; but adjudged good, for by the Payment of the Money he is acquitted of all Treſpaſſes done to the Plaintiff, who is barred thereby to bring any Action againſt the Defendant for the ſame. 2 *Cro.* 354. *Ormelade* verſus *Cook.*

5. An Award, that one ſhall pay Money, and the other ſhall execute a *Releaſe* to him who paid it, is a void Award, but this muſt be intended where the Submiſſion is by Word; for in ſuch Caſe the Award is void, becauſe 'tis of one Side, for when the Money is paid, the other hath no Remedy to enforce the Execution of the Releaſe, for he cannot have an Action *on the Caſe*, and the Reaſon why it will not lie upon an Award is, becauſe that is in Nature of a Judgment. *Poph.* 134. *May* verſus *Samuell. Paſch* 10 *Jac. Mounteagle* verſus *Penruddock. S. P.* 1 Roll. Rep. 1.

6. Two Perſons, (*viz.*) *A.* and *B.* on the one Part, and *C.* on the other Part, ſubmitted to an Award, *&c.* the Arbitrators awarded, that *B.* ſhould pay ſo much Money to *C.* but made no Award as to *A.* In Debt upon this Bond, the Defendant pleaded *nil debet*; and after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Award was but of one Side, for it was not Binding as to *A.* who was one of the Parties ſubmitting; and for that Reaſon the Judgment was arreſted. *Style* 471. *Morden* verſus *Hart.*

7. *Caſe*, by an Adminiſtratrix, ſetting forth, that the Defendant was indebted to the Inteſtate, *&c.* The Defendant pleaded in Bar an Award made between him and the Plaintiff, that the Defendant ſhould *pay the Plaintiff* 7 *l.* 15 *s.* (but did not ſay, in Satisfaction of all Demands) and that both of them ſhould be at equal Charge at the Payment of the Money, *&c.* And upon Demurrer to this Plea it was adjudged ill, becauſe the Award was void, it being only of *one Side*, for the Money was not awarded to be paid *in Satisfaction or Diſcharge of any Thing.* 1 *Lutw.* 281. *Ruſſell* verſus *Williams.* *Poſtea* Tender. (B) 15. *S. C.*

8. Debt upon Bond, for Performance of an Award: Upon *Nullum Arbitrium pleaded*, the Plaintiff replied, and ſet forth the Award, which was, that the Defendant ſhould pay the Plaintiff 12 *l.* before ſuch a Day, and within a Week afterwards ſhould fetch his Mare and Colt from the Plaintiff; and upon Demurrer to this Replication, it was objected, that the Award was only of one Side, becauſe it appeared, that the Plaintiff had the Poſſeſſion of the *Mare and Colt* at that Time, which ſhall not be intended a wrongful Poſſeſſion, but rather by the Delivery of the Defendant, or by Taking *Damage-feaſant*, and if ſo, then the Plaintiff is not awarded to do any Thing. 1 *Lutw.* 539. *Cooper* verſus *Hirſt. Quære.*

9. Debt upon Bond, for Performance of an Award, the Defendant pleaded *Nullum Arbitrium* by the Arbitrators, but that the *Umpire* awarded him to pay the Plaintiff 40 *l.* which he had done; the Plaintiff in his Replication ſet forth the Award in *hæc verba*, by which it was recited, that there had been *great Dealings* between the Parties, and that the Plaintiff had paid to the Defendant all his juſt Demands, and that there remained due to him (the Plaintiff) 40 *l.* which the Defendant had not paid, tho' he was awarded to pay it; and upon Demurrer it was objected, that this was an Award on one Side, for it was only, that the Defendant ſhould pay the Plaintiff 40 *l.* but adjudged, that becauſe the Award recited *Dealings* between them, and that the Plaintiff had paid all that was due to the Defendant, and then ordering him (the Defendant) to pay 40 *l.* to the Plaintiff, this ſhall be intended in Satisfaction of the Debt due from the Defendant to him. 1 *Lutw.* 541. *Elliot* verſus *Chevall.* *Poſtea* (P) 9. *S. C.*

10. Debt upon Bond, for Performance of an Award, conditioned, that whereas the Defendant by himſelf, *and his Son*, had ſubmitted, *&c.* and the Award was, that the Plaintiff ſhould ſeal three Bonds to the Defendant, and that he (the Defendant) ſhould pay to the Plaintiff 100 *l.* which he had not done; and upon Demurrer, this was adjudged a void Award, becauſe nothing was awarded *concerning the Son.* 1 *Lev.* 139. *Bean* verſus *Newbery.*

11. Debt upon Bond, for Performance of an Award, which was, that the Defendant ſhould be bound *with Sureties*, ſuch as the Plaintiff ſhould approve in the Sum of 150 *l.* to be paid to him in ſuch a Time, *&c.* After a Verdict for the Plaintiff, *per Curiam*, this Award is void, becauſe; the *Sureties* were Strangers to the Submiſſion, and being ſuch as the Plaintiff ſhould approve if he ſhould not approve any, then he was not to Seal a Releaſe, (for in this Caſe general Releaſes were awarded) and then the Award is only of one Side. 3 *Mod.* 272. *Thurſly* verſus *Helbott.*

(F)

Award not good, being incertain, and where 'tis good. Antea (C) 6, 14. (D) 3. (I) 7.

1. THE Award was, that the Defendant ſhould *enter into a Bond* to the Plaintiff, that he and his Wife ſhould enjoy ſuch Lands, *&c.* adjudged, that the Award was void, becauſe it did not appear in what Sum the Defendant ſhould be bound; therefore it was void for the *Incertainty.* 5 *Rep. Sammon's* Caſe. *Antea* (B) 17. *S. P.*

2. The Award was, that the Defendant ſhou'd pay to the Plaintiff a Sum of Money upon the 25*th Day of May*, and that the Plaintiff ſhould *Releaſe* to the Defendant all his Right to the Lands, *&c. on that Day*; adjudged, that the Award was void, becauſe it was incertain to what Day the *Releaſe* ſhould relate. *Mich.* 4 *Jac. Markham* verſus *Jennings.*

3. The Award was, that the Defendant ſhould pay to the Plaintiff 20 *l. per Annum*, during the *Continuance of a Leaſe* for Years then in Being; it was objected, that this was Incertain, becauſe the Term was not expreſſed in the Award, and this cannot be helped by the Averment of the Plaintiff, what the Term was, and how long it was to continue; but adjudged, that the Payment of the Money, referring to the *Continuance of the Leaſe*, is certain enough, for *certum eſt quod certum reddi poteſt. Paſch.* 3 *Jac. Girling* verſus *Goſnold.*

4. An Award was made, that the Defendant *ſhould pay the Charges of ſuch a Suit in Law*; it was objected, that this was *incertain*; but adjudged good, for 'tis certain enough when the Attorney had made his Bill. *Cro. Car.* 279. *Beale* verſus *Beale.* See *pl.* 9.

5. The Award was, that the Defendant ſhould pay to the Plaintiff, *&c.* 3 *l.* 10 *s. &c.* adjudged, that this is void for the Incertainty, becauſe it doth not appear *for what* the Money was to be paid. *Hob.* 49. *Nicholls* verſus *Grunnion.*

6. The Award was, that the Defendant ſhould pay Money to the Plaintiff at three ſeveral Payments; and that if before the laſt Day of Payment (which was long after the Date of the Bond of Submiſſion) it ſhould appear to the Arbitrators, that the Defendant was bound for the Plaintiff *in any Debt not ſatisfied*, then he ſhould repay the Defendant *as much* as that amounted to:

Now, tho' in this Caſe ſomething was reſerved for the *future Judgment* of the Arbitrators, yet that did not make the Award void, but it was the *Incertainty of the Debts not ſatisfied*; for if the Award had been thus, (*viz.*) If it appear to the Arbitrators, that the Defendant is bound in 20 *l.* for the Plaintiff, *not ſatisfied*, then he ſhall pay 20 *l.* tho' 'tis referred to their *future Judgment*, 'tis good, becauſe the Sum is *Certain*. 2 *Cro.* 584. *Grove* verſus *Crane*. *Palm.* 145. *S. C.* 2 *Roll. Rep.* 214. *S. C.*

7. The Caſe was, an Award was made, that *W. R.* ſhould pay *T. S.* ſeveral Sums of Money, (*viz.*) at *Michaelmas*, *&c.* ſo much, *&c.* and *if it ſhould appear to the Arbitrators before that Day came, that T. S owed any Money to W. R. that then W. R. ſhould deduct ſo much*, *&c.* adjudged a void Award, becauſe the Arbitrators could not reſerve a *future Power* to themſelves, for then all which they had done before would be incertain. 2 *Cro.* 584. *Winch* verſus *Sanders*. See *antea* (C) *pl.* 12. See *Warley* and *Beckwithe*'s Caſe. 2 Roll. Rep. 214. Palm. 110, 154.

8. The Award was, that one of the Parties, who was an *Infant* ſhould pay 5 *l.* to the other for Quit-Rents, *and other ſmall Things*; adjudged, that this was void, becauſe it was Incertain, *what thoſe ſmall Things were*, and probably they may be ſuch, for which an *Infant* is not chargeable by Law. *March* 111, 141. *Rudſtone* verſus *Yates*.

9. The Award was, That the Defendant ſhould pay to the Plaintiff 10 *l.* and *all the Coſts of Suit now depending in an Inferior Court*, and then to execute mutual Releaſes; adjudged, that to pay ſuch Coſts as the Maſter ſhall tax, is good, becauſe that may be reduced to a Certainty; but this is incertain. 1 *Salk.* 75. *Winter* verſus *Garlick*. See *Cro. Car.* 383. 2 *Vent.* 242. See *pl.* 4. Mod. Ca. 195.

(G)

Award not good, being made where the Party is a Stranger to the Submiſſion. Antea (D) 3. Poſtea (K) 3.

1. THE Award was, that one of the Parties to the Submiſſion ſhould pay *W. N.* 20 *l. &c.* adjudged, that it was void, becauſe it was to pay Money to one, who was a Stranger to the Submiſſion, and the Arbitrators cannot award a Man to do what is not in his Power, as in this Caſe; for 'tis not in the Power of the Party to make *W. N.* receive the Money. *Paſch.* 24 *Eliz. Godb.* 13.

2. The Award was, that one of the Parties ſubmitting ſhould pay ſeveral Sums, at ſeveral Days, to the other, and that one *G. D.* ſhould enter into a Bond for the Payment of the ſame, he being a *Stranger* to the Submiſſion; adjudged, that what was to be done by him, was void. *Mich.* 29. *Eliz. Moor* verſus *Bedell*, cited in *Osborn*'s Caſe. 10 *Rep. Paſch.* 24. *Eliz. Eccleſfeild* verſus *Mallard*.

3. The Award was, that the Defendant and *one of the Arbitrators* ſhould enter into a Bond, *&c.* and for that Reaſon it was adjudged void, becauſe the *Arbitrator* was a Stranger to the Submiſſion. *Godb.* 164. *Pitts* verſus *Wardel*.

4. The Obligor was bound to *E. T.* being a Feme ſole, in a Bond of 200 *l.* in Truſt for *F. T.* and afterwards the Obligee *J. T.* married the Plaintiff, *Lynch*, and there being Controverſies about Payment of the Money, the Obligee became bound in another Bond to *Lynch*, and *F. T.* that *Lynch* alone, and the Obligee, ſhould ſtand to the Award of certain Arbitrators to determine all Differences between them, *or either of them*; in an Action of Debt brought on this Bond by *Lynch*, and *F. T.* the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, and ſhewed an Award, which, amongſt other Things, was to pay the Plaintiff *F. T.* 83 *l.* and that upon Payment thereof *Lynch* ſhould execute a general *Releaſe*; the Defendant rejoined, that *F. T.* was no Party to the Submiſſion; 'tis true, the Defendant became bound to him as well as to *Lynch*, but the Condition of the Bond was to ſtand to the Award to be made between the Defendant and *Lynch alone*; for *F. T.* is not ſo much as named in the Condition of the Bond of Submiſſion, all which was objected upon a Demurrer to the Rejoinder; but adjudged, that Money awarded to be paid to *F. T.* ſhall not be as if he was a Stranger to the Submiſſion, becauſe, if it had been awarded to be paid to *Lynch*, it had been in Equity a Payment to *F. T.* for *Lynch* was his Truſtee, and it was his Money; ſo that 'tis the ſame Thing in effect as if the Money had been awarded to *Lynch*. 1 *Lutw.* 571. *Lynch & Templeman* verſus *Clemence*. *March* 77. *S. P.*

5. Debt upon Bond, the Defendant craved *Oyer* of the Condition, which was, for the Performance of an Award of *T. S.* and then pleaded, no Award made; the Plaintiff replied, and ſet forth an Award, which was, that the Plaintiff and the Defendant ſhould pay each of them a certain Sum yearly, *to W. R. for the Uſe of M. R. their Mother*; it was objected, that this was a void Award, becauſe of a Thing to be done to a *third Perſon*, who was a *Stranger* to the Submiſſion, and by Conſequence out of their Power to award; but adjudged, that an Award to pay Money to a *Stranger*, is good, becauſe it ſhall be intended, that both Parties were Truſtees, and liable to pay it; and it ſhall be intended, that the Payment was for their Benefit, eſpecially in this Caſe, becauſe it was for the Uſe of their Mother. 1 *Salk.* 74 *Bird* verſus *Bird*.

(H) Awards

(H)

Awards on Submiſſions General and Conditional, good.

Poſtea (N) 23.

1. WHere a Submiſſion is General of all Actions, *&c.* without any Condition, (*viz.*) *ſo as the Award be made, &c.* in ſuch Caſe, becauſe *generale nihil certi implicat*, it may ſtand well with the Generality of the Words, that there was but one Cauſe in Controverſy between the Parties, and therefore an Award made of one Thing, ſhall be good. *9 Rep. 97. Baſpool's* Caſe.

2. So where a Submiſſion is general of all Actions, Suits and Demands, and without any Condition, *ſo that it be made upon the Premiſſes*, in ſuch Caſe, if the Arbitrators make an Award of Part, 'tis good for Part; but if the Submiſſion had been *Conditional*, 'tis otherwiſe. *2 Cro. 354. Ormelade* verſus *Cook.*

3. An Award to pay yearly 15 *l.* for a Houſe on *Lady-day* and *Michaelmas*, or within forty Days after, *and if he failed in Payment, &c.* then the Award for enjoying the Houſe ſhould be void; adjudged, that this *Conditional* Award was good, for 'tis abſolute upon Payment of the Rent, and 'tis the Defendant's own Fault, if he doth not pay it. *2 Cro. 423. Furſer and Bond* verſus *Prowd.*

4. Debt upon Bond to ſtand to the Award of *four Men*, ſo as the ſame be made by *four or three of them, &c.* the Award was made by *three only*, and adjudged good; for upon the whole Submiſſion it appears, that the Parties intended it ſhould be made either by three or four of the Arbitrators. *Moor 849. Barry* verſus *Perin.*

5. Debt on a Bond conditioned to perform an Award, *ſo as* it be delivered the *7th of October, at the Shop of G. D. in H. &c.* Upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſhewed an Award, made, *&c.* and that he delivered it at *the Shop of G. D. in H.* and upon Demurrer to this Replication, it was objected, that the Plaintiff did not ſhew that he delivered it at the *Shop aforeſaid*, or at the Shop of *G. D. aforeſaid*, and it may be, that there was *another G. D.* or that he had removed his Shop; but adjudged, that another Shop, or another Perſon, ſhall not be *intended. Cro. Car. 279. Beale* verſus *Beale.*

6. Debt upon Bond, for Performance of an Award of all Actions and Suits between the Parties, *ſo as* it be made in Writing *before ſuch a Day*, and if not, then to ſtand to the Award of an *Umpire*: the Defendant pleaded, that neither the Arbitrators or Umpire made any Award; the Plaintiff in his Replication alledged, that the Arbitrators made no Award, but that the *Umpire* awarded, that all Suits between the Parties, *or any others upon their Accompts*, ſhould ceaſe, and that the Defendant ſhould pay 5 *l.* to the Plaintiff, *towards his Coſts at Law*, and aſſigned the Breach in not paying the 5 *l.* and upon Demurrer it was objected, that this Award was void, becauſe it was, that all Suits ſhould ceaſe *between others*, who were no *Parties to the Submiſſion*, and the 5 *l.* being to be paid in Conſideration of ceaſing ſuch Suits, the Defendant upon Payment of the Money, could not have the Benefit of the Award, becauſe thoſe who were no Parties to the Submiſſion are not bound by this Award, for they may ſtill proſecute their Suits againſt him; this ſeemed a good Objection: There was another Objection, which was not allowed, (*viz.*) This Submiſſion was conditional, with an *Ita quod* the Award to be made *before ſuch a Day*: Now tho' the Words *de Præmiſſis* were omitted, yet 'tis ſtill *Conditional*, and therefore the Award ſhould be final, which 'tis not, becauſe it was, that the Defendant ſhould pay to the Plaintiff 5 *l. towards his Charges*, which Words include only Part of the Charges, and if ſo, then the Plaintiff may proceed againſt him for the Reſt; but it was held, that Payment *towards the Charges*, in common Underſtanding, is taken for the Payment of the Whole. *1 Lutw. 530. Onyons* verſus *Cheeſe.*

Mod. Ca. 160. * Mod. Ca. 82. Robinſon *v.* Culwood. S.P. * Mod. Ca. 160, 176. S. C. *Co. Ent. 126. S. C. 1 Salk. 74. By the Name of* Simon *v.* Gavill. Antea (B) 32.

7. Debt upon Bond, for Performance of an Award, *ſo as it be made and ready to be delivered* by ſuch a Day: The Defendant pleaded no Award; the Plaintiff replied an **Award made by Parol*, and averred, that it was *ready to be delivered* by ſuch a Day; and upon Demurrer to this Replication, the Plaintiff had Judgment, becauſe a *Parol Award* may be delivered, for a Man may deliver a Meſſage, as well as a Letter, and ſuch an Award is ready to be delivered from the Time it was made. *1 Salk. 75. *Oates* verſus *Broomhill.* See *Dyer* * 218. *3 Bulſt. 34, and 311. Capell* verſus *Rogers.*

8. Debt upon Bond to perform an Award; the Defendant pleaded no Award made; the Plaintiff replied, and ſet forth an Award, that all *Suits* between the Parties ſhould ceaſe, and that the Defendant ſhould *pay* 10 *l.* to the Plaintiff in full of all Demands, and give him a *general Releaſe*; and that upon *the Receipt of the* 10 *l.* the Plaintiff ſhould give the Defendant *a General Releaſe:* There was Judgment for the Plaintiff in *C. B.* and now upon a Writ of Error in *B. R.* it was objected, that this Award was not final, for it is, that all *Suits now depending* ſhall ceaſe; but if either of the Parties die, then new Suits may be brought for the ſame Cauſes, becauſe the Award extends only to *Suits then depending*; beſides the *Releaſe* is awarded to be made *upon Payment of the* 10 *l.* Now if the Plaintiff will not receive the 10 *l.* then he is not obliged to make the *Releaſe*; but adjudged, that this Award is final, becauſe the Awarding, that all *Suits* ſhall ceaſe,

ceaſe, is more comprehenſive than if it had been, that all *Actions* ceaſe; and if it had been, that all *Actions* ſhall ceaſe, that had been final, for if the Remedy is gone, the Right muſt likewiſe be gone, and the Words, *now depending*, are only to ſhew what Sort of Suits were awarded to ceaſe: As to the other Objection, it was held, that where a Thing is to be done upon Payment and Receipt of Money, that in ſuch Caſe, a * Tender of the Money is as much as an actual Payment; beſides, where Money is awarded to be paid, it amounts to an Award for the other to receive it. *Mod. Caſes* 33. *Squire* verſus *Grevell.*

* Style 388, 481. London & Craven.

(I)

Awards upon Submiſſions general and conditional, not good.

1. DEBT upon Bond againſt two Defendants, who were bound to perform an Award, *ſo as it be made and delivered utrique partium*, at or before ſuch a Day; the Defendants plead, and confeſs the Award made, and that it was delivered to the Plaintiff, and to one of the Defendants, but not to the other: And upon a Demurrer to this Plea, it was adjudged, that the Word *utrique* in this Caſe ſhall be taken *Collective*; for 'tis reaſonable, that the Award ſhould be delivered to both, and not to one alone, ſince both are liable to the ſame Penalty and Danger, if they do not perform it; therefore the Delivery to one is not ſufficient, and by Conſequence this Action will not lie. *Trin.* 44 *Eliz.* 6 *Rep.* 40. *Hungate's* Caſe. Moor 642

2. Debt upon Bond to ſtand to an Award, *&c.* for and concerning Matters contained in *nine Articles*, *&c.* *ſo as the ſame* be given up under the Hand and Seal of the Arbitrator, *&c.* he made an Award of the Matter contained *in ſeven Articles*, omitting the other *two Articles*; adjudged, that the Submiſſion *being Conditional*, the Award muſt refer to all the Articles, otherwiſe 'tis void. *Hill.* 43 *Eliz. Goldſ.* 125. *Hammond* verſus *Hatch.* and *Cro. Eliz.* 839. *Riſden* verſus *Jugler. S. P.* 2 *Cro.* 200, 354, 584. *Dyer* 216. *S. P.* 1 *Lutw.* 51. *Dighton* verſus *Whiting. S. P.* Arbitrament. (N) 30. *S. C.*

3. Where the Submiſſion is of *all Controverſies*, *Ita quod* the Award be made *de præmiſſis*, *&c.* in ſuch Caſe the Award may be made of all Controverſies, of which the Arbitrators had Notice; otherwiſe 'tis void; but if the Bond of Submiſſion had been of *all Controverſies* generally, without the *conditional Clauſe of Ita quod*, there, tho' there are ſome Matters depending between the Parties which the Arbitrators did not know, and by Conſequence did not determine, yet the Award will be good for what they did arbitrate. *Hob.* 49. 2 *Cro.* 200, 354. *S. P.*

4. Debt upon Bond for Performance of an Award, and ſhewed the Award and aſſigned the Breach; and upon Demurrer it was objected, that the Award was larger in Point of *Time* than the Submiſſion; but adjudged, that whether it be larger, or not, 'tis good, till new Matter is ſhewed on the other Side; 'tis true, where a particular Thing is ſubmitted, as to make an Award of ſuch Treſpaſs, *Ita quod*, it be made within ſuch a Time, there the Submiſſion muſt be anſwered by the Award; but where the Submiſſion is general *de præmiſſis* (as it was in this Caſe) there 'tis good. *Sid.* 252. *Manning* verſus *Warren.*

5. The Bond of Submiſſion was by *T. S.* as Attorney for *D. R.* concerning all Accompts between the ſaid *D. R.* and the Plaintiff, and this was to the Award of *W. W.* the Arbitrator, if *D. R.* ſhould agree thereunto; in an Action of Debt brought againſt the ſaid *T. S.* he pleaded no Award made; the Plaintiff replied, and ſet forth an Award, that the Defendant *T. S.* ſhould pay to the Plaintiff 400 *l.* and that mutual Releaſes ſhould be given to each other; and upon Demurrer to this Replication it was adjudged, that the Submiſſion was good, tho' the Defendant ſubmitted for another, and ſhall bind him, but not the Perſon for whom he ſubmitted, becauſe he is a Stranger to the Agreement. 1 *Salk.* 70. *Bacon* verſus *Dubarry.* 2 *Salk.* 787. *The Pleadings.* See *Hob.* 49. 8 *Rep.* 97. 2 *Cro.* 354. 1 *Roll. Rep.* 254, 255. *Style* 44. 2 Salk. 787. Hob. 49. 8 Rep. 97. 2 Cro. 354. 1 Roll. Rep. 254. Style 44.

6. Debt upon Bond for Performance of an Award *Ita quod* it be made, *&c.* by the Arbitrators, and if not, then *Ita quod* it be made *de præmiſſis* by the *Umpire*, either in Writing, or by Word of Mouth *before two Witneſſes*, the Defendant pleaded *nullum Arbitrium*; the Plaintiff replied, and ſhewed an Award made by the *Umpire by Word of Mouth*, but did not aver, that it was *made before Witneſſes*; and upon Demurrer to this Replication it was held ill, becauſe the Submiſſion being conditional the Plaintiff had not ſhewed that the Award was made purſuant to the Condition. 1 *Lutw.* 536. *Wilſon* verſus *Conſtable.*

7. Debt upon Bond for Performance of an Award *of all Differences*, *Ita quod* it be made *de præmiſſis*, *&c.* upon *nullum Arbitrium* pleaded, the Plaintiff replied and ſhewed an Award, *&c.* for the Defendant to pay to the Plaintiff 12 *l.* 15 *s.* *at or upon* the ſecond *Day of February*, *&c.* and to deliver *three Boxes and ſeveral Books*, and aſſigns the Breach, that the Defendant had not paid the Money *ſecundum formam Arbitrii*; and upon Demurrer it was adjudged, that the Award to *deliver ſeveral Books*, without naming them, is void as to that Part, becauſe 'tis incertain what Books ſhould be delivered; and this being upon a conditional Submiſſion, the whole Award is likewiſe void. 1 *Lutw.* 550. *Cockſon* verſus *Ogle.*

(K)

Awards upon ſpecial Submiſſions, good, and not good.

1. THE Condition of the Bond of Submiſſion was to ſtand to the Award of the Arbitrators *for and upon the Dilapidations* of a Parſonage-houſe, and alſo of all Actions between the Parties, ſo as the ſame be made, *&c.* and the Award was only of the *Dilapidations*, with a Proteſtation by the Arbitrator, that he would not meddle with the reſt; adjudged, that where the Submiſſion is of two Things, that an Award made of one of them is good, but not where the Submiſſion is *conditional*, as in this Caſe, (*viz.*) *ſo as the ſame be made, &c.* for there it muſt be made upon the Whole; and here the Arbitrator refuſed to meddle with Part, therefore this was not a good Award. 4 *Eliz. Dyer* 217. 2 *Cro.* 200. *Middleton* verſus *Weeks. Mich.* 8 *Eliz. Dyer* 242. *S. P.* 2 *Cro.* 354. *Ormelade* verſus *Cook. S. P.*

2. And ſo is the Reſolution in *Baſpole's* Caſe, (*viz.*) that where the Submiſſion is of *certain Things ſpecially*, with a Condition, *ſo that the Award be made de præmiſſis*; there the Award muſt be made upon the Whole, otherwiſe 'tis void; but if there is no ſuch Condition, then the Award may be made only of one Thing. 9 *Rep.* 97. *Baſpool's* Caſe.

3. In Arbitrament, the Submiſſion was of the *Right, Title, and Poſſeſſion of certain Lands* in Controverſy between the Parties, in ſuch Caſe the Arbitrators cannot Award, that the Obligor ſhall cauſe the Lord of the Manor of whom the Land is holden to grant it by Copy to the Obligee, or that he ſhall Cauſe a Stranger to make a Releaſe of all his Right to the Obligee. *Mich.* 34 *H.* 8. *Bendl.* 5.

4. Debt on a Bond for Performance of an Award of all Controverſies between the Parties, which the Arbitrators ſhall make and publiſh in Writing *under their Hands and Seals, &c.* upon *nullum arbitrium* pleaded; the Plaintiff replied, and ſet forth an Award *under the Seals* of the Arbitrators, by which they ordered the Defendant to pay the Plaintiff *66 l.* at *Sennock aforeſaid*, (when *Sennock* was not named before) then he avers, that the Award was ready to be delivered to the Parties under *the Hands and Seals* of the Arbitrators, and aſſigns the Breach; and upon Demurrer to this Replication it was objected, that the Submiſſion being to an Award to be made and publiſhed *under the Hands and Seals* of the Arbitrators, it doth not appear that ſuch an Award was made, for it was under their *Seals* only; but adjudged, that the Plaintiff having alledged it was ready to be delivered under their *Hands and Seals*, that the Award was good, if the Submiſſion had been to an Award *ſigned under their Hands*, they muſt actually ſubſcribe their Names, tho' *Signing* is not ſo eſſential to a Deed as Sealing. 1 *Lutw.* 558. *Lambard* verſus *Kingsford.* 2 *Cro.* 278. *S. P. Palm.* 97. *S. P.* 109. *S. P.*

(L)

Breach of Award well aſſigned.

1. THE Award was to pay Money *before the 25th Day of November, &c.* the Breach aſſigned was, that he did not pay it *on the 25th of November*; and adjudged good, for if it was not paid *on the 25th of November*, it was not paid *before. Bridgm.* 90. *Berry* verſus *Berry. Antea* (B) 3. *S. C.*

2. Debt upon Bond for Performance of an Award, which was, that the Defendant ſhould make Submiſſion, and acknowledge himſelf ſorry for all Treſpaſſes and Words done and ſpoken by him concerning the Plaintiff, *at or before the next Court*, to be holden for the Manor of *D.* and for Non-performance, *&c.* the Action was brought; the Defendant pleaded, that he went to the *next Court, &c.* in order to make his Submiſſion, *&c.* and was there ready to perform it, but that the Plaintiff was not there to accept it; and upon Demurrer to this Plea the Court was divided, *Cook and Foſter*, that the Defendant had performed the Award by doing as much as he ought to do, and that he was diſcharged, becauſe the Plaintiff was not ready to accept his Submiſſion; but *Walmſley and Warburton contra*, for he might have made his Submiſſion, tho' the Plaintiff was not there to accept it, as well as a Man may ſubmit himſelf to an Award of a Man who is abſent. *Hill.* 8 *Jac.* 2 *Brownl.* 41. *Cartwright* verſus *Gilbert.*

3. Debt upon Bond for Performance of an Award, the Defendant pleaded no Award made; the Plaintiff replied, and ſet forth the Award, reciting, that ſeveral Perſons being indebted to one *I. B.* ſhe ordered *I. S.* to take Bonds for thoſe Debts in his own Name, which he did, and that afterwards ſhe aſſigned thoſe Bonds *to I. S. and to Elizabeth Strong*, and that the ſaid *I. S.* received the Money due on the Bonds, a Moiety whereof belonged to the Plaintiff *Elizabeth*, and that ſhe being indebted to the ſaid *I. S.* in 15 *l.* the Arbitrators awarded, that he ſhould pay unto her 29 *l.* 2 *s.* 10 *d. ſuper deliberationem Arbitrii* to him, then ſhe averred, that the Award was delivered to him, and that the Money was not paid; upon Demurrer to this Replication it was objected, that the Breach was aſſigned too narrow in reſpect of the Time of Payment of the Money, becauſe it was *upon the Delivery of the Award*, and that might be when the Defendant was on a Journey, or from home, ſo that he ought to have a reaſonable Time to pay the Money; beſides,

ſides, the Plaintiff ſhould have alledged, that it was not paid upon the Delivery of the Award *nec unquam poſtea*, for it might be paid afterwards; but adjudged, that it ſhall *not be intended*, that the Defendant was on a Journey, or that the Money was paid after the Delivery of the Award. 1 *Lutw.* 389. *Strong* verſus *Saunders.*

4. Debt upon Bond for Performance of an Award; upon *nullum arbitrium* pleaded, the Plaintiff replied, and ſet forth an Award for the Defendant to pay to the Plaintiff 11 *l.* * *upon or before the 7th of May, &c.* and the Breach aſſigned was, that he had not paid Money *ſecundum formam arbitrii*; and upon Demurrer it was objected, that the Breach was not well aſſigned, for it ſhould be, that the Money was not paid *upon or before the 7th of May*, that the Defendant might take Iſſue either upon the one or the other; but adjudged, that tho' it would have been better to have aſſigned the Breach purſuant to the very Words of the Award, yet it was well aſſigned in Subſtance, that the Money was not paid *ſecundum formam & effectum Arbitrii.* 1 *Lutw.* 545. *Lee* verſus *Elkyn.* *Antea* (C) 20. *S. C.* * Poſtea (M) 4.

5. The Bond of Submiſſion was conditional of *all Differences*, *Ita quod* the Award be made *de præmiſſis*; the Award was, that the Defendant ſhould pay 12 *l.* 15 *s.* to the Plaintiff, *at or upon the 2d Day of February, &c.* and the Breach aſſigned was, that he had not paid the Money *ſecundum formam Arbitrii*; now, tho' in the Caſe laſt mentioned it might be a colourable Objection, that the Breach was not well aſſigned, (*viz.* That the Money was not paid *ſecundum formam Arbitrii*, becauſe the Award being in the Disjunctive, and relating to different Days, (*viz.*) *on or before* ſuch a Day a ſingle Iſſue could not be well taken upon a Breach ſo generally aſſigned, yet in this Caſe there is no Colour for ſuch an Objection, for tho' the Award was in the Disjunctive, yet it related to one and the ſame Day, (*viz.*) The Money was to be paid *at or upon the 2d of February, &c.* 1 *Lutw.* 550. In *Cockſon* and *Ogle's* Caſe. *See* (I) 7. *S. C.*

(M)

Breach of Award not well aſſigned.

1. IN Debt upon a Bond for Performance of an Award, the Defendant pleaded the Award, which was, that the Plaintiff ſhould be *acquitted of a Suit in Chancery then depending between them*, and of all Matters contained *in the Bill*; and then averred, that he proſecuted no farther on that Bill, but that the Plaintiff was *acquitted* thereof; the Plaintiff replied, that after the ſaid Award, (*viz.*) on ſuch a Day, the Defendant exhibited *a new Bill*, which contained the ſame Matter with the firſt, and ſet them both forth, but did not ſay that he was ſerved with a *Subpœna*; and upon Demurrer to this Replication the Defendant had Judgment, for that the Plaintiff had not aſſigned a good Breach, for the exhibiting *a new Bill* could be no Prejudice to him, unleſs he had been ſerved with a *Subpœna*, for 'tis only a Suggeſtion of ſeveral Things, which cannot effect either his Perſon or Goods. 1 *Brownl.* 122. *Freeman* verſus *Sheilds.* 2 *Cro.* 339. *S. C.* 1 Roll. Rep. 74

2. The Award was, that the Defendant and *one of the Arbitrators* ſhould enter into a Bond, *&c.* and the Breach was aſſigned in the ſame Words, (*viz.*) *That the Defendant and the Arbitrator had not entered into the Bond*; adjudged, that it was not well aſſigned, for tho' he might not enter into a Bond *with the Arbitrator*, becauſe, as to him the Award was void, he being a Stranger to the Submiſſion, yet he might enter into a Bond by himſelf, and without the Arbitrator. *Godbolt* 164. *Pitts* verſus *Wardell.*

3. Debt upon Bond for Performance of an Award, the Defendant pleaded *nullum Arbitrium*; the Plaintiff replied and ſet forth the Award, but aſſigned no Breach; the Defendant rejoined, that it was not the Award of the Arbitrators, upon which they were at Iſſue, and the Plaintiff had a Verdict, but could never get Judgment; becauſe there being no Breach alledged, it did not appear that he had any Cauſe of Action; which is a Defect in Matter of Subſtance, and not helped by any Statute of Jeofails. 2 *Cro.* 220. *Barret* verſus *Fletcher.*

4. The Award was, that the Defendant ſhould pay the Plaintiff 15 *l. at or before* the firſt of *December*; and the Breach aſſigned was, that he had not paid it *upon the Day*; and upon Demurrer it was held ill, for he might have paid it *before the Day.* 3 *Lev.* 293. *Walnough* verſus *Holgate.* *Dyer* 243. *S. P.* 2 Vent. 221. 1 Saund. 326. 1 Lutw. 550, 570. Antea (L) 4.

(N)

Pleadings in Award, good, and not good.

1. DEbt upon a Bond conditioned to perform an Award of certain Perſons, *&c.* ſo as it be made and *given up* in Writing, at or before the Feaſt of St. *Michael, &c.* the Defendant, by Way of Proteſtation ſaid, that the Arbitrators made no Award before the ſaid Feaſt; and for Plea he ſaid, that the Arbitrators * *non deliberaverunt* in Writing, *&c.* when it ſhould be *non rediderunt*, for ſo is the Condition of the Bond. *Paſch.* 3 *Eliz. Bendlos* 39. *Cox* verſus *Mackleſfeild.* * Poſtea 3, 4, 13.

2. *Two* were jointly and ſeverally bound to perform an Award, the Arbitrators awarded, that one of them ſhould pay 16 *s.* to the Obligee, and that the other ſhould pay 3 *s.* 4 *d.* to him; and

in an Action of Debt brought againſt *one of them*, he pleaded Performance generally; adjudged an ill Plea, for he ought to have ſhewed * how he had performed, and likewiſe how it was performed by the other, becauſe they were bound for each other. *Paſch.* 28 *H.* 8. *Bendl.* 5.

* Poſtea 6.

3. The Bond of Submiſſion was to perform an Award, ſo as it be made and yielded *in Writing, at or before Michaelmas, &c.* in an Action of Debt brought on this Bond, the Plaintiff ſet forth, that the Arbitrators made an Award, *&c. before Michaelmas*, and *before* that Day they were * *ready to deliver* it to the Parties, and ſo aſſigned a Breach, upon which the Defendant demurred; adjudged, that the Declaration was not good, becauſe the Plaintiff did not directly affirm, that the Arbitrators were ready to deliver the Award *at Michaelmas*, but only, that they were ready *before Michaelmas*, which is only an * argumentative Affirmation that they were ready *at Michaelmas*; he ſhould have ſet forth, that they were ready to deliver it *ſecundum formam Conditionis, &c.* (viz.) *at or before Michaelmas*, and not *before* only. *Mich.* 8 *Eliz. Dyer* 243.

* Antea 1.

* Poſtea 4, 13.

4. Debt upon Bond for Non-performance of an Award, the Submiſſion was of all Actions, *&c.* ſo as the Arbitrators made and *delivered* their Award in *Writing, at or before the 21ſt of July, &c.* The Defendant by Proteſtation ſaid, that the Arbitrators made no Award, *&c.* and for Plea he alledged, that they did not *deliver it* in Writing before the 21ſt of *July*; the Plaintiff replied, that after the Bond, and before the *21ſt of July*, by an Award in Writing, and *then delivered* to the Parties by the Arbitrators *ſecundum formam & effectum Conditionis*, they awarded, *&c.* and ſo ſet forth the whole Award, and that the Defendant ſhould pay the Plaintiff 40 *l.* for which he brought the Action; and upon Demurrer to this Replication it was adjudged ill, becauſe the Delivery *ſecundum formam Conditionis* was not a direct but an * argumentative Affirmation, that the Arbitrators *delivered an Award, &c.* he ought to have replied, that they *did deliver the Award in Writing*, at or before the 21ſt of *July*. *Mich.* 18 *Eliz. Dyer* 244. *See* Bonds. (M) 6. Bonds. (N) 22.

* Antea 1, 3.

5. *In Debt, &c.* upon an Award, the Plaintiff ſet forth, that he and the Defendant put themſelves upon the Judgment of *B. G.* an Arbitrator indifferently choſen, *&c.* to determine the *Right and Title to a certain Houſe*, and that he awarded the Defendant ſhould pay to the Plaintiff 16 *l.* in full Satisfaction, *&c.* which he had not paid; it was objected, that this Declaration was not good, becauſe it did not appear that any Thing was awarded to the Defendant, but adjudged good, becauſe the Plaintiff is not bound to ſet forth the whole * Award in his Declaration, but only ſo much of it as doth entitle him to the Action; and if the Defendant will impeach the Award, it muſt come of his Side. 1 *Leon.* 72. *Smith* verſus *Kirfoot.* 2 *Cro.* 354. *Ormelade* verſus *Cook. S. P.*

* Poſtea 33.

6. The Award was, that the Defendant ſhould pay 10 *l.* and that he ſhould relinquiſh and deliver up to the Plaintiff all ſuch Houſes which he had in his Poſſeſſion, *&c.* and that he ſhould acquit and diſcharge the Plaintiff of and from ſuch a Bond; in an *Action of Debt* brought upon this Award, and the Breach aſſigned in theſe Particulars; the Defendant, as to the firſt Part of the Award pleaded, that he was *ready at the Day, &c.* and yet is ready to pay the Money; as to the ſecond Part, he pleaded, that he did yield up all ſuch Houſes *generally*, and to the third Part he pleaded *non damnificatus*; and it was adjudged againſt him as to all, for to the firſt he ought to have pleaded a *Tender* of the Money; to the ſecond, he ought not to plead, that he had delivered up the Houſes *generally*, but he ought to ſhew which in certain; and to the Third, he ought to have ſhewed * *how* he had diſcharged him, for 'tis not ſufficient to ſay, that he was not damnified. 1 *Leon.* 71. *Brett* verſus *Andrews. Goldſ.* 63. *Owen* 7. *S. C. Poſtea* Tender. B. 4. *S. C.*

* Antea 2.

7. Debt on a Bond for Performance of an Award between the Plaintiff of one Part, and *W. R.* and *T. W.* of the other Part, ſo as the ſaid Award be made and delivered *utrique partium*, at, or before ſuch a Day, *&c.* the Defendant pleaded, that the Award was delivered to one of the Parties; adjudged an ill Plea, becauſe the Award is to be delivered to both, for both are ſubject to the Penalty of the Bond for Non-performance of the Award, and therefore 'tis reaſonable, that both ſhould have Notice of it. 5 *Rep.* 203. *Hungate*'s Caſe. *Poſtea* Bonds. (H) 5. *S. C.*

8. Debt upon Bond for Performance of an Award, the Defendant pleaded *nullum Arbitrium*; the Plaintiff replied, and ſet forth the Award made, but did not ſhew * *where it was made*, and for that Reaſon the Replication was held ill, for this is Matter iſſuable. *Cro. Eliz.* 759. *Bretton* verſus *Pratt. Antea* (C) 2. *S. C.*

* Poſtea 21.

9. There was a Proviſo in an Indenture, that *if any Strife or Controverſy* ſhould hereafter ariſe, by Reaſon of any Clauſe or Article therein, that then, before any Suit ſhould be brought, the Parties ſhall chooſe four indifferent Perſons to determine the ſame; upon an Action brought againſt the Defendant, he ſet forth this Proviſo in his Plea, and that *Lis & controverſia* did ariſe upon *the ſaid Indenture, &c.* and upon Demurrer to this Plea it was adjudged for the Plaintiff, becauſe the Defendant ſhould have ſhewed *ſpecially*, what the *Strife* and *Controverſy* was, and upon what Article, for this Proviſo did not extend to ſubmit the Breach of every Article in the Indenture, to the Determination of four Arbitrators, but only to ſuch Article where any *Strife or Controverſy* ſhould ariſe upon the Conſtruction of it. 1 *Leon.* 37. *Parmort* verſus *Griffin.*

10. Debt upon Bond for Performance of an Award, which was, that the Defendant ſhould * *Releaſe to the Plaintiff all Actions before the Feaſt of St. Peter next enſuing*; the Defendant pleaded, that in the *Eve* of the ſaid Feaſt, he executed a *Releaſe* to the Plaintiff, and delivered it to *W. R.* to the Uſe of the Plaintiff, without his Conſent or Knowledge, and that when the Plaintiff heard it was done, he diſagreed to it; adjudged to be a good Performance of the Condition,

* Poſtea 24.

dition; for perhaps the Plaintiff might abſent himſelf on Purpoſe, ſo as the Defendant might not find him to deliver the *Releaſe* to him in Perſon. *Hill.* 29 *Eliz. Cro. Eliz.* 54. *Alford* verſus *Lee.*

11. Debt upon Bond conditioned to perform and keep the Order, *&c.* of the Council of the *Marches of Wales*; the Defendant pleaded *Nullum fecerunt ordinem*, the Plaintiff replied, that they did make an Order, and he ſet it forth, and upon a Demurrer to the Replication, it was objected, that the Plaintiff ought to have ſet forth the Names of the Counſellors; as if a Man plead a Divorce, he muſt ſhew before what Judge; beſides, this Replication is not good, becauſe the Plaintiff did not ſhew, that the Order was made by the *Preſident and Counſel*; for by the Statute 34 *H.* 8. it muſt be made by them; but on the other Side it was argued, that in an Action brought upon the Statute 23 *H.* 6. the Plaintiff may declare generally, that he was choſen *per majorem numerum*, and good; ſo where the Defendant was bound to ſerve the Plaintiff in *all his lawful Demands*, he may plead, that he did ſerve him ſuch a Day, and ſhall not be compelled to ſet forth the particular Services; the Caſe was not adjudged. *Mich.* 4 *Car. Godb.* 436. *Hill* verſus *Farley.*

12. Where *Money* is awarded to be paid, if the Defendant plead the Award in *Bar* to any Action, ſuch Plea is not good, without pleading actual Performance. *Cro. Eliz.* 66. *Hare* verſus *George.*

13. Debt upon Bond for Performance of an Award, *&c.* ſo as it be made and *ready to be delivered* to the Parties on or before ſuch a Day; the Defendant pleaded, no Award made, *&c.* the Plaintiff replied, and ſet forth the Award, but did not aver, that it *was ready to be* * *delivered* to the Parties; and adjudged, that he need not, for that was ſupplied by ſetting forth the Award it ſelf. *Hardr.* 399. *Joyce* verſus *Haines.* * Antea 3, 4.

14. Debt upon Bond for Performance of an Award; the Defendant pleaded *Non ſubmiſit*, upon which they were at Iſſue, and there was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment, that there was no Breach aſſigned; but adjudged good, becauſe upon *Non ſubmiſit* pleaded, the Plaintiff hath no Opportunity to ſhew a Breach. *Sid.* 290. *Kind* verſus *Cater.*

15. Debt upon Bond, the Defendant demanded *Oyer* of the Condition, which was for the Performance of the Award of *A. P.* ſo as it be made *on or before* 27 *June*, *&c.* and if not, then to ſtand to the Umpirage of, *&c.* The Defendant pleaded, no Award made *before* 27 *June*; the Plaintiff replied, and ſhew'd, that the *Umpire* made an *Umpirage*, and aſſigned a Breach, which was ill; and upon a Demurrer to the Replication, Judgment was given againſt the Defendant, becauſe his Plea in Bar was ill, it being no Award made *before the* 27*th June*, but did not ſay, *on the* 27*th June:* Now the Bar being ill in Subſtance, is not helped by the Replication, which ſeems to admit, that no Award was made *on the* 27*th June*, becauſe it ſets forth an Umpirage made after that Day; for if an Award was made on that Day, then the *Umpirage* is void in it ſelf. *Sid.* 336. *Bamfeild* verſus *Bamfeild.*

16. Debt upon Bond, for Performance of an Award, ſo as it be ready to be delivered to the Parties *on ſuch a Day, and at ſuch a Place*; the Defendant pleaded, no Award made; the Plaintiff replied, and ſet forth an Award delivered to the Parties *before the Day*, and *at another Place* then mentioned in the Submiſſion, and upon Demurrer, it was adjudged for the Plaintiff, becauſe the Award was delivered to the Parties themſelves. 2 *Lev.* 68. *Elborough* verſus *Gates.*

17. Debt upon Bond for Performance of an Award, ſo as it was made by the Arbitrators *in Writing*, before ſuch a Day, under their Hands and Seals: After a Verdict for the Plaintiff, a Writ of Error was brought, and the Errors aſſigned were, that the Plaintiff had pleaded an Award made, but did not ſay it was *in Writing*; but it was ſaid to be under the Hands and Seals of the Arbitrators, which implies, that it was in Writing; beſides, it concludes, *as by the ſaid Writing it doth appear*, which is a ſufficient Certainty that it was in Writing. 2 *Sid.* 38. *Lane* verſus *Butler.*

18. Debt upon Bond, for Peformance of an Award, *&c.* The Defendant pleaded, no Award made, *&c.* the Plaintiff replied, and ſhewed an Award made, and *ready to be delivered* to the Parties; the Defendant rejoined, that the *Award was not tendered to him* on the Day, *& hoc paratus eſt verificare*, and upon a Demurrer this Rejoinder was held ill, becauſe it was a *Departure* from the Plea, for that was *no Award made*; but the Rejoinder was, that the Award was not *tendered*, which implies it was *made*; beſides, this Rejoinder was ill concluded, for the Replication ſets forth, that the Award was *ready to be delivered* to the Parties, the Rejoinder ſays it was not, which is a Negative and Affirmative, and that is a plain Iſſue; therefore he ſhould have concluded to the Countrey, and not have *averred* the Rejoinder. 2 *Saund.* 181.

19. An Award was, that the Defendant ſhould pay Money to the Plaintiff, and that both ſhould execute general *Releaſes*: In Debt upon Bond for Peformance of this Award, the Defendant in his Plea confeſſed, that an *Award* was made, that he ſhould pay ſo much Money, and execute a *General Releaſe*, and then averred Performance; the Plaintiff replied, and tendered an Iſſue upon Non-payment, the Defendant waived the Iſſue, and pleaded an ill Rejoinder, and upon Demurrer had Judgment, becauſe the *Award*, as pleaded by him, was *on one Side*, for he did not ſet forth, that the Plaintiff was to execute a Releaſe to him; and the Plaintiff having replied to an ill *Award*, and omitted in his Replication, that the *Award* was, that he ſhould ſign a *Releaſe* to the Defendant, and having tendered an Iſſue upon Non-payment of the Money, 'tis ill, for he

ſhould have ſet forth, that he was awarded to ſign a *Releaſe* to the Defendant, and have averred * *Performance* on his Part, and then have aſſigned a Breach in the Defendant, and tendered the Iſſue upon Non-payment. 1 *Saund.* 323. *Veale* verſus *Warner.*

* Poſtea 30.

20. Debt upon a Bond, by which the Defendant and two others were bound to perform an *Award*; the Defendant pleaded the Award, which was, that he ſhould pay to the Plaintiff 20 *s.* and likewiſe 20 *s.* to each of the other, and that he tendered the 20 *s.* to the Plaintiff, which he refuſed to accept; the Plaintiff replied, that on ſuch a Day after the Refuſal he demanded the 20 *s.* of the Defendant, which he then refuſed to pay; and upon Demurrer, it was adjudged, that this Replication is idle, becauſe by the Tender of a Sum *awarded*, and a *Refuſal*, the Money is loſt; but then it was adjudged, that the Plea was ill, becauſe it only anſwered Part, (*viz.*) the 20 *s.* to himſelf, and not the 20 *s.* a-piece to the other two Perſons; and for that Reaſon the Plaintiff had Judgment. 3 *Lev.* 24. *Genne* verſus *Tinker.*

21. Debt upon Bond for Performance of an Award; the Defendant pleaded, *no Award* made, the Plaintiff replied, and confeſſed no Award made, but ſays, that on the 18*th of Auguſt*, &c. the Umpire *made* and delivered to the Defendant at his Houſe, &c. an *Umpirage*, &c. and ſo ſets it forth, and aſſigns a Breach, and upon a Demurrer to this Replication, it was objected, that it was ill, becauſe the Plaintiff did not ſhew, * *where the Umpirage was made*, which he ought to do, becauſe 'tis traverſable; but adjudged, this cannot be objected *after nullum Arbitrium pleaded*, becauſe if he ſhews any Thing to make the Award void, it would be a Dparture. 3 *Lev.* 238. *Barnes* verſus *Harvey.*

*Antea 8: Poſtea 39:

22. Debt upon Bond conditioned to perform an Award; the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, that at the Time of the Bond made ſhe had *an Action againſt the Defendant* for ſcandalous Words, and that the Arbitrators did Award, that he ſhould pay to the Plaintiff *twelve Guineas* and *all ſuch Money as ſhe had expended circa proſecutionem placiti præd'* and that the Parties ſhould give mutual *Releaſes*, &c. Upon Demurrer to this Replication, it was inſiſted, that the Award was void, for 'tis to pay the Charges of a Proſecution *placiti præd'*, and there was no Suit mentioned before; beſides, 'tis for the *Payment of the Charges of that Suit*, when 'tis altogether incertain to what Sum it will amount; but adjudged, that the Parties having ſubmitted to an Award to be made either by Word or Writing, and this Award being made by *Word*, the Plaintiff is not tied to the preciſe Words by which it was made, becauſe it may be difficult to prove them; therefore 'tis ſufficient for him to ſhew the Subſtance of the Award, which he did, by ſhewing that it was to *pay all ſuch Money as the Plaintiff had expended about the Proſecution of the ſaid Suit*, which was ſufficiently ſhewed to be concerning an Action of Slander; 'tis true, if it had been in Writing it had been void; and 'tis no Objection to ſay, that the Sum awarded was incertain, becauſe it may be eaſily reduced to a Certainty, when ſhe makes it appear how much ſhe laid out in the Suit. 2 *Vent.* 242. *Hanſon* verſus *Liverſedge.* * *Spigurnell's* Caſe denied to be Law.

* Antea (C) 11. S. C.

23. *In Aſſumpſit*, &c. the Plaintiff declared, that he and the Defendant ſubmitted themſelves to an Award to be made by one *Baker* of all Differences between them, and that in Conſideration thereof, and that the Plaintiff had promiſed to pay to the Defendant 40 *l.* if he did not perform the Award on his Part, the Defendant promiſed to pay to the Plaintiff 40 *l. cum adinde requiſitus fuiſſet*, if he did not perform the Award on his Part; then he averred, that the Arbitrator made an Award, which he ſet forth, and that the Defendant did not peform it, and ſhews wherein *ad damnum*, &c. The Defendant pleaded in Bar, that the Plaintiff was indebted to him in 4 *l.* for his Fees, &c. and that before any Award made, the Defendant offered to prove it to the Arbitrator, and deſired he would allow it in his Award; but he made an Award without any Conſideration of this 4 *l.* tho' he had Notice and Proof thereof; and upon Demurrer, it was adjudged, that this *Plea* was ill, becauſe it did not appear the *the Submiſſion was conditional with an Ita quod*, &c. for in ſuch Caſe the Arbitrator could not make an Award of Part of the Differences, when he had Notice that there were more; but when the *Submiſſion is not conditional*, an Award for Part, tho' he had Notice of more, is good for that Part; but if it ſhould be admitted, that this Submiſſion was conditional, yet this Award is good, becauſe the Arditrator had awarded, that the Parties ſhould execute mutual Releaſes, and that makes it final. 1 *Saund.* 32. *Birks* verſus *Trippet.*

24. Debt upon Bond for Peformance of an Award: the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, and ſhewed an Award, that the Defendant ſhould * *Releaſe* to the Plaintiff all Matters and Things *to the Time of Making the Award*; it was objected, that this Award made the Bond of Submiſſion void, becauſe, if the Defendant made ſuch a Releaſe that Bond would be diſcharged; but adjudged, that there being ſeveral other Things to be done at the ſame Time, and before the Defendant was to execute the *Releaſe*, and if thoſe Things had been done purſuant to the Award, then the Releaſe would be no Prejudice. *Raym.* 169. *Barker* verſus *Durrant.*

* Antea 10.

25. Debt upon a Bond of Award, and the Breach aſſigned was, for not delivering quiet Poſſeſſion of a *Seat in a Church*; the Award was, that the Plaintiff ſhould quietly enjoy it, &c. and that the Defendant ſhould *deliver up the Seat on the firſt Day of November following*, and that each ſhould bear his own Charge; the Defendant pleads, that the Plaintiff did enjoy the Seat till the 31*ſt of October* next following, on which Day the Seat was pulled down without his Knowledge or Conſent, *per quod* he could not deliver it up to the Plaintiff on the *firſt Day* of

November; and upon a Demurrer to this Plea, the better Opinion was, that where a Man is bound to deliver a Thing which is in his own Poſſeſſion, he muſt ſecure it ſo as he make a Delivery accordingly; but where the Thing is in the Cuſtody of a Stranger, as it was in this Caſe, for the Property of the Seat was in the Plaintiff himſelf, and it was fixed in the Church, ſo that he could not poſſibly ſecure it from being pulled down; he may plead, that it was pulled down without his Knowledge by way of Excuſe for not performing the Award. 2 *Mod.* 27. *Bridges* verſus *Bedingfield.*

26. Debt upon Bond for Performance of an Award: Upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſet forth an Award, which was, that *all Suits which were proſecuted by the Plaintiff ſhould ceaſe*, and that the Defendant ſhould *pay* ſo much, *&c.* which he had not paid; and upon a Demurrer to the Declaration, it was objected, that this Award was not mutual; for the Defendant was to pay Money, and the Plaintiff was to do nothing. *Sed per Curiam*, the Award is *mutual*, for it being, that all Suits by the Plaintiff againſt the Defendant ſhall ceaſe, that hath the Effect of a *Releaſe*. 2 *Mod.* 227. *Strangford* verſus *Green.*

27. Debt by an Executrix to her late Husband, upon a Bond, wherein the Defendant was bound to her Teſtator for the Performance of an Award; the Defendant craved *Oyer* of the Condition, and pleaded an Award made for him to pay *to the Husband or his Aſſigns* 30 *l.* within two Months next following, in full Satisfaction of all Demands, *&c.* and ſhewed, that after the Award, and within two Months after, he *departed this Life*; and upon Demurrer to this Plea the Plaintiff had Judgment, for tho' the Money was awarded to the Husband or *his Aſſigns*, without mentioning his *Executors*, yet it muſt be paid to his *Executrix*, becauſe the Award creates a *Duty*, and ſuch a Duty, which, upon the Payment of the Money, ſhe ought to *releaſe*, for ſhe ought to releaſe all Demands which the Teſtator had againſt the Defendant. 2 *Vent.* 249. *Dawney* verſus *Veſey.*

28. Debt upon Bond, the Defendant craved *Oyer* of the Bond and Condition, which was to perform an Award, *ſo as it be in Writing under the Hand and Seal* of the Arbitrator; and upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and ſet forth an Award *under the Seal* of the Arbitrator; the Defendant rejoins no Award *Under Hand and Seal*, according to the Condition of the Bond, and upon a Demurrer to the Rejoinder, the Defendant had Judgment; for *per Curiam*, the Plaintiff ought to have replied an Award under the **Hand* as well as the *Seal* of the Arbitrator. 2 *Mod.* 77. *Columbell* verſus *Columbell.* * Poſtea (O) 3.

29. Debt upon Bond for Performance of an Award: Upon *Nullum Arbitrium* pleaded, the Plaintiff replied, that he was poſſeſſed of a Mill, to which the Defendant pretended a Title, and brought an Ejectment, and had Judgment by Default; and the Diſpute was, whether the Defendant ſhould have it, or the Plaintiff ſhould keep Poſſeſſion; and thereupon they ſubmitted to the Award, *&c.* and afterwards, but before the Time in which the Award was to be made, the Defendant brought an *Habere facias poſſeſſionem* upon the ſaid Judgment, and had the Poſſeſſion delivered to him, *& ſic non ſtetit Arbitrio, &c.* Upon a Demurrer to this Replication, it was inſiſted for the Defendant, that tho' he had the Poſſeſſion, yet that Matter is ſtill arbitrable. *Sed per Curiam*, a particular Controverſy is ſet forth in this Pleading, and the Defendant by his own Act had taken away the ſubject Matter, ſo that it was impoſſible to make an Award of it. *T. Jones* 134. *Green* verſus *Taylour.*

30. Where there are no Bonds by the Parties to ſtand to an Award, there the Award cannot be pleaded in Bar, becauſe 'tis *Executory*, and there is no Remedy to enforce the Performance, or to have Satisfaction, if 'tis not performed; ſo that it muſt appear in the Plea, that the Plaintiff had either a preſent Satisfaction awarded for his Demand, or that the Award was executed before the Action brought; ſo if the Award was to do any collateral Act, as to ſeal a Bond, *&c.* there, if the Day is paſt in which he was to ſeal, the Defendant ſhall not plead that *Award* in *Bar*, without an *actual* * *Performance*, or Shewing, that he was hindered by the Plaintiff; ſo where *Money* is *awarded* to be paid on ſuch a Day, and *that Day is paſt*, there the Defendant muſt plead, that the *Award* is actually executed, either by Payment of the Money, or by a *Tender* and *Refuſal*, which in Law amounts to a Payment; but if the Day of Payment is not paſt, there the Defendant may plead the *Award* itſelf, becauſe the Plaintiff hath a proper Remedy to recover the Money *awarded*, (*viz.*) by an Action of Debt; there are ſome Books that prove 'tis ſufficient for the Defendant to plead, that *he was always ready to perform the Award*, but there are many which prove it to be no good Plea. 1 *Lutw.* 51. in *Dighton and Whiting*'s Caſe. * Antea 19.

31. Debt upon an *Umpirage* Bond; the Defendant pleaded in Bar, that the Arbitrators made no Award, but that the *Umpire awarded*, that all Suits ſhould ceaſe, and that the Defendant ſhould pay ſix Pounds, and *give a general Releaſe* to the Plaintiff; then he averred, that he had not proſecuted any Suit, *&c.* that he had paid the ſix Pounds, which the Plaintiff had accepted in full Diſcharge of the Money *awarded*, and that *paratus fuit* to execute a general *Releaſe, &c. Et hoc paratus eſt verificare.* The Plaintiff in his Replication confeſſed what the Defendant had ſet forth in his Plea, and that he had paid the ſix Pounds, but traverſed, *that the Umpire did award only* what the Defendant had pleaded, *& hoc paratus eſt verificare, &c.* and upon a Demurrer it was admitted, that this Replication was ill, becauſe the Plaintiff did not conclude to the Country, but then the Plaintiff objected againſt the Plea in Bar, for that the Award was, that the Defendant ſhould give a general Releaſe to the Plaintiff; and he pleaded,

that

that *ſemper paratus fuit* to ſeal it, which is ill, for he ought to aver, that he had ſealed it, and tendered it to the Plaintiff, ſo he had Leave to Diſcontinue. 1 *Lutw.* 525. *Strike* verſus *Bensby.* See (*B*) *pl.* 10. *S. P.*

32. Debt upon Bond for Performance of an Award; the Defendant pleaded an Award made for him to pay to the Plaintiff 50 *l.* and that he ſhould acknowledge his Offence in *London, at ſuch Time and Place as the Plaintiff ſhould appoint*, and averred, that he had paid the 50 *l.* but that the Plaintiff had not appointed any Time or Place; the Plaintiff replied, and confeſſed the Award as the Defendant had pleaded it, and alſo, that upon Payment of the 50 *l.* they ſhould execute general and mutual Releaſes, and avers, that he *had appointed a Time and Place* where the Defendant ſhould make an Acknowledgement, *&c.* of which he had Notice, but had not paid the Money, *&c.* And upon Demurrer, it was objected, that this was an Award of one Side, becauſe *the Time and* Place of making the Acknowledgment was left to the Appointment of the Plaintiff himſelf; and the making the Award being a Truſt repoſed in the Arbitrators to make a final End, they could not delegate any Part of that Truſt to another; but adjudged, this was a little Circumſtance, and a miniſterial Act, and that the Subſtance of the Award was the Payment of the Money. 2 *Lutw.* 1597. *Glover* verſus *Barry.* See *Antea* (C) *placito* 12. *S. C.* 1. *Salk.* 71. *S. C.*

33. Debt upon Bond to perform an Award; the Defendant pleaded *no* Award made; the Plaintiff replied, and ſet forth an Award, with *profert hic in Curia*; the Defendant rejoined, and *craved Oyer* of the Award, and then demurred for the *Variance* between the Award ſet forth in the Replication, and that upon the *Oyer*; adjudged, that where an *Action of Debt is brought upon the Award it ſelf*, the Plaintiff need not ſet forth more of * the Award than makes for him; but 'tis otherwiſe, where *Debt is brought upon the Bond of Submiſſion*, for there, upon no Award pleaded, the Plaintiff muſt ſet forth the whole Award, and in ſuch Caſe, if there is a material Variance between the Award given in Evidence, and the Award ſet forth in the Replication, it will be againſt the Plaintiff; but not if the Variance be only an Omiſſion of a void Part of an Award. 1 *Salk.* 72. *Foreland* verſus *Marygold.*

*Antea 5.

34. Debt upon Bond for Performance of an Award of *T. S.* of all Differences, *&c.* concerning a *Piece of Ground* uſed as a *Wharf*, and all Erections thereon, which were Nuſances to the Plaintiff's Houſe; the Defendant pleaded no Award; the Plaintiff replied, and ſet forth an Award *(but did not ſay * when made)* by which it was awarded, that the Defendant ſhould enjoy the Wharf, and that the Erections ſhould be pulled down within eight Days, from the Date of the Award, *but did not ſay by whom*; and upon Demurrer, it was objected againſt the Replication, by Reaſon of thoſe Omiſſions; but adjudged, that the Day of the Making is the Day of the Date, and that the Erections ſhall be pulled down by him on whoſe Ground they ſtand; but as to this laſt Point, *Holt Chief Juſtice* was not of that Opinion. 1 *Salk.* 76. *Armitt* verſus *Breame.* See *Moor* 39. 5 *Rep.* 78. *Cro. Eliz.* 472. 1 *Roll. Rep.* 164. *Style* 365.

*Antea S.

35. Adjudged, that an Award of a *collateral Thing* in Satisfaction, as a *Horſe, &c.* is a good Plea, without ſhewing the * Performance, becauſe the Submiſſion is a mutual Promiſe, upon which an Action may be founded, and the Remedies are reciprocal, ſo that Performance need not be averred on either Side; but formerly it was held otherwiſe. 1 *Salk.* 76. *Parſloe* verſus *Baily.*

* Antea 13, 18.

(O)

Of the Bond of Submiſſion varying from the Award.

1. THE Condition of the Bond by which the Parties ſubmit themſelves to an Award, is an *intire Thing*, and therefore, if 'tis void in Part, in Reſpect to one of the Parties, who ſubmits himſelf, *&c.* 'tis void againſt the Reſt; as for Inſtance, where an *Infant* and two more ſubmitted themſelves to an Award, the Bond was void as to the *Infant*, and ſhall be ſo likewiſe as to the Reſt. *March* 111. *Rudſtone* verſus *Yates.*

2. Two Brothers entered into a Bond for the Performance of an Award of all Controverſies between them, and in an Action of Debt brought upon this Bond, the Defendant pleaded *Nullum Arbitrium*; the Plaintiff replied, and ſet forth, that their Father was ſeiſed of ſeveral Lands, and had Iſſue him and the Defendant, and *one W.* and that there being ſome Controverſy between the three Brothers, about thoſe Lands, the Plaintiff entered into a Bond to the Defendant, and he into another Bond to the Plaintiff, to ſubmit all Controverſies, *&c.* to the Award of *B. G.* and at the ſame Time *W. entered into another Bond to perform the Award, &c.* then he ſet forth the Award, that the Plaintiff ſhould releaſe to the Defendant and *to W. &c.* and that *they* ſhould pay to the Plaintiff 300 *l.* and upon Demurrer, it was objected, that this Award was void, becauſe the Submiſſion was *of all Controverſies between the Plaintiff and the Defendant*, and the other Brother was not ſo much as named in that Bond, and yet the Award was made between *him* and the other two, when *he* was a Stranger to the Submiſſion; but adjudged, that both the Bonds being given at the ſame Time, it ſhall be accounted but one Submiſſion by ſeveral Bonds. *Cro. Car.* 313. *Hayes* verſus *Hayes.*

3. The Condition of the Bond was, to ſubmit to an Award in Writing *under the Hand* and *Seal* of the Arbitrator, the ſame *to be delivered* before ſuch a Day, in an Action of Debt brought on this Bond; and upon *nullum Arbitrium* pleaded, the Jury found the Award made under the *Seal* of the Arbitrator, but not *under his Hand*; adjudged void, for it ought to be made in Purſuance and according to the Submiſſion. 1 *Bulſt.* 110. *Scott* verſus *Scott.* * Antea (N) 28.

4. And yet in another Caſe, where the Submiſſion was to an Award, *&c.* the ſame *to be delivered on* ſuch a Day, and in an Action of Debt and *nullum Arbitrium* pleaded, the Plaintiff replied and ſet forth the Award, but did not alledge, that *it was delivered, &c.* and upon Demurrer to the Replication it was held well enough, tho' the Award was not alledged *to be delivered according to the Submiſſion.* *Style* 110. *Langly* verſus *Wybord.*

(P)

Of Umpirage.

1. THE Caſe upon the Pleadings was upon an Award-Bond, conditioned to perform the Award of two Arbitrators, and *if they diſagreed*, then to the Umpirage of *T. P. ſo as the ſaid Award or Umpirage be made before the firſt Day of May*; adjudged, that the Umpire could make no Umpirage before the Arbitrators *had diſagreed*, and they having Power to make their Award at any Time before the laſt Day, therefore no Time is limited for the Umpire, and by Conſequence his Power is void. 1 *Roll. Rep.* 261. *Barber* verſus *Giles.*

2. The Bond of Submiſſion was to Arbitrators, ſo as they made their Award *to morrow*; and if they *cannot agree*, then to the Umpirage of *T. P.* ſo as he make his Umpirage *to morrow or the next Day*; adjudged, that the Umpire could not make his Umpirage on the Morrow, tho' the Arbitrators declare, that they will not meddle with making any Award. 1 *Roll. Rep.* 262. *Bernard* verſus *King.*

3. Debt upon Bond for Performance of an Award of two Arbitrators, ſo that they made it before or upon *the firſt Day of July*, and if not, then to the Umpirage of *T. S.* ſo as he made it *on or before the ſecond Day of July*, and this Umpirage was made on the *firſt Day of July*; and upon Demurrer it was objected, that it was made before the Time allotted to be made by the Submiſſion, becauſe the Arbitrators had all the whole Day, (*viz.*) *the firſt Day of July*, to make their Award: *Sed per Curiam*, this Umpirage is good, for the Authority given to the Arbitrators, and to the Umpire was not abſolutely *concurrent*, but only conditionally, (*viz.*) if the Arbitrators made any Award on that Day, it ſhould be good, if not, then the Umpirage made on that Day ſhould be good. *T. Jones* 167. *Caſe* verſus *Dare.* 1 Lutw. 544.

4. Where an *Umpire* is appointed *by the Parties themſelves within the Time*, which the Arbitrators had to make their Award; in ſuch Caſe the Bond of Submiſſion is void, becauſe both the *Arbitrators and Umpire* have a *concurrent Juriſdiction at one and the ſame Time*; but where the Condition of the Bond of Submiſſion is, that the * *Arbitrators ſhall chooſe an Umpire* if they do not make an Award within ſuch a Time; there, if they chooſe one *within that Time*, the Bond is good, becauſe by their chooſing an Umpire, they have * waived the Submiſſion made to themſelves. 1 *Lev.* 285, 301. *Donavan* verſus *Maſcall.* Sid. 416. 1 Mod. 274. Raym. 205. * Poſtea 9, 11. * Poſtea 6, 12.

5. Debt upon Bond conditioned to perform an Award, and upon a Demurrer the Caſe was, the Bond of Submiſſion was to two Arbitrators, ſo as they made their Award before the *firſt Day of May*, and if not, then to the Umpirage of ſuch a Perſon as they (the *Arbitrators*) ſhould chooſe, ſo that he made this Umpirage before the *firſt Day of May*; the Arbitrators choſe an Umpire before that Day, and afterwards made an Award themſelves; the Queſtion was, whether it was good, and the better Opinion was, that it was not, becauſe, by chooſing an Umpire they had * deveſted themſelves of their Authority. 1 *Lev.* 174. *Travers* verſus *Twiſleton.* * Antea 4, 12.

6. Debt upon Bond, the Condition was, to perform the Award of Arbitrators, and that if they made no Award, *and* could not agree *within ſuch a Time*, then to ſtand to the Award *of T. P.* ſo that he made his Award *within that Time*; upon *nullum Arbitrium* pleaded, the Plaintiff replied and ſet forth, that true it is, that the Arbitrators made no Award, *nec potuerunt facere aliquod Arbitrium inter partes*, but that *T. P.* the *Umpire* made an Award *within the Time*, which he ſet forth; and upon Demurrer to Replication the Defendant had Judgment, becauſe the Replication *quod non potuerunt facere Arbitrium* was idle, for nothing obſtructed them to make an Award *with the Time*; and if they might have made an Award, then the Umpire had no Authority to do it *within that Time*, before the Authority of the Arbitrators was determined; 'tis true, (as *Saunders* reports it) that if the Plaintiff had ſet forth, that the Arbitrators had abſolutely refuſed and decared, that they would not make any Award, then the Award of the Umpire had been good. 2 *Saund.* 129. *Copping* verſus *Horner.* See *Dyer* 347. *Barber* verſus *Giles*, and *Godb.* 241. *Fiall* verſus *Varrier.* See *Raym.* 205. *Donavan* verſus *Maſcall. S. P.* 1 Lev. 285. Raym. 187. 1 Mod. 14. Sid. 488.

7. Debt upon Bond conditioned to perform an Award of Arbitrators, ſo as it be made, *&c.* on or before 9 *Aprilis*, *&c.* and if not made within that Time, then to ſtand to the Award of an *Umpire to be nominated by the Arbitrators*; the Defendant pleaded in Bar *nullum Arbitrium* by the Arbitrators, and that on the 10th of *April* they named *Francis Jeſſup* to be an *Umpire*, and that he did not make any Award or *Umpirage* within the Time, *&c.* The Plaintiff replied, that true it is, that the Arbitrators made no Award, and that they did *Name the ſaid Jeſſup to be Umpire*, but 3 Lev. 263. 5 Mod. 457.

but that he *adtunc & ibidem* did refuſe, and thereupon the ſaid Arbitrators did name one *Cornelius Clerke* to be Umpire, who *ſuſcepto ſuper ſe onere Umpiragii* did award, *&c.* and ſo ſets forth the Award and the Breach; and upon Demurrer, *Pollexfen* Ch. Juſt. was of Opinion for the Defendant, becauſe, tho' *Jeſſup* did refuſe, yet he might ſtill have proceeded to the *Umpirage*, and if *Clerke* had been well named, then he might do ſo too, ſo that here would be a concurrent Authority in two Perſons to make the Umirage, which the Law will not allow; therefore, when *Jeſſup* was named by the Arbitrators, their *Authority was determined*, and they could not name another upon his Refuſal: But the other three Judges were of another Opinion, for this Nomination of *Jeſſup* to be an *Umpire* did not make him ſo, becauſe 'tis the * *Acceptance* of the Office, and not the naming to it which makes him an Umpire, and therefore the Pleadings are always *ſuſcepto ſuper ſe onere, &c.* for the *Nomination* is no more than a Propoſal to him to be an Umpire, and his Refuſal makes him none; 'tis true, where an *Authority* is fully executed, the Power is determined, but this is not properly an *Authority* given to the Arbitrators, but rather a Deſcription of the Perſon who is to make the Award, (*viz.*) it muſt be ſuch a Perſon who ſhall be an *Umpire*, and it muſt be an *Umpire* by their Nomination, but if it was an *Authority*, here is no compleat Execution of it, becauſe the Umpire by them named immediately refuſed: if a Letter of Attorney be made to deliver Seiſin, and the Attorney delivers it in the *View of the Land*, this is an Authority, but not well executed, becauſe ſuch a Delivery is wrong, but yet this doth not determine his Authority, for he may afterwards deliver Seiſin upon the *very Land*; ſo where the Sheriff hath an *Authority* by an *Habere facias poſſeſſionem* to deliver Poſſeſſion, which he executed by delivering Poſſeſſion of an Houſe, and as ſoon it was done it was diſcovered to him, that a Perſon was hid in one of the Rooms, and thereupon he was turned out and the Sheriff delivered Poſſeſſion again, and held good. *Palm.* 289. becauſe his Authority was not fully executed. 2 *Vent.* 113. *Trippet* verſus *Eyre.* See *Copping* verſus *Hernalt*, and *Hob.* 167. 3 *Cro.* 7.

* Antea 4.

8. Debt upon Bond conditioned to perform an Award of two Arbitrators, ſo as it be made, *&c.* at or before the 23*d of January*, and if they did not agree, then they ſhall chooſe an indifferent Man, and *they ſhall ſtand to his Determination*; the Defendant pleaded, that neither the Arbitrators or the Umpire made any Award *ſecundum formam & effectum* of the Condition, *&c.* the Plaintiff in his Replication confeſſed, that the Arbitrators made no Award, but that they choſe an *Umpire*, and he made an Award, that the Defendant ſhould pay to the Plaintiff ſo much Money, *&c.* and aſſigned the Breach in not paying it; and upon a Demurrer to this Replication it was inſiſted for the Defendant, that he is not bound to perform the Award of the Umpire, becauſe the Condition of the Bond in that reſpect was inſenſible; for it is, that the *Arbitrators* ſhall chooſe an Umpire, *and they ſhall* ſtand to his Award, ſo that by the Word *they* it muſt be intended, that the Arbitrators ſhall ſtand to the Award of the Umpire, and therefore the Defendant is not bound to do it, neither can this Word *they* refer to the Plaintiff and to the Defendant both, for then the Defendant will be bound, that the Plaintiff ſhall ſtand to the Award of the Umpire, which is abſurd; but adjudged, that any Words by which the *Intention* of the Parties may appear, tho' they may be improper, yet they ſhall be ſufficient to make a Condition, which is always made for the Benefit of the Obligor, and therefore ſhall be favourably expounded; and tho' ſuch an Expoſition may be prejudicial to the Defendant in this Caſe, yet the Law is ſtill the ſame, and muſt not be altered for him. 1 *Saund.* 65. *Butler* verſus *Wigg.*

9. Debt upon Bond for Performance of an Award *Ita quod* it be made by the Arbitrators *de præmiſſis*, ready be delivered to the Parties *on or before the* 20*th of May*, and if not made before that Day, then to ſtand to the Award of *an Umpire*, *&c.* the Defendant pleaded *nullum Arbitrium by the Arbitrators*, but that the Umpire being choſen by them *on the* 20*th Day of May*, awarded, that the Defendant ſhould pay to the Plaintiff 40 *l.* before the 11*th Day of June* following, and ſo pleads Performance; there was a Replication and a Demurrer to it; and the Objection was, that the Chooſing an *Umpire on the* 20*th Day of May* was Wrong, becauſe the Power of the Arbitrators themſelves was not then determined; but adjudged, that the Umpire being choſen by the * Arbitrators, his Award was good, eſpecially ſince the Arbitrators made no Award. 1 *Lutw.* 541. *Elliot* verſus *Chevall. Cro. Car.* 263. *S. P.* 2 *Jones* 167. 2 *Mod.* 169. 2 *Saund.* 133. *S. P.*

* Antea 4.

10. Debt upon Bond for Performance of an Award, which was (amongſt other Things) that the Plaintiff ſhould deliver to the Defendant ſeveral Goods particularly named, and that if any of thoſe Goods ſhould be loſt, then the *Value* ſhould be paid as *appraiſed by the Arbitrators and Umpire*; now the better Opinion was, that this Umpirage was void, becauſe by the Bond of Submiſſion the Arbitrators were firſt to give Judgment before the Umpire, and that not being done, their Power is determined, ſo that afterwards they are not to intermeddle in the Valuation of the Goods, for if they did the Award would be void. 1 *Lutw.* 550. In * *Cockſon* and *Ogle*'s Caſe. 2 *Cro.* 314. *S. P.* See † *Grove* and *Crane*'s Caſe.

* Antea (I) 7. S. C.

† Antea (F) 6. S. C.

11. Adjudged, that where *Arbitrators chooſe an Umpire, before their Time for making an Award is expired*, 'tis abſolutely void, tho' they never intended to make any Award themſelves, that *when their Time is expired*, their Authority is executed, if they chooſe an Umpire, and they cannot revoke or chooſe again if the Umpire ſhould refuſe to accept the Umpirage, unleſs they chooſe him upon Condition that he accept, for in ſuch Caſe he is not an Umpire till * Acceptance; this was upon Motion for an Attachment for not performing an Umpirage. 1 *Salk.* 70. *Reynolds* verſus *Grey.*

* Antea

12. The Bond of Submiſſion was to two Arbitrators, ſo as they made their Award on, or before the 29*th Day of June*, and if they made no Award, then to chooſe an *Umpire*, which they did

did *on that very Day*; adjudged, that if the Submiſſion had been to ſuch an Umpire as they ſhall chooſe, ſo as he make his Umpirage before the *29th of June*, and an Umpire is choſen accordingly, this is good, tho' the Arbitrators had at firſt ſo long Time to make their Award, becauſe by chooſing an Umpire the * Arbitrators had determined their Power; but if the Umpire be named in the Submiſſion, he cannot make his Umpirage before the Time of the Arbitrators is expired. 1 *Salk.* 71. *Mitchell* verſus *Harris*. * Antea 4.

(Q)

Pleadings in Umpirage, good, and not good.

1. CASE, *&c.* upon a Promiſe to perform an Award, the Submiſſion was of one Thing, and the Award was of that Thing, and *another not in the Submiſſion*; and the Breach aſſigned was, that the Defendant had not performed that to which they ſubmitted, and which was arbitrated, *nec Arbitrium prædict' performavit in Aliquo*, upon which they were at Iſſue, and the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Award was void as to Things not ſubmitted, and the Breach was aſſigned in that as well as in the other, and the Jury had given entire Damages: *Sed per Curiam*, the Words *nec Arbitrium performavit in Aliquo*, refer only to that which was within the Submiſſion, and for the reſt the Award was void, and by Conſequence no Award, and therefore Damages could not be given for that. 2 *Roll. Rep.* 46. *Tomkins* verſus *Webb*.

2. *Indebitatus Aſſumpſit*, upon an Accompt for 9 *l.* The Defendant pleaded a Submiſſion of all Actions and *Controverſies* to Arbitrament, *&c.* and that the Arbitrators awarded the Defendant to pay the Plaintiff 4 *l.* in Satisfaction of *all Accompts*; the Plaintiff replied, that *non ſubmiſerunt Arbitrio, &c.* upon which they were at Iſſue, and the Defendant had a Verdict; but it was objected in Arreſt of Judgment, that Arbitrament is no Plea *in Debt* nor in *Aſſumpſit* upon a Debt; beſides, this Plea did not reach the Thing in Demand, for it was a *Submiſſion of all Accompts*, but the Plaintiff had declared for a *Duty* upon an Accompt, ſo the Defendant could not have Judgment. *Allen* 4. *Farrer* verſus *Bates*.

3. Debt upon Bond conditioned to perform an Award; the Defendant pleads, that the Arbitrators made no Award, but that the Umpire made an Umpirage, that the Defendant *ſhould pay the Plaintiff ſo much, &c. and that he tendered it accordingly, and* that the Plaintiff refuſed to accept it; the Plaintiff replied, that the Umpire awarded *the Money to be paid in Satisfaction of all Controverſies*, and that the Defendant did not *tender* it, and *concludes to the Country*; and upon a Demurrer to the Replication it was inſiſted for the Defendant, that the Plaintiff having alledged new Matter in his Replication, he ought not to have concluded to the *Country*, for by that Means he had deprived the Defendant of his *Traverſe to the new Matter*, for which Reaſon the Plaintiff cannot have Judgment, eſpecially ſince it doth not appear by the Pleading, whether the Award was good, or not, and of this Opinion were two Judges, but the other Two were of another Opinion, for they held that the Defendant had admitted the Award to be good, by Pleading that he had performed it in tendring the Money, and that he ſhall not afterwards be admitted to a Traverſe to prove it no Award. 3 *Lev.* 164. *Seale* verſus *Crowe*.

4. *Treſpaſs*, for that the Defendant *Vi & Armis* did aſſault, beat, and wound the Plaintiff, *&c.* The Defendant pleaded Not guilty as to the *Vi & Armis*, and as to the reſt, *&c.* he pleaded a Submiſſion, *&c.* to an Award of all Controverſies, *&c.* and ſet forth an Award made, that the Defendant ſhould provide two Fowls at his Houſe in *Old Bedlam* in *London*, to be eat by the Plaintiff and his Friends, *on Wedneſday or Thurſday* in ſuch a Week, in Satisfaction of the Treſpaſs, and avers, that on *Thurſday* in the ſaid Week he did provide two Fowls at his Houſe, *&c.* but that the Plaintiff or his Friends did not come; the Plaintiff replied, that *Wedneſday* in ſuch a Week was the Day appointed, *&c.* and traverſed, that it was *Wedneſday or Thurſday*, to this there was a Rejoinder and a Demurrer; and it was objected, that the Award alone was not a good Plea to bar the Action, unleſs it had been executed; becauſe it was not of Money, but of a collateral Thing, for which the Plaintiff could have no Action if the Defendant refuſed to perform it; that it being at the Election of the Defendant to provide the Fowls, either on the *Wedneſday or Thurſday*, he ought to give the Plaintiff Notice on what Day he would provide them, and not only ſo, but he ought to have tendered them: As to the firſt Objection, *Holt* Ch. Juſt. held, that it is true, the old Books tell us, that an Award of a *collateral Thing* in Satisfaction of Damages is not a good Plea in Bar, without alledging a *Performance*, becauſe the Plaintiff had no Remedy upon the Award, which is very true, but yet an *Aſſumpſit* lies upon the *Submiſſion*, for that is a mutual Promiſe between the Parties ſubmitting to perform what ſhall be awarded, and if there is a Remedy for it, then it need not be averred to be executed. *Mod. Caſes* 221. *Boiſloe* verſus *Baily*. 1 Salk. 76.

Arreſt.

(A)

Of Arreſts in general, and of Arreſts before the Money due. See *Impriſonment* and *Falſe Impriſonment* per totum.

1. THE Defendant covenanted to pay to the Plaintiff a certain Sum on the 24*th Day of June, &c.* The Plaintiff before that Day came, ſued out a *Latitat*, *Teſte* 3 *Maii*, returnable the laſt Day of *Trinity-Term*, and arreſted the Defendant, but upon Motion he was diſcharged; 'tis true, by the * Cuſtom of *London*, a Debtor may be arreſted before the Money due, to make him find Sureties; the Defendant in this Caſe moved for Coſts, for being put to Charges, *&c.* but that was denied, it being for Taking out Proceſs of the Court. 1 *Vent.* 28. *Hanway* verſus *Merry*.

* Hob. 86. 2 Cro. 667.

2. Adjudged, that an Arreſt on a * *Sunday* is a void Arreſt, and the Party may have an Action of Falſe Impriſonment. 1 *Salk.* 78. *Wilſon* verſus *Tucker*. See 29 *Car.* 2. *cap.* 7.

* Poſtea 4.

3. A Bailiff having a Warrant againſt *Sparks*, told him ſo at a little Diſtance, and withal, that he arreſted him, but *Sparks* having a Fork in his Hand, kept the Bailiff off, ſo that he never touched him, but retreated into his Houſe; adjudged, that bare Words will not make an Arreſt, but if the Bailiff had * touched *Sparks*, then it would have been an Arreſt, and his Retreat a *Reſcous*, and the Bailiff might have purſued and broke open his Houſe, or might have an Attachment, or brought a Reſcous againſt him, but now he hath no Remedy but an Action of Aſſault, and the holding up his Fork when he was within his Reach is good Evidence of it. 1 *Salk.* 79. *Genner* verſus *Sparks*.

* 2 Cro. 486. S. P.

4. Debt upon the Statute 23 *H.* 6. *cap.* 10. by which 'tis enacted, that *the Sheriff ſhall have* 20 *d. and the Bailiff who makes the Arreſt* 4 *d. and that the Sheriff or Bailiff who doth the contrary ſhall pay treble Damages to the Party grieved, and forfeit the Sum of* 40 *l. one Moiety to the King, and the other to him who ſhall ſue, and that the Juſtices of Aſſiſe, and Juſtices of Peace in their Seſſions may determine this Offence*; this Action was brought by a common Informer againſt the Defendant, for taking 5 *s.* 6 *d.* for an Arreſt on a Bond; after a Verdict for the Plaintiff it was inſiſted, that by the Statute 21 *Jac. cap.* 4. the Action ought to be brought and proſecuted in the County where the Offence was committed, but the Plaintiff had Judgment. 5 *Mod.* 225. *Newnham* verſus *Lunn*.

5. The Defendant was taken on a * *Sunday* without any Warrant, and locked up all that Day, and then on Monday-Morning a Writ was got againſt him; it was ruled, that he might have an Action of Falſe Impriſonment, and that an Attachment ſhould go againſt thoſe who took him on the *Sunday*. *Mod. Caſes* 96. *Lidford* verſus *Thomas*.

*Antea 2.

6. Ruled, that the *Bail* may take the *Principal* on a *Sunday*, and confine him till *Monday*, and then render him, and this is *no Serving of Proceſs*, for the Entry in *B. R.* is *traditur in Ballivum, &c.* 'tis rather like the Caſe where the Sheriff arreſts the Defendant on a Saturday, and *Eſcapes*, he may take him on the *Sunday*, becauſe 'tis only a Continuation of the former Impriſonment. *Mod. Caſes* 231.

7. By the *Statute* 5 *Annæ*, for preventing Eſcapes, 'tis enacted, that it ſhall be lawful to take on a Sunday any Perſon eſcaping by Vertue of a Warrant for that Purpoſe.

Aſſault and Battery.

Pleas therein good. (A) | Pleas therein not good. (B)

(A)

Pleas therein, good. See *Pleas.* (E) 5, 10. *Treſpaſs.* (B) per Totum. (K) 10.

1. IN Battery the Plaintiff declared, that on ſuch a Day the Defendant aſſaulted and beat his *Wife*; this Action was brought by the *Husband* after the Death of his *Wife*, and it being a Perſonal Wrong, is dead with the Perſon; and if ſhe had been living, the Husband alone could not have the Action, becauſe Damages would ſurvive to the Wife. *Yelv.* 89. *Higgins* verſus *Butcher.* Brownl. 205.

2. In an Action of Aſſault, the Plaintiff declared *quod cum* the Defendant ſuch a Day, *&c.* him the aforeſaid Plaintiff did beat, which is only a Recital, and not expreſs Allegation that the Defendant did beat him, and for this Purpoſe the Caſe of *Sheriff* and *Bridges* was cited, *Mich.* 39 *Eliz.* where ſuch a Declaration was held ill; but yet the Declaration in the principal Caſe was held good. *Paſch.* 12 *Jac. Godb.* 251. *Sherley's* Caſe. 2 *Bulſt.* 215. reported by the Name of *Sherland* verſus *Heaton*, where the Declaration was held ill; but if it had been *quod Cum* the Plaintiff being *in pace Domini Regis, &c.* the Defendant did aſſault him, this had been good, becauſe 'tis Relative to the *quod Cum*, which always preſuppoſeth ſome ſubſequent Matter. 2 Bulſt. 215.

3. In *Aſſault and Battery*, the Defendant pleaded Not guilty, and afterwards, before the Record of *Niſi prius* was ſealed, he would confeſs the Action; but adjudged, that it came too late, tho' all the Pronotaries were of a contrary Opinion. *Paſch.* 16 *Jac. Hob.* 221. *Claſebrook* verſus *Liveſey.*

4. *Aſſault, &c.* the Defendant pleaded, that *tempore quo, &c.* he was ſeiſed of ſuch Rectory in Fee, and that the Corn growing in the Place was ſevered from the nine Parts, and that he came into the Ground to carry away the *Tythes*, and in Defence thereof, and to hinder the Plaintiff from taking it, he ſtood there to defend it, and if any Hurt was done it was of his own Wrong; the Plaintiff replied, *de injuria ſua propria abſque tali cauſa*; and upon Demurrer to this Replication the Plaintiff had Judgment, becauſe by his Declaration he did not claim any Thing in the Soil or in the Corn, but only Damages for the Aſſault, *&c.* which is collateral to the *Title*; but if he had claimed a *Title, &c.* and the Defendant had pleaded any Matter to deſtroy ſuch Title, there the Plaintiff muſt reply ſpecially, and ſhall not plead generally *abſque tali cauſa. Yelv.* 157. *Tailor* verſus *Markham.*

5. *In Battery, &c.* the Action was laid in *London*, when in Truth it was done at *Uxbridge*; the Defendant pleaded, that on ſuch a Day and Year the Plaintiff at *B.* in the County of *S.* made an Aſſault upon the Defendant, and ſo pleaded *de injuria ſua propria*, and traverſed, that he was guilty in *London*; this was adjudged a good Plea. *Goldſ.* 5. *Webſter* verſus *Paine.* See *Goldſ.* 43.

6. *Aſſault, Battery and Wounding*; the Defendant juſtified, for that he being Maſter of a Ship, commanded the Plaintiff to do ſome Service in the Ship, which he refuſing, the Defendant *moderate caſtigavit*; the Plaintiff maintained his Declaration, and traverſed, that the Defendant *moderate caſtigavit*, upon which they were at Iſſue, and the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that the Iſſue was not well joined, for *non moderate caſtigavit* doth not imply, that he beat him at all; the direct Iſſue had been *immoderate caſtigavit*; but *de injuria ſua propria abſque aliqua tali cauſa* had been the moſt formal Replication; however it was held good after a Verdict. 1 *Vent*, 70. *Aubrey* verſus *James.* Sid. 444.

7. *In Aſſault, &c.* the Defendant pleaded *ſon Aſſault Demeſne*; the Plaintiff replied, that he was Servant to *Mr. Sandys* to look after his Horſes, and that the Defendant *would have beaten* one of them, but that the Plaintiff laid his Hands on the Defendant in *Defence of the Horſe*, and thereupon the Defendant aſſaulted him: The Defendant rejoined, that he was Servant to *Mr. Ridler*, who was ſeiſed in Fee of a Cloſe call'ed *Davis Cloſe*, which *was well fenced*, and that he ſeeing one *Payton*, another of *Mr. Sandy's* Servants, attempting to leap over the Fence on Horſe-back, forbid him, and endeavoured to hinder him; and that the Plaintiff coming to aſſiſt *Payton*, aſſaulted the Defendant, who defended himſelf, and traverſed that he was guilty, *&c.* but in *Davis Grove, &c.* and upon Demurrer, it was objected to the Replication, that the Plaintiff *did not poſitively alledge*, that the Defendant *did beat him*, but only, that *he would have beaten him*; but notwithſtanding this Exception, the Defendant had Judgment. *Nota*, in this

this Case the Plaintiff justified as a Servant, in Defence of his *Master's Goods*, and the Defendant justified in Defence of his Master's Possession; and it was held, that a Servant may justify a *Battery* in Defence of his Master, but not of his Goods. 2 *Lutw.* 1481. *Shingleton* versus *Smith.*

(B)

Pleas therein, not good. See *Justification.* (A) per Totum.

1. *Assault, Battery and Wounding*; the Defendant pleaded, that he was Constable of *B.* and for such a Misdemeanor done by the Plaintiff he laid his Hands on him and put him into the Stocks, *quæ est eadem transgressio*; and upon Demurrer to this Plea, it was adjudged for the Plaintiff, because the Defendant did neither plead Not guilty, or justify the * *Wounding*; but if he had pleaded, that the Hurt which the Plaintiff had was of his Wrong, this had answered all. *Cro. Eliz.* 93, 168. *Pendlebury* versus *Elmer.*

* *He cannot justify a Wounding in Defence of his Possession, but he may of his Person.* 1 Roll. Rep. 19. Butler *versus* Austen.

2. In Assault, &c. the Defendant justified by a *molliter manus imposuit* on the Plaintiff, who *entered his Close*; and upon a Demurrer, it was adjudged no good Plea, because the Plaintiff did not shew what Estate he had in the Close, or that he did endeavour to turn the Defendant out. *Moor* 846. *Smith* versus *Bull.*

3. In *Assault, Battery* and *Wounding*; the Defendant pleaded *son Assault Demesne*; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant cannot justify the *Wounding* by this Plea; but this may be still a Question, for the Ground of the Action is the Trespass, to which this is a proper Plea. *Sid.* 246. *Dance* versus *Lucy.*

Sid. 441. 1 Mod. 36. 4. *In Assault, &c.* the Defendant pleaded *son Assault Demesne*; the Plaintiff replied, that he was standing at his Gate, and that the Defendant being on Horse-back, offered to ride over him, whereupon he *molliter assaulted* the Plaintiff in Defence of himself *quæ est eadem, &c.* and upon Demurrer to this Replication, it was adjudged to be ill, because he had now confessed he made the first Assault; it should have been, *molliter manus imposuit* * to obstruct the Riding over him. 1 *Lev.* 282. *Jones* versus *Trefilian.*

* 3 Lev. 414.

3 Lev. 403. 5. *Assault, Battery* and *Wounding, &c.* the Defendant, as to the Wounding, pleads Not guilty, and as to the Rest, he justified by Vertue of a *Ca. Sa.* against the Plaintiff, and a Warrant thereon, and that he to arrest the Plaintiff *molliter manus imposuit* on him, and that he did take and imprison him, *quæ quidem mollis impositio manuum*, is the same Assault and Battery of which the Plaintiff complained; and upon Demurrer, it was objected, that *molliter manus imponere* was too soft a Justification for *Battery*, the Defendant ought to have pleaded Not guilty as to that; and that it was so adjudged in *Stony and Calvert's* Case. *Hill.* 2 *Will.* 3. *Rot.* 759. *in C. B.* 'Tis true, *Serjeant Levinz*, who Reports the principal Case, tells us, that *molliter manus imponere* is a *Battery*, if the Defendant hath nothing to excuse himself for so doing, and that most of the Precedents are as this is; tho' in some the *Battery* is particularly answered, and that would be the surer Way of Pleading. 1 *Lutw.* 925. *Patrick* versus *Johnson.* 2 *Cro.* 251. *S. P. See* Justification. (E) 4. *S. C.*

Assent.

(A)

Of the Assent of an Executor, &c. to a Devise of Personal Things.

1. THE *Assent* of an Executor to a Devise of a *Legacy*, or of any *Personal Thing*, is so necessary, that if the Legatee or Devisee take the Thing, without the Delivery and Assent of the *Executor*, he may have an Action of Trespass against them. *Keilw.* 128. *Dyer* 254. *B.*

2. But such an *Assent* will not make a Devise of a *personal Thing* good, which is void in it self; as for Instance, the Testator having a *Term for Years, as Executor* to another, devised it to a *Stranger*, and made his own Son Executor, and died; the *Devisee* enter'd by the Assent of this Son, and afterwards he as Executor to his Father, re-entered upon the *Devisee*; and adjudged, that his Entry was lawful, because the Devise to this *Stranger* was void, for an Executor cannot devise that to another which he *he hath as Executor*, because he hath it not in his own Right, but for the Use of his Testator; therefore an Assent to a void Devise must be also void. *Plow. Com.* 525. *Barnsly* versus *Grantham.*

2 And. 132. 5 Rep. 29. 3. In Trespass, &c. the Case was, that the Testator being possessed of Lands, which he held upon several Leases, some of which were in the Diocese of the *Archbishop of York*, and some in

Peculiars, deviſed all thoſe Leaſes to his Son, and made his Daughter Executrix, who was then an *Infant*; the Mother took out Adminiſtration *durante minore ætate* of the Executrix in the *Peculiar*, where her Husband died, and granted the Reſidue of the Term of the Lands there to the Plaintiff; the Queſtion was, whether the *Aſſent of an Adminiſtratrix, durante minore ætate*, was good to the Deviſe of a Term, or whether the Aſſent of the Executrix herſelf, tho' an *Infant* was neceſſary; the Chief Juſtice *Anderſon* held, that an Infant at the Age of eighteen might aſſent; but the Court doubted, whether the Aſſent of an Adminiſtratrix was good or not. *Cro. Eliz.* 719. *Price* verſus *Simpſon*.

4. The Teſtator being poſſeſſed of a *Term of Years*, deviſed the ſame to his Daughter *for ſo many Years as ſhe ſhould live*, Remainder to *J. H.* and made his Daughter's Husband *Executor*, and died; the Executor ſometime afterwards declared, that if his Wife was dead his Eſtate in the Lands was ended; adjudged, that this was a ſufficient Aſſent to make him take the Term in Right of his Wife, as a *Deviſee*; but if he had not made ſuch a Declaration, he might have taken it as Executor, and not as a Deviſee, and by Conſequence might have enjoyed it, if he had ſurvived his Wife. *March* 137. *Southward* verſus *Millard*.

5. Adjudged, that the Spiritual Court may compel an Executor to aſſent to a Legacy, and ſo may a Court of Equity. *Marsh.* 97.

Aſſets.

What ſhall be Aſſets in the Hands of an Executor or Adminiſtrator. (A)
What ſhall not be Aſſets in the Hands of an Executor. (B)
Pleadings concerning perſonal Aſſets. (C)
What ſhall be Aſſets by Deſcent in the Hands of an Heir. (D)
What ſhall not be Aſſets by Deſcent. (E)
Pleadings in Caſes of Aſſets by *Deſcent*. (F)
Pleadings of other Aſſets, good and not good. (G)

(A)

What ſhall be Aſſets in the Hands of an Executor or Adminiſtrator.

1. Aſſets are of two Sorts, (*viz.*) In the Hands of an Executor, *&c.* which is called Aſſets *inter maines*, and *Aſſets by Deſcent*; thoſe Things which are Aſſets in the Hands of an Executor, are as follow:

2. Debt againſt an Executor, who pleaded *Plene Adminiſtravit*; the Plaintiff replied Aſſets *die impetrationis brevis*, upon which they were at Iſſue, and the Proof for the Plaintiff was, that on the ſame Day 100 *l.* was paid to the Defendant in the Prerogative Court, and that preſently, by the Order of the ſaid Court, the ſame was paid by the Defendant to another Creditor of his Teſtator; adjudged, that becauſe the Money was once in the Hands of the Defendant as Executor, *&c.* it ſhall be accounted Aſſets, tho' paid over to another Creditor; but the Defendant might have helped himſelf, upon pleading this Matter Specially, but not upon *Plene Adminiſtravit*. *Dyer* 208.

3. The Leſſor covenanted with the Teſtator to make him a *Leaſe for Years* of ſuch Lands, but he died before the Leaſe was made, and afterwards the Leſſor made *the Leaſe to his Executors*: Now it was adjudged, that the *Term* ſhall be Aſſets in their Hands, for tho' it commenced in their Time, and after the Death of the Teſtator; yet, becauſe the Covenant was made *to him*, and by Vertue thereof the Leaſe was granted *to them*, it ſhall be Aſſets. 1 *Rep.* 91. *B. Chapman's* Caſe. cited in *Shelley's* Caſe.

4. If an Executor *ſurrenders a Term of Years* (which he had *as Executor*) to him who hath the Reverſion in Fee, tho' 'tis merged and extinct as to him, yet it ſhall ſtill remain Aſſets in the Executor to ſatisfy Debts and pay Legacies; and ſo it had been, if the Executor himſelf had purchaſed the Inheritance and Reverſion. 1 *Rep.* 87. *in Corbett's* Caſe.

5. A Man *mortgaged* his Eſtate for a Term of Years; adjudged, that the *Equity of Redemption* is Aſſets, and ſo is a *Term for Years* to attend the Inheritance; ſo, if the Mortgagor pays the Money to the *Heir* of the Mortgagee, he ſhall not take it as Heir, but it ſhall be Aſſets in his Hands. 3 *Leon.* 32.

6. Where a *Debt due* to the Teſtator *is certain*, as 'tis always upon Bond, there a *Releaſe* of that Debt makes it Aſſets in the Hands of the Executor, becauſe it ſhall be intended, that he would not have made the Releaſe unleſs the Money had been paid to him, or unleſs he had otherwiſe been ſatisfied; therefore where an *Infant* was Executor, and the Adminiſtrator during his Mi-

Minority, had received 600 *l.* due to the Teſtator, and when the Infant Executor came of Age, and had proved the Will, he releaſed the *Adminiſtrator* of all Actions; it was adjudged in an Action of Debt brought againſt him, that the 600 *l.* which was certain, and which was now releaſed, ſhall be Aſſets in his Hands; for it ſhall be intended, that he received it from the Adminiſtrator, otherwiſe he would not have given him a Releaſe. *Owen* 36. *Hob.* 66. *S. P. Godb.* 29. *S. P.* 1 *And.* 138. *Kightley* verſus *Kightley.* *Cro. Eliz.* 43. *S. C.* By the Name of *Brightman* verſus *Keighly.* 4 *Leon.* 102. *S. C.* *Godb.* 29. *S. C.*

7. There was a Bond of 100 *l.* made to the Teſtator for Performance of Covenants, which afterwards were broken, and the Executor put the Bond in Suit, and pending the Action, ſubmitted himſelf to Arbitration, and the Obligor was awarded to pay the Executor 70 *l.* and that upon Payment of the Money he ſhould releaſe the Bond; all which was done; and in an Action brought againſt him, it was adjudged, that he ſhoulld be anſwerable for Aſſets to the Value of 10 *l.* for ſo was the Bond; and tho' he was compelled by the Award to releaſe the Bond, yet it was his own Act to ſubmit to the Arbitration. 3 *Leon.* 51.

Owen 139. 2 And. 127.

8. *Judgment* was had againſt one *Vaughan*, who afterwards died Inteſtate, having firſt made a *fraudulent Gift* of his Goods to his Daughter, who by Vertue thereof gave them to the Defendant, and he having gotten the Goods in his Poſſeſſion, took out *Adminiſtration* to the ſaid Inteſtate; afterwards a *Scire facias* was brought againſt him as Executor to *Vaughan*, and this was to have Execution of the ſaid Judgment, who pleaded *Riens inter maines*; and all this Matter being found Specially, the Plaintiff recovered againſt him; for by his Intermeddling with the Goods, he was an *Executor de ſon Tort*, becauſe the Gift to the Daughter being fraudulent and void, as to Creditors, ſhe could not give him any Authority to poſſeſs them, therefore he was a Treſpaſſer, and they were Aſſets in his Hands, and his ſubſequent Adminiſtration did not purge that Wrong; therefore a Creditor may ſue him as *Executor de ſon Tort*, or he might have ſued him as Adminiſtrator. *Cro. Eliz.* 810. *Bethell* verſus *Stanhope.* *Poſtea pl.* 11. *S. P. and* Baron and Feme (H) 4. *S. P.*

Hob. 265.

9. Executor *durante minore ætate* of an *Infant*, who afterwards came of Age, and proved the Will, and left ſeveral Goods of the Teſtator in the Hands of the ſaid *Executor*, yet theſe ſhall be adjudged Aſſets in his Hands; now he had proved the Will, tho' he never had *the Poſſeſſion*, becauſe he might have recovered them of the Executor after he came of Age. 1 *Roll. Abr.* 921. *Chandler* verſus *Thompſon.*

Owen 125. Yelv. 9. Moor 666. Cro. Eliz. 840. Poſtea (D) 1.

10. Leaſe for eighty Years, if the Leſſee ſhould live ſo long, the Remainder after his Deceaſe to his Executors or Aſſigns for forty Years; the Leſſee died Inteſtate, and his Wife took out Letters of Adminiſtration, and in an Action of Treſpaſs brought by her, againſt one who claimed under another Leaſe, it was adjudged, that this Term was veſted in the Leſſee, and that his Adminiſtratrix ſhall have it, and that it ſhall be Aſſets in her Hands. *Cro. Eliz.* 666. *Sparke* verſus *Sparke.*

11. The Teſtator being poſſeſſed of ſeveral Goods, made *M. R.* his Executrix, and died; the Executrix made a *fraudulent Gift* of the Goods, but continued in the Poſſeſſion of them, and afterwards ſhe married the Defendant, and died; and in an Action of Debt brought againſt him as *Executor de ſon Tort*, the Queſtion was, whether theſe Goods were Aſſets in his Hands, *he having paid Debts and Legacies*; and adjudged, that they were; 'tis true, the Gift, tho' fraudulent, is good againſt all but Creditors; but if in Reſpect to them 'tis void, (as certainly it is) then the Executrix had a good Title to them, notwithſtanding her fraudulent Gift; and if ſo, then her Husband having poſſeſſed the Goods, and *paid Legacies, &c.* he is liable as *Executor of his own Wrong*, and they are Aſſets in his Hands. *Cro. Eliz.* 405. *Wilcocks* verſus *Watſon.* *Antea pl.* 8. *S. P.* Baron and Feme. (H) 1. *S. C.*

12. *Money* decreed in a Court of Equity by Reaſon of any Executorſhip, and *Money* ariſing by Sale of Lands by Executors, and even *Damages* recovered by an Executor, ſhall be Aſſets, and ſo ſhall the *Intereſt of Money* lent by the Executor, if it was the Teſtator's Money; 'tis true, it hath been argued to the contrary, becauſe the Teſtator lends the Money at his own Peril; therefore he being to bear the Loſs, 'tis reaſonable he ſhould have the Profit; but now 'tis held otherwiſe. *Moor* 858. *Harcourt* verſus *Wrenham.* 1 *Brownl.* 76. *S. C.* 2 *Ch. Rep.* 152. *Ratcliffe* verſus *Graves.*

13. A Woman, who was an Executrix, was poſſeſſed of a Term for Years, afterwards ſhe married, and then the Husband purchaſed the Reverſion; adjudged, that the Term was extinguiſhed as to her, if ſhe ſhould ſurvive her Husband, but that it ſhall be Aſſets in his Hands in Reſpect to all others. *Moor* 54.

14. A *Copyholder* made a Leaſe for Years of his Copyhold Lands by *Licence*; the Leſſee died, this ſhall be Aſſets in the Hands of his Executor or Adminiſtrator; but 'tis clearly ſo, if the Leaſe was made for *one Year*, becauſe that is a Leaſe warranted by Common Law, and not Cuſtomary. *Mich.* 2 *Car. Poph.* 188.

15. Deviſe of Lands *to his Executors to ſell*, or a Deviſe of Lands *to be ſold by his Executors*, and with the Money ariſing by ſuch Sale to pay the Teſtator's Debts, there the Money received by ſuch Sale ſhall be Aſſets; but where *Lands are deviſed to be ſold for the Payment of Debts and Legacies*, with the Money ariſing by ſuch Sale, and with his perſonal Eſtate, and the *Reſidue thereof* (after the ſame are paid) *is given* to his Executor; in ſuch Caſe the perſonal Eſtate ſhall be Aſſets, and ſhall be applied as far as it will go for the Payment of the Debts, and the Lands ſhall

not be charged any farther than to ſatisfy what the perſonal Eſtate falls ſhort, and this is in Favour of the Heir. *Hardres* 405. 2 *Vent.* 349. See (B) *pl.* 2.

16. Upon a *Bill of Review*, the Queſtion was, whether a Copyhold Eſtate deviſed to be ſold by the Executor *to pay Debts*, and afterwards ſold accordingly, ſhall be Aſſets *at Law and in Equity*, or in *Law only*, for if only *in Law*, then a Decree to make them Aſſets in Equity, without a Trial firſt had at Law, is erroneous, and it was held, that the Decree could not be reverſed, becauſe it doth not appear, whether upon the Proof, at the Hearing the Cauſe, it was Matter of Law or Equity; and after a Decree, it ſhall be intended that the Court adjudged on the Whole. *Hardres* 174. *Fanſhaw's* Caſe.

17. The Teſtator being poſſeſſed of a Leaſe for a *long Term for Years*, deviſed it to his Wife for Life, then to his eldeſt *Son* for Life, and to the Heirs Males of his Body, and made his Wife Executrix, and died very much in Debt, the Executrix proved the Will, and paid ſo many of the Debts as the Stock of the Teſtator did amount unto, and then ſhe *aſſented* to the Deviſe of the *ſaid Leaſe*, and made one *Crofts* her Executor, and ſhe died; afterwards *Crofts* entered into Articles with the Plaintiff to *ſell the Leaſe* to him for a valuable Conſideration, and was decreed to convey it accordingly, becauſe the Leaſe was Aſſets in his Hands notwithſtanding the *Aſſent* of the Executrix to the Deviſe thereof; 'tis true, by ſuch *Aſſent* it was ſo veſted in the Son, that if he had ſold the Leaſe the Sale had been good, but it not being ſold, it ſhall now remain in *Crofts* as a Truſt for the Creditors of the firſt Teſtator. 1 *Ch. Rep.* 256. *Chamberlaine* verſus *Chamberlaine*.

18. Ruled by *Holt* Ch. Juſt. that if an Executor lives in *London*, and his Teſtator had Goods at *Briſtol*, the Executor hath ſuch an immediate Poſſeſſion of thoſe Goods, that he may maintain *Trover* for them in his own Name, and the Damages recovered ſhall be Aſſets in his Hands; but if he doth not recover ſo much as the Goods are really worth, (if there is no Default in him) he ſhall anſwer for no more than he recovers; if the Goods are periſhable and are impaired, without any Default in him, either to preſerve them or ſell them at the full Value, he ſhall not anſwer for the firſt Value, but may give that Matter in Evidence to diſcharge himſelf: But if one takes Goods out of his Poſſeſſion, he muſt ſue him, that the Executor may be the better able to diſcharge himſelf in anſwering more in Aſſets than he recovers; if he neglects to ſell the Goods at a good Price, and afterwards they are taken from him, there the Value of the Goods ſhall be Aſſets in his Hands, and not what he recovers, becauſe there was a Default in him in not ſelling them when he might. *Mod. Caſes* 181, 182.

(B)

What ſhall not be Aſſets in the Hands of an Executor. See (E) pl. 1.

1. GOODS taken from the Teſtator in his Life-time are not Aſſets till recovered by the Executor, and in his *Poſſeſſion*, neither is a *Debt due to him upon Bond* any Aſſets till recovered, becauſe 'tis but a *Choſe* in Action. *Owen* 36.

2. So where the Teſtator deviſed *Lands to be ſold* by his Executor, and that the Money ariſing by ſuch Sale ſhould be diſtributed amongſt his Daughters *when they ſhould be of full Age*; the Executor ſold the Lands purſuant to the Power given him by the Will; adjudged, that the Money ſhall not be Aſſets in his Hands in the mean Time to ſatisfy Debts, becauſe *'tis limited to a particular Uſe*. 1 *Leon.* 87. *Germy's* Caſe, and 225. *S. P.* See (A) *pl.* 15. 2 *Leon.* 119. reported by the Name of *Geering's* Caſe. 2 Leon. 119. 4 Leon. 82. S. C.

3. The Teſtator *pawned* his own Goods, and his Executor redeemed them with his own Money, and *retained* them till he was ſatisfied; adjudged, that the Property was altered by the *Retainer*, he having paid to the Value, and therefore the Goods ſhall not be Aſſets in his Hands. *Keilw.* 63.

4. The Teſtator made a Leaſe of his Houſe, *&c.* rendring *Rent* to himſelf, his *Heirs or Aſſigns*, and died; after his Death, his Executor received the Rent ſeveral Years, and in an Action brought againſt him, wherein the Iſſue was, whether he had Aſſets, or not, all this Matter was found ſpecially; but adjudged no Aſſets, becauſe the Rent belonged to the *Heir*. *Dyer* 361. *Plow. Com.* 114, 259. *S. P.*

5. The Plaintiff, who was an Executor, and the Defendant, ſubmitted themſelves to an Award, and the Arbitrators awarded the Defendant to pay the Plaintiff 300 *l.* afterwards a Creditor of his Teſtator attached this Money in the Defendant's Hands, for the Debt owing by the Teſtator; but adjudged, that this was not Aſſets till the Executor had received it, and therefore the Attachment was not good. 1 *Lev.* 306. *Horſey* verſus *Turges*. 1 *Vent.* 111. *S. C.*

6. *T. S.* took a Bond *in Truſt* for another, and died; adjudged, this is not Aſſets in the Hands of his Executor; ſo where the Obligee *aſſigned* over a Bond, and covenanted not to revoke it, and died; this is not Aſſets in the Hands of his Executor. 1 *Salk.* 79. *Deering* verſus *Torrington*.

7. Leſſee for Years died, his Executor entered and received the Profits; adjudged, that they are received by him as Tertenant, and appropriated to the Uſe of the Leſſor, but what is over and above the Rent ſhall be Aſſets. 1 *Salk.* 79. *Bulkley* verſus *Pirk.* 316. *S. C.*

8. In

8. In an Attachment upon a Prohibition, the Caſe was, the Inteſtate died ſeiſed of a Meſſuage, which he held *for three Lives*; the Adminiſtrator was ſued in the Spiritual Court for a Diſtribution, and to exhibit an Inventory, which he did, but omitted the Eſtate for *three Lives*; and the Queſtion was, whether an Eſtate *pur auter vie* was diſtributable, according to the Statute 22 & 23 *Car.* 2. by Vertue of the Statute 29 *Car.* 2. *cap.* 3. and adjudged, that 'tis not diſtributable; for it remains a Freehold notwithſtanding the Statute, which ſubjects it to the Payment of Debts, but not Legacies, unleſs expreſly given out of it. 2 *Salk.* 464. *Oldham* verſus *Pickering*.

(C)

Pleadings concerning perſonal Aſſets.

1. THE Teſtator made *two Executors*, who lived in ſeveral Counties, one of them poſſeſſed all the Goods, but yet in an Action brought againſt him he could not plead *plene adminiſtravit*, becauſe Aſſets in the Hands of one Executor is Aſſets in the Hands of both; and the Jury in *one County* may *find Aſſets* in another, for 'tis their *Finding Aſſets* which is the Subſtance, and the *Place* is but Surpluſage, for if the Defendant plead *plene Adminiſtravit* at *Salisbury*, the Jury may find Aſſets at *Exceſter*, becauſe 'tis a Thing tranſitory. *Keilw.* 51. 6 *Rep.* 46. *Richardſon* verſus *Dowdale*. *Dyer* 30. *b.* See 2 *Cro.* 55.

2. But in finding Aſſets, the Jury muſt always find to what *Value*, otherwiſe 'tis void, becauſe the Plaintiff muſt recover only according to the Value of the Aſſets found, which muſt be certain, therefore to find Aſſets generally, without ſaying to what Value, is void. 1 *Roll. Rep.* 58. *Lea* verſus *Lidford*, and 214. *Evet* verſus *Sutcliffe*.

3. Where an Executor is ſued upon a *Promiſe* to pay a Legacy, in ſuch Caſe the Plaintiff need not *aver*, that the Defendant hath Aſſets in his Hands at the *Time of the Promiſe made*, becauſe it ſhall be intended, that he had Aſſets at that Time, for otherwiſe he would not have promiſed to pay the Money. 2 *Cro.* 602. *Bard* verſus *Bard*, and 613. *Booth* verſus *Crompton*. *S. P. Hutt.* 27. *Bogg* verſus *Melins*. *S. P. Poſtea*, *pl.* 5. *S. P.*

4. Debt againſt *Sir John Chicheſter* as Executor of *Windham*, who was Executor of *Lutterell*; upon a Bond of the ſaid *Lutterell*, the Defendant pleaded, that *Lutterell*, who was the firſt Teſtator, was indebted to *Windham* in 100 *l.* upon a Statute, and that after the Death of *Lutterell* his Goods, of the Value of 100 *l. came to the Hands of Windham* as his Executor, *which he adminiſtred and retained*, to ſatisfy his own Debt, and that beyond the ſaid Goods he had nothing in his Hands; the Plaintiff replied, that *Windham* had Aſſets of the Goods of *Lutterell* beyond the ſaid 100 *l. in London*, upon which they were at Iſſue, and the Cauſe was tried there, and a Verdict for the Plaintiff, that *Windham*, at the Time of his Death, had Goods and Chattels of *Lutterell*, *&c.* it was objected, that this was an immaterial Iſſue, becauſe *Windham* might *adminiſter* all the Goods of *Lutterell which came to his Hands*, and yet *Lutterell* might have more Goods, which might come to the Defendant *Chicheſter*, after the Death of *Windham*, and which never came to the Hands of *Windham*, and therefore the Defendant having ſaid nothing of any Goods of *Lutterell*'s, which came to him after the Death of *Windham*, his Plea is ill; but adjudged, that this Exception came too late after a Verdict. *Dyer* 185. *Sir John Chicheſter*'s Caſe.

5. *Aſſumpſit*, *&c.* againſt an Executor, upon the Promiſe of his Teſtator, but the Plaintiff in his Declaration did not *aver*, that the Defendant had Aſſets; and adjudged, that the Declaration was good, and that he need not make any ſuch Averment. *Cro. Eliz.* 52. *Cottington* verſus *Hulett*. *Antea pl.* 3. *S. P.* 9 *Rep.* 94. *Bane*'s Caſe. *S. P.*

6. The Defendant demurred to a Bill in Equity, becauſe it was brought to diſcover Aſſets before any Suit commenced at Law againſt him, for if an Action had been brought againſt him as Executor, *&c.* he might have confeſſed the Action or paid the Debt, but now he may be doubly vexed. *Hardres* 115. *Clough* verſus *Floyd*.

7. Debt againſt an Executor, who pleaded *plene Adminiſtravit*, the Plaintiff replied Aſſets *die exhibitionis Billæ Originalis*, (*viz.*) ſuch a Day, this Iſſue was tried in *Middleſex*, and the *Bill of Middleſex being the Original*, the Plaintiff at the Trial was required to produce it, (when in Truth it ought not to be given in Evidence) and becauſe he did not produce it he was nonſuited; and upon a Motion for a new Trial he could not prevail, for he ought to have tendered a *Bill of Exceptions to the Evidence*. *Sid.* 226. *Rogers* verſus *Rogers*.

8. Debt againſt an Executor, who p'eaded *plene Adminiſtravit*, the Plaintiff replied Aſſets *die exhibitionis Billæ*, *viz.* on the 23*d of October*, which was the firſt Day of *Michaelmas-Term*; now, if it appear upon the Evidence, that the Bill was not filed till *fourteen Days* afterwards, or within the Term, whatever the Defendant paid after the 23*d Day of October*, and before the Bill filed, ſhall be Aſſets, if it was paid in Diſcharge of any Debts of equal Degree with the Debt for which the Action was now brought. *Sid.* 432. *Man* verſus *Adams*.

(D)

What ſhall be Aſſets by Deſcent in the Hands of an Heir.

See *Abatement.* (D) 10.

1. WHere the Anceſtor enters into a Bond, and dies ſeiſed of Lands *in Fee*, which *deſcend* to his Heir as ſuch, thoſe Lands are *real Aſſets* and liable to ſatisfy the Debts of the Anceſtor, and they are called Aſſets by Deſcent; and formerly the Law was, that if the *Heir* had ſold or aliened the Land before the Bond was put in Suit, the Debt was loſt, to prevent which the Statute 3 & 4 *W. & M. cap.* 14. was made, by which Statute the *Heir* is made liable *to the Value of the Land by him ſold, in an Action of Debt to be brought againſt him by the Obligee, in which he ſhall recover to the Value of the Land, as if the Debt was the proper Debt of the Heir; but the Land which is ſold or aliened,* bona fide, *before the Action brought, ſhall not be liable to any Execution upon a Judgment recovered againſt the Heir in any ſuch Action.*

2. The Father bound himſelf and *his Heirs* in a Bond, and died, leaving Iſſue two Sons; the eldeſt of them entered on the Lands as Heir at Law to the Father, and he died without Iſſue, and then the youngeſt Son entered; and in an Action of Debt brought againſt him upon this Bond, it was adjudged, that he ſhould be charged with Aſſets as Heir to his Father, notwithſtanding the intermediate Deſcent of the Lands to his elder Brother. *Dyer* 368.

3. So where the Father ſettled his Lands to the Uſe of himſelf for Life, Remainder to his *eldeſt Son in Tail Male*, Reverſion to his own right Heirs, and died, leaving Iſſue two Sons, the eldeſt who was *Tenant in Tail*, entered, and had Iſſue one Son, and died, which Son died without Iſſue, ſo that the Eſtate-tail was ſpent, then the *youngeſt Son* of the Father entered; adjudged, that theſe Lands ſhall be Aſſets in his Hands to anſwer the Father's Debts; and the ſole Queſtion was, whether he ſhould be charged as Heir to his Father, without naming the intermediate Deſcent to his elder Brother and Nephew. 3 *Lev.* 286. *Kellow* verſus *Rowden.* 3 Mod. 253.

4. Where a *Ceſtui que Truſt* dies and leaves a *Truſt* to deſcend to his Heir, this ſhall be Aſſets by Deſcent, but 'tis by Vertue of the Statute 29 *Car.* 2. *cap.* 3. for before that Act was made, a Truſt of Lands deſcending upon an Heir, was not Aſſets even in Equity; but now ſuch an Heir ſhall be liable for the Debt of the Anceſtor, as if the Eſtate had deſcended to him in Poſſeſſion and not in Truſt. 1 *Chancery Rep.* 12. *Bennet* verſus *Box.*

The like Law of an Eſtate *pur auter vie*, (*viz.*) it ſhall be Aſſets in the Hands of the Heir, if it come to him by Reaſon of any ſpecial Occupancy, and if not, it ſhall go to the Executors or the Adminiſtrators of Party that had the Eſtate by Vertue of the Grant made, it ſhall be Aſſets in his Hands.

(E)

What ſhall not be Aſſets by Deſcent.

1. A Leaſe was made, rendring Rent to the Leſſor, his *Heirs or Aſſigns*; the Leſſor died, and his Executor received the Rents for ſeveral Years after the Death of the Leſſor, this ſhall not be Aſſets, becauſe it belonged to the Heir. *Dyer* 361.

2. A *Reverſion in Fee* expectant upon an * *Eſtate-tail* ſhall not be Aſſets, becauſe 'tis in the Power of the Tenant in Tail in Poſſeſſion to bar it when he will, but when the Eſtate-tail is ſpent, then 'tis Aſſets by Deſcent. 6 *Rep.* 58. *b.*

* *But if 'tis expectant upon an Eſtate for Life or Years, 'tis Aſſets.*

3. Therefore where the Jury found, that the Heir had ſeveral Lands and *Tenements* by Deſcent, the Verdict was incertain, becauſe it may be true, and yet the Heir may not have Aſſets, becauſe a Reverſion expectant upon an Eſtate-tail is a *Tenement*, and yet that is not Aſſets. *Ibid.*

4. Where a *Copyhold of Inheritance* deſcends to an Heir, this ſhall not be Aſſets, becauſe 'tis an Inheritance *created by Cuſtom*, and the Deſcent is directed by the Common Law, but it doth not allow any other collateral Qualities which do not concern ſuch Deſcent, and which are proper to other Inheritances at Common Law. 4 *Rep.* 22. *a.*

5. The Father being ſeiſed of Lands in Fee, deviſed them to his Son and Heir in Fee *upon Condition* that he ſhould pay his Debts within a Year; and if he failed, that then his Executors ſhould have all, and pay his Debts; 'tis true, the Heir had a Fee-ſimple by this Deviſe, but being obliged by this *Condition* to pay his Father's Debts, he hath the Lands as a *Purchaſer*, and therefore they ſhall not be Aſſets by *Deſcent.* *Cro. Car.* 161. *Gilpin*'s Caſe.

(F)

Pleadings in Caſes of Aſſets by Deſcent. See *Heir.* (D) per totum.

1. DEBT againſt an Heir upon the Bond of his Anceſtor, he pleaded *Riens per Deſcent* in Fee-ſimple from his Father but *ſixteen Acres of Land*, and demanded Judgment if he ſhould be farther charged, than to the Value of thoſe Lands, and Judgment was given accordingly, that he ſhould be no further charged, but it was likewiſe adjudged, that if he had not confeſſed the Action, and ſhewed the *Certainty of the Aſſets deſcended* to him, but had pleaded *Riens per Deſcent* only, or if a Judgment had been againſt him by Confeſſion, or by any Defect in Pleading, in ſuch Caſe the Plaintiff ſhall have Judgment and Execution of all his Lands, or a *Ca. Sa.* to take his Body, as if it had been his own Debt. *Plow. Com.* 440. *Davis* verſus *Pepps. Hill.* 2 *Ed.* 6. *Dyer* 81. *S. P. Hill.* 41 *Eliz. Barker* verſus *Brown. S. P. Cro. Eliz.* 692.

2. Debt againſt the Heir upon a Bond of his Anceſtor, and the Plaintiff had Judgment by *Nil dicit*; and upon a *Sci. fa.* to have Execution, the Defendant pleaded *Riens per Deſcent* in Fee-ſimple at the Time of the Writ brought, or after; adjudged, that after a Judgment by *Nil dicit*, or Confeſſion, *&c.* the Heir comes too late to plead *Riens per Deſcent*, *&c.* for he ought to have pleaded that firſt. *Dyer* 344. *Henningham's* Caſe.

3 Bulſt. 317. Palm. 419. 3. But *Anno* 1 *Car.* both theſe Caſes were denied to be Law, (*viz.*) The Teſtator obtained a Judgment againſt *G. D.* and made his Wife Executrix and died, ſhe alſo having made an Executor, died, then *G. D.* the Creditor died, and the Executor of the Wife brought a *Scire facias* againſt his Heirs, who pleaded *Riens per Deſcent*, *&c.* of *G. D.* and it was found, that he had two Acres and an half by Deſcent, *&c.* it was thereupon moved, that there might be a general Judgment againſt the Defendant, as well of his own Lands as of thoſe he had by Deſcent, becauſe his Plea was falſe; but adjudged, that Execution ſhall be only of a Moiety of thoſe Lands which were found to deſcend to him, for it ſhall be no otherwiſe againſt him than it would have been againſt his Anceſtor, even if the Judgment had been by *Nil dicit*, or by Confeſſion; but in the principal Caſe, the Lands deſcending from *G. D.* to the Heir, ſubject to the Payment of a *Judgment*, come to him with a Charge, and therefore he cannot be ſued as *Heir*, becauſe he comes in as a *Purchaſer. Poph.* 193. *Bowyer* verſus *Rivitt. See* Execution. (G) 6. *S. C.*

4. In a Formedon, the Defendant pleaded in Bar a Warranty with Aſſets; the Plaintiff replied, *Riens per Deſcent*, upon which they were at Iſſue, and the Jury found, that the Anceſtor of the Defendant, whoſe Warranty was pleaded in Bar, was ſeiſed of the Lands in Nature of *Gavelkind*, and by his Will deviſed them to his two Sons, equally to be divided between them, and to their Heirs, and that the Defendant was his eldeſt Son; adjudged, that this was not Aſſets by Deſcent. 1 *Leon.* 315. *Beare's* Caſe.

(G)

Pleadings of other Aſſets, good, and not good.

1. DEBT againſt an Executor upon a Bond of the Teſtator; the Defendant pleaded, that his Teſtator became bound to the Plaintiff in a Statute of 2000 *l.* conditioned, that whereas the ſaid Plaintiff had covenanted to aſſure ſuch Lands to the Uſe of himſelf for Life, Remainder to the right Heirs of the Teſtator, that if he performed the ſaid Covenant, then the Statute ſhould be void, and aſſigned the Breach in Non-performance; and averred, that he had Aſſets *die impetrationis Billæ*, but did not ſay *nec unquam poſtea*, *&c.* and this was adjudged an incurable Fault. 2 *Cro.* 131. *Gawen* verſus *Rolls.*

Aſſignment.

Where, and of what Things it ſhall be good. (A)
Where, and of what Things it ſhall not be good. (B.
Who ſhall be an Aſſignee, and what Actions he ſhall have. (C)
Who ſhall not be an Aſſignee. (D)
Of Actions of Debt for Rent againſt Aſſignes, and by what Covenants they are bound; and where Executors and Adminiſtrators ſhall be bound after an Aſſignment of the Term. (E)
By what Covenants he is not bound, and where Executors and Adminiſtrators ſhall not be bound *after the Aſſignment of the Term.* (F)

(A)

Where, and of what Things it ſhall be good.

1. ADjudged, that where Leſſee *for Years* of the *Crown* is put out of his Eſtate by a Stranger, yet he may aſſign the Term, tho' he is not in Poſſeſſion, becauſe the Reverſion being in the Crown, he cannot lawfully be put out of Poſſeſſion, but at his own Will. *Cro. Eliz.* 275. *Wingate* verſus *Marks.*

2. Adjudged, that a *Duty*, which is not naturally a *Debt*, but by *Circumſtances* only; as a Debt upon a Bond to ſave another harmleſs, or for Performance of Covenants, which are not Debts till the Party is damnified, or the Covenants broken, yet theſe Bonds may be aſſigned to the Crown for a Debt; but Execution ſhall not be taken againſt the Obligors, until a *Sci. fa.* is brought againſt them to ſhew Cauſe why ſuch an Aſſignment ſhould not be made. 2 *Leon.* 55. *Beaumont's* Caſe.

3. *A Leaſe was made for Years* to commence after the Death of the Tenant for Life then in Poſſeſſion, and after his Death a Stranger entered, and the Leſſee aſſigned his Leaſe; adjudged, that the Aſſignment was good notwithſtanding the Entry of the Stranger; but if the Leſſee himſelf had firſt entered, and had afterwards been put out, he could not have made an Aſſignment till he had re-enter'd. *Cro. Eliz.* 15. *Bruerton* verſus *Rainsford.*

4. Adjudged, that a Bond may be aſſigned to the Queen, without enrolling it, and where the Obligee is not indebted to her; but it cannot be aſſigned to a ſubject unleſs for a Debt due by the Aſſignor to the Aſſignee. 4 *Leon.* 9, 80.

5. *Judgment* in an Action of Debt againſt a *Leſſee for Years*, who *after the Judgment aſſigned his Term*, and then, after a Year, he who had obtained the Judgment brought a *Sci. fa.* to have Execution; adjudged, that if the Aſſignment was made *bona fide*, it ſhall be good, and the Term not liable to this Execution; but if the Leſſee for Years had not aſſigned the Term *bona fide*, but only in Fraud to defeat the Execution, and the Aſſignee had *bona fide* aſſigned it to another, it ſhould not be liable to this Execution in the Hands of the Aſſignee of the Aſſignee. *Godb.* 161. *Wilſon* verſus *Wormall.*

6. Leaſe for Years to commence after the Death of a Leſſee for Life, who was *diſſeiſed*; but yet by that Diſſeiſin the Intereſt of the Leſſee for Years is not turned into a *Right*, but remains as it did before the Diſſeiſin, and therefore may be aſſigned. 2 *Brownl.* 224. *Stydſon* verſus *Glaſs.*

7. The Vendor ſold a Manor to another in Fee; Proviſo, that he, his Heirs and Aſſigns might dig Ore in Parcel of the Waſte, the Vendor afterwards aſſigned his Intereſt to *G. D.* for twenty-one Years, who aſſigned it to two more; adjudged, that this Aſſignment was good. *Godb.* 17. *D. Montjoy and Earl of Huntingdon.* 1 And. 307.

8. 'Tis enacted by the Statute 7 *Jac. that a Debtor to the King ſhall not aſſign any Debts to him, but ſuch as did originally grow due to the Debtor*; afterwards there was a Debtor to the Husband in 2000 *l.* by a Statute; the Husband made his Wife Executrix, and died, ſhe married again one *G. D.* who was indebted to the King, and then the Husband and Wife aſſigned this Statute to the King in Satisfaction of the Debt due to him; adjudged, that the *Aſſignment* was good, for tho' the ſecond Husband had the *Statute in Right of his Wife*, and by Conſequence the Debt was not *originally* due to him; yet becauſe he might *releaſe* the Statute 'tis the ſame Thing as if it had been *originally* taken in his Name. 2 *Cro.* 324. *Fawn's* Caſe.

9. Grant of a Rent for Life *pro conſilio impendendo* to the Grantee and his Aſſignes, payable yearly at the four Feaſts, *&c.* this Grant was aſſigned to another, who demanded the Rent on

the Land; adjudged, this Assignment was good. 7 *Rep.* 28. *Maud's* Case. 6 *H.* 8. *Dyer* 2. *contra.* See *Dav. Rep.* in the Case of Proxies.

10. *Bonds and Specialties* may be *assigned* over, and therefore where *A.* was indebted to *B. B.* was indebted to *C.* in such Case *B.* may assign the Bond of *A.* to *C.* so where there is a Bond for the Performance of Covenants in a Lease, if the Lessee assigns the Lease, he may likewise assign the Bond; but this must be before any of the *Covenants are broken*; but if any of the Covenants are broken, and the Lessee afterwards assigns the Lease and Bond, and the Assignee puts the Bond is Suit, 'tis Maintenance. *Godb.* 81. *Reynolds* versus *Truelock.*

11. *Case* against the Defendant for assigning *counterfeit Bills* of Publick Faith to the Plaintiff to the Value of 800 *l.* Upon Demurrer to the Declaration, it was insisted for the Defendant, that the Plaintiff had declared of an *Assignment of Papers*, which could not be, for those are Things in Action which are not assignable; but adjudged, that the Ordinance of Parliament gave Authority to assign such Papers. *Style* 348. *Fowke* versus *Boyle.*

12. The *Conusee of Statute* extended the Lands, and after the *Liberate* returned he *assigned* his Interest, but the Conusor still continued in Possession; the Question was, whether this in Trust was assignable? it was insisted, that it was, for before the actual Entry of the Conusee, 'tis like an *Interesse Termini*, or the Interest of one who hath a Lease to commence *in futuro*; but adjudged, that it was not *assignable*, because by the *Return of the Extent an Interest* was vested in the Conusee, and by the *Return of the Liberate* it must be intended, that he had the actual Possession, for the Sheriff returns *quod liberari feci*, so that the Estate of the Conusee is turned into a Right which may be granted; but it cannot be *assigned*, for the Conusor continuing in Possession makes a Disseisin. 2 *Salk.* 563. *Hammond* versus *Wood.*

(B)

Where, and of what Things it shall not be good. Antea (A) 12.

1. AN *Office of Trust* is not grantable or assignable to another; and therefore it was adjudged, that the Office of a *Filazer*, which was an Office of Trust, could not be assigned, and if it could not be assigned, it cannot be extended upon a Statute. 28 *H.* 8. *Dyer* 7.

2. One, who had Goods to the *Value of* 30 *l. and no more*, was indebted to one in 5 *l.* and to another in 10 *l.* and assigned all his Goods to him to whom he owed 5 *l.* to the Intent, that after he was satisfied, he would be kind to the Debtor for the Rest; adjudged, that because there was *Fraud* in Part, the Assignment shall be void for the Whole; but one Judge was of Opinion, that it shall be only void for the Residue, after the 5 *l.* paid. *Godb.* 161. *Wilson* versus *Wormall.* See 3 *Rep.* 81. *in Twyne's* Case.

3. A Lease was made to the Husband and Wife, and the Children *between them begotten, at the Assignment of the Husband*; they had then but *one Child*, and afterwards many more; the Wife died, and the Husband assigned the Lease to his *second Son*, who was born after the making the Lease, and for that Reason it was void, because the Power which the Husband had assigned extended only to such Children which he had at the Time of the making the Lease. 1 *Leon.* 287. *Cole* versus *Friendship.*

4. Adjudged, that some Things in Respect of their Nature are not assignable, or to be granted over; as for Instance, if the Donee in Tail holdeth of the Donor by *Fealty*, he cannot assign it over to another, because *Fealty* is incident to and inseparable from the Reversion; so if the *Founder of a College* grant his Foundation, tho' it be to the King, the Grant is void, because 'tis inseparable from his Blood. 11 *Rep. in Magdalen College's* Case.

5. Lessee for six Years of a *Tavern in London*, made an Under-lease thereof for three Years, in which it was covenanted between them, that the Under-lessee should in every Month during the said three Years, *account with the Lessor for all the Wine sold in that Tavern*, and should pay to him so much *per Tun*; afterwards the Lessee *assigned* the Residue of the other three Years to another, and then he required the Under-lessee to accompt, who refusing, he brought an Action of Covenant against him, who pleaded, that he had accompted to the Assignee of the three Years; and upon Demurrer to this Plea, it was adjudged against the Defendant, because this being a *collateral Covenant*, and not one which did go with the Land, it did pass by the Assignment of the three Years. *Mich.* 29 *Eliz. Godb.* 120.

4 Mod. 48. Salk. 562. 6. *B.* being seised in Fee, acknowledged a Statute to one *Studley*, who in the Year 1623, died Intestate; and about fifty-two Years afterwards, (viz.) *Anno* 1675. one *Robert Studley* administred, and sued out an Extent upon that Statute, and a *Liberate*, and before any Entry or recovering the Land by Ejectment, or otherwise, he *assigns* his Interest to the Lessor of the Plaintiff, who brought an Ejectment; adjudged, this Assignment was void, because by the *Liberate Robert Studley* had accepted the Possession, but suffering the Owner to continue in Possession so many Years after, this turned the Possession (which he (the Conusee) had accepted by the *Liberate*) *into a Right*, which is not assignable before the Possession be regained either by Ejectment or Re-entry of the Conusee. 3 *Lev.* 312. *Stephens* versus *Hanham.*

(C)

Who ſhall be an Aſſignee, and what Actions he ſhall have. (E) 3, 4.

1. THE Leſſee covenanted, that if he, his Executors or *Aſſignes*, did alien, then it ſhould be lawful for the Leſſor to enter; he made his Wife Executrix, and died, ſhe married again, and then Husband and Wife alienedthe Term; adjudged, that this ſecond Husband was an *Aſſignee in Law* of the firſt. *Paſch.* 28 *H.* 8. *Dyer* 7. Cro. Eliz. 26. 1 And. 123.

2. The Vendor covenanted with the Vendee, that if he paid to him, or to his Heirs or *Aſſigns* 100 *l.* before ſuch a Day, that he and his Heirs would ſtand ſeiſed of the Lands to the Uſe of the Vendee and his Heirs, before the Day of Payment came, the Vendor having Iſſue a Son, made his Will, and his Wife Executrix, and died; the Widow renounced the Executorſhip; adjudged, that the Word *Aſſigns* ſhall be intended Aſſigns *in Fact*, (*viz.*) Aſſigns of the Eſtate of the Vendor, who had an Eſtate aſſignable, and the Law will never ſeek for an *Aſſignee in Law* (as an Executor is) where there is an *Aſſignee in Fact*, as in this Caſe the Son was; but if the Vendor had made a *Feoffment in Fee*, and not ſold his Eſtate by a *Covenant to ſtand ſeiſed* (as in this Caſe) and if there had been a Condition in ſuch Feoffment, that the Feoffee ſhould pay the Purchaſe Money to the Feoffor her Heirs or *Aſſigns*, there, becauſe he had departed with his whole Eſtate by the Feoffment, and had nothing left but a naked Condition, which could not be aſſigned over, the Law will conſtrue what Perſon is moſt apt and capable of receiving the Money, as his *Aſſignee in Law*, and that is his Executor, becauſe he repreſents the Perſon of the Teſtator in all Goods and Chattels, and in ſuch Caſe the Feoffor cannot have an *Aſſignee in Fact*. 5 *Rep.* 97. *Goodale's* Caſe. Moor 708. Cro. Eliz. 383. S. C.

3. Leſſee for Years made an Aſſignment of *Part of his* Term, and the *Aſſignee covenanted to repair*; afterwards the Leſſee *deviſed the Reverſion* of the whole Term to another, and died, and the *Deviſee* brought an Action of Covenant againſt the *Aſſignee*; adjudged, that this Deviſee of the Reverſion was an *Aſſignee* to take the Benefit of this Covenant or Condition within the Statute 32 *H.* 8. of Conditions. *Godb.* 161. *Briſtow* verſus *Briſtow.*

4. *An Aſſignee of an Aſſignee*, an Executor or Adminiſtrator of an Aſſignee, or an Aſſignee of an Executor, are comprehended under the Word *Aſſigns*, and theſe ſhall have an Action of Covenant for a Breach of any Covenant which runs with the Land. 5 *Rep.* 16. *Spencer's* Caſe.

5. *Leſſee for Years* covenanted for himſelf and his *Aſſigns*, that he would not *lop the Trees, &c.* afterwards the Leſſee died Inteſtate, and Adminiſtration was granted to *W. R.* who lopped the Trees, *&c.* adjudged, that it was a Breach of the Covenant, for an Adminiſtrator is an Aſſignee as well as an Executor. *Moor* 44.

6. Feoffment in Fee, reſerving *Rent*, *Suit of Court*, and *Relief*, and that if the Feoffee, his *Heirs or Aſſigns*, ſhould be ſued for more Services than were reſerved, *&c.* that then they might diſtrain in the Manor of *D.* and keep the Diſtreſs till they ſhould be ſatisfied for the Damages which they had ſuſtained, *&c.* afterwards the Feoffee made a Feoffment, *&c.* to *W. R.* the Queſtion was, if *W. R.* might diſtrain in the Manor of *D.* to have Recompence for Damages, *&c.* and adjudged, that he might by Vertue of the Word Aſſigns; but if that Word had been left out, the Word *Heirs* would warrant the Diſtreſs as an Aſſignee. *Moor* 179. 2 And. 126. Eden *v.* Atherton.

7. *Leſſee for Life* made a Leaſe for ſeventeen Years, who in the next Year aſſigned the Term to *B.* who made a Leaſe to *W. B.* for fourteen Years, rendring Rent on certain Days, and if it be behind for three Days after, being lawfully demanded, and not paid, the Leaſe ſhall be void; he in the Reverſion for ſeventeen Years, granted all his Eſtate and Intereſt by Deed Parol to one *Rowland*, who demanded the Rent, and entered for Non-payment; one Queſtion was, whether at *Common Law*, without the Help of the Statute 32 *H.* 8. *of Conditions*, the Aſſignee of him in Reverſion could take the ſame Advantage of this Leaſe, being void, as the *Aſſignee of the Term* himſelf might have done, who granted the Leaſe for fourteen Years? and adjudged, that he might by the *Grant of all his Eſtate*, if it had been in Writing, and that by the *Statute* 32 *H.* 8. the Grantee of the Reverſion of a Term, ſhall have the Benefit of a Condition annexed to a Leſſer Term derived out of a Larger. *Moor* 525. *Davy* verſus *Matthews.* Rent. (A) 17. *S. C.*

8. Leſſee for twenty Years made a Leaſe for four Years to *W. R.* in which he covenanted to deliver up the Land peaceably to the Leſſor, his Executors, Adminiſtrators or Aſſigns, at the End of the Term; afterwards the Leſſor for twenty Years granted the Reverſion of that Term (after the Expiration of the four Years) to the Plaintiff, to whom the Leſſee for four Years attorned, and afterwards an Action of Covenant was brought againſt him by the Aſſignee of the Reverſion, and the Breach aſſigned was, that he had not delivered up the Land peaceably at the End of the four Years: The Defendant confeſſed both the Leaſes of twenty Years and four Years, but pleaded, that before the Aſſignment of the Reverſion to the Plaintiff, he the ſaid Defendant, had aſſigned over the Term for four Years to another; and upon Demurrer adjudged, that the *Aſſignee of a Reverſion of a Term* ſhall take Advantage of a Covenant againſt the Leſſee of an inferior Term, by Vertue of the Statute 32 *H.* 8. *Moor* 527. *Mathuris* verſus *Weſtoray.* *Poſtea* Repairs. (A) 5. *S. C.*

9. Leſſee for ninety Years covenanted with the Leſſor, that he would not alien, *&c.* unleſs to his Wife, or her *Aſſignes* during her Life; in this Caſe the Queſtion was, that ſince the Husband could not alien to his Wife, becauſe *during the Coverture* he cannot give any Thing to her, whether 1 Roll. Rep. 68, 389.

* 2 Mod. 93. ther, if he *deviſed* it to her for Life, ſuch a * *Deviſee* was an *Aſſignee* within this Covenant? the Point was not reſolved. 2 *Bulſt.* 292. *Fox* verſus *Witchcott.* 1 *Roll. Rep.* 389. That ſhe is an Aſſignee.

W. Jones 305. 10. Husband and Wife were ſeiſed of Lands to them and the *Heirs of the Husband*, and they made a Leaſe thereof to the Defendant, who covenanted with them and the *Heirs of the Husband to repair*; afterwards the Husband and Wife aſſigned the Reverſion to the Plaintiff, who as *Aſſignee to the Husband alone*, brought an Action of Covenant againſt the Leſſee for not *repairing*, without averring, that the Wife was dead; it was objected, that the Plaintiff having an Eſtate from both Husband and Wife, he ſhould have brought the Action as Aſſignee to both; but adjudged, that it was well brought as Aſſignee to him who had the Inheritance. *Cro. Car.* 285. *Major* verſus *Talbot.*

11. Leſſee for Years covenanted for himſelf and his *Aſſigns to pay the Rent*, ſo long as he or they ſhall be in Poſſeſſion of the Lands demiſed; he afterwards aſſigned his Term to another; the Leaſe expired, and the Aſſignee continued in Poſſeſſion, the Rent became due after the Term ended, and the Leſſor brought an Action againſt the Aſſignee; adjudged, that tho' he is not an Aſſignee ſtrictly within the Rules of Law *after the Term was ended*, yet he ſhall be ſuch an Aſſignee as ſhall be liable to perform the Covenant for Payment of Rent. *Style* 407. *Bromfeild* verſus *Williamſon.*

12. *Leaſe for Years*, reſerving Rent; the Leſſor *aſſigned the Reverſion*, and the Aſſignee brought an Action of Covenant againſt the Leſſee; the Queſtion was, whether it ought to be brought in *the County where the Lands lie*; it was argued, that the Action is tranſitory, becauſe the Statute 32 *H.* 8. *cap.* 34. which gives the Action of Covenant to an *Aſſignee of the Reverſion*, ſaith, that he ſhall have the Action *in like Manner as the Leſſor might*: Now, if it had been brought by the Leſſor, it had been tranſitory; on the other Side it was argued, that the Statute did not give the Remedy as a meer *Choſe in Action*, which is tranſitory; but it was to knit it to the Reverſion, and that by the Words, that the Aſſignee of the Reverſion ſhall have Action *in like Manner as the Leſſor might* (*i. e.*) *the like Remedy in Subſtance. Adjornatur.* 1 *Vent.* 10. *Nurſtie* verſus *Hall.* 1 *Saund.* 230. *S. C. Sid.* 401. 3 *Lev.* 394.

(D)

Who ſhall not be an Aſſignee.

Yelv. 9. Moor 666. Cro. Eliz. 840. Aſſets. (A) 10. Owen 125. 1. LEaſe to *B. G*, for eighty Years, if he ſhould ſo long live, Remainder after his Death to his *Executors or Aſſigns* for forty Years; afterwards the Leſſee died *Inteſtate*, and Adminiſtration was granted to his Widow, who by Vertue thereof claimed the Term of forty Years, and being diſturbed, ſhe brought an Action on the Caſe; adjudged, that an *Adminiſtrator* is not an *Aſſignee*, for he is appointed by the *Ordinary*, and *Aſſigns* muſt be by the Act of the Party himſelf, and not by a Stranger. *Owen* 125. *Sparke* verſus *Sparke. Poſtea* Purchaſe. (B) 2. *S. C.*

2. In a *Warrantia Chartæ, &c.* there was a Demurrer, and it was adjudged, that the Word *Heirs* doth not imply *Aſſignes*, becauſe he is Heir who comes to a Thing by Deſcent, which is the Act of God, by the Death of the Anceſtor; but an Aſſignee is he who comes to the Thing by the Act of the Party; and ſometimes an Aſſignee, tho' appointed by the Party, hath his Authority from another as an Executor. 1 *And.* 299. *Yaxley* verſus *Kemp.*

3. The Condition of a Bond was, that the Obligor ſhould *pay* 20 *l.* to ſuch Perſon, or his *Aſſigns*, as the Obligee ſhould by her laſt Will *appoint*; in an Action of Debt brought againſt the Obligor by the Executors of the Obligee, he pleaded, that the Obligee did not appoint any Perſon to receive the Money; the Plaintiffs replied, that ſhe made her Will by which they were appointed her *Executors*; and upon Demurrer to this Replication, it was adjudged, that this Money is not payable to the Plaintiffs as *Executors*; for tho' it is true, that where a teſtamentary Thing is to be done to a Man, or his *Aſſigns*, it muſt be done to the *Executor* where there is no *actual Aſſignee*, becauſe the Word *Aſſigns* ſtands indifferent as well to *Aſſigns in Fact as in Law*; yet in this Caſe the Word *Aſſigns* muſt neceſſarily intend *Aſſigns in Fact*, and not in *Law*, as an Executor is, and the rather, becauſe the Word *to pay*, carrieth a Property with it, (*viz.*) that the Money muſt be paid to the proper Uſe of that Perſon who ſhall be appointed to receive it. *Hob.* 9. *Peaſe* verſus *Styleman.*

4. Leaſe for Years of Lands, rendring Rent, with a Clauſe of Re-entry for Non-payment, he in the *Reverſion* levied a Fine thereof to the Father, who before any *Attornment*, *aſſigned* the ſaid Reverſion to his Son and Heir, to whom the Leſſee for Years *attorned*; the Rent was in Arrear, and the Son entered; adjudged, that his Entry was lawful by Vertue of the Statute 32 *H.* 8. *of Conditions*; for tho' his Father could not take Advantage of the Breach of the Condition for Non-payment of the Rent, becauſe he was no compleat Aſſignee, for Want of the * Attornment of the Leſſee; and when a Statute ſpeaks of *Aſſigns*, it ſhall be intended ſuch which are compleat, and have all the Incidents of Aſſigns; yet here the Son was a compleat Aſſignee within the Statute, becauſe there was an actual Attornment made to him. 5 *Rep. Mallorie's* Caſe.

* *Attornment is taken away by Statute* 4 & 5 Annæ *for Amendment of the Law.*

(E)

Of Actions of Debt for Rent againſt Aſſigns, and by what Covenants they are bound, and where Executors and Adminiſtrators ſhall be bound after an Aſſignment of the Term. See *Debt.* (B) per totum.

1. THE Leſſee covenanted for himſelf, his Executors and Adminiſtrators, to leave fifteen Acres every Year for Paſture, without Plowing it, and afterwards he *aſſigned* his Leaſe to the Defendant, againſt whom an Action of Covenant was brought for not leaving fifteen Acres in Paſture, *&c.* and upon a Demurrer to the Declaration it was inſiſted for the Defendant, that he was not bound by this *Covenant*, becauſe he was not *Aſſignee* of the Leſſee, who had covenanted only for his *Executors and Adminiſtrators*, and not for his *Aſſigns*, for they were not * named in the Covenant: But adjudged this Covenant binds them, tho' not named, becauſe 'tis *for* † *the Benefit of the Eſtate*; but it had been otherwiſe if it had been to do a collateral Act, as to build *de novo*, or the like, for in ſuch Caſe the Aſſigns of the Covenantor are not bound, unleſs named. 2 *Cro.* 125. *Cockſon* verſus *Cox.* *Godb.* 69. *Baker* verſus *Fletcher.* *S. P.*

Lemmon. 5 Rep. 24. Dean and Chapter of Windſor *v.* Hide. Moor 399. S. C.

* Poſtea 3.

† Dyer 27. Abbot of Weſtminſter *v.*

2. Where the *Executor of a Leſſee aſſigns the Term*, Debt will not lie againſt him for Rent incurred after the Aſſignment, becauſe there is neither *Privity of Contract* between the Leſſor and the Executor, *before the Aſſignment*, nor *Privity of Eſtate* after the Aſſignment, and this was * *Overton* and *Syddall's* Caſe: But where the *Leſſee himſelf* aſſigns his Leaſe, in ſuch Caſe the *Privity of Contract* ſtill remains between him and the Leſſor, tho' the *Privity of Eſtate* is gone by the Aſſignment, and therefore notwithſtanding that Aſſignment, he ſhall be chargeable *during his Life*, but after his Death the * *Privity of Contract* is likewiſe determined. 3 *Rep.* 24. *Walker's* Caſe.

Moor 351. S. C.

* Poſtea (F) 2. S. C.

* Poſtea 7. *That 'tis not gone by the Death of the Leſſee.*

3. The Statute 32 *H.* 8. *enables Grantees of Reverſions to enter for Conditions broken, and to bring Actions of Covenant*, &c. *and alſo enables the Tenants of particular Eſtates as for Life*, &c. *to have Actions of Covenants againſt their Grantees*; the Queſtion was, if a Leſſee for Life covenant for himſelf, his *Executors and Adminiſtrators*, to build a Wall on the Lands, and afterwards he aſſigns the Eſtate to *W. R.* whether he or the Grantee of the Reverſion may have an Action of Covenant againſt *W. R.* * the Aſſignee, if the Wall is not built; and adjudged, that he may, tho' the Word *Aſſigns* was not in this Covenant, but only *Executors and Adminiſtrators*; for by the Acceptance of the Poſſeſſion he had made himſelf ſubject to all the Covenants which run with the Land, and are inherent to it, ſuch as *paying Rent*, *Repairing*, *building Walls*, *&c.* and to ſuch he is bound without the ſpecial Word *Aſſigns*, but not to any collateral Covenants. *Moor* 159.

* 1 And. 82. Iſted *v.* Stanley. S. P.

4. Leſſee for *forty Years* made a Leaſe for *three Years* to one *Calice*, wherein he covenanted, that he would keep a Wine Cellar and ſell Wine there, and *accompt* every Month, upon Requeſt, to the Leſſor *or his Aſſigns*, for all Wines ſold, and would *pay him* 30*s.* for every Tun ſold; the Leſſor granted the Reverſion to *W. R.* who required *Calice* the Leſſee *to accompt*, *&c.* and upon his Refuſal brought an Action of Debt upon the Bond for Performance of Covenants; and upon Demurrer it was objected, that the Grantee of the Reverſion could not have this Action, becauſe *to accompt* is a collateral Benefit, and therefore not within the Statute 32 *H.* 8. for the Money ariſing upon the Accompt is not *a Rent*, or a Thing incident to the Reverſion; on the other Side it was argued, that tho' 'tis not a Rent, yet 'tis an Advantage inherent to the Thing demiſed, ſo that the Grantee of the Reverſion is aided by the Statute, for tho' this Payment is collateral, yet it paſſes to the Aſſignee by the Word Aſſigns. *Moor* 243. *Purfrey's* Caſe.

5. In a Special Verdict in an Action of Debt for Rent, the Jury found, that the Leſſor being ſeiſed both of Freehold and Copyhold Lands, made a Leaſe of both to *W. R.* rendring Rent, *W. R.* the Leſſee *aſſigned the Term* to the Defendant; and afterwards the Leſſor by a Grant of the Freehold and Surrender of the Copyhold, conveyed the *Reverſion to the Plaintiff*, but firſt he made a * *Releaſe to W. R. the Leſſee* of all Demands; and in an Action of Debt for Rent brought by the *Grantee of the Reverſion* againſt the *Aſſignee of the Term*, the Queſtion was, whether the Rent was *extinguiſhed* by this *Releaſe*, and adjudged that it was not, becauſe the *Releaſe* was made *after* the Aſſignment of the Term; 'tis true, it was made *before* the Grant of the Reverſion, but it being after the Aſſignment of the Term, the Leſſor in ſuch Caſe had his Election, either to charge the *Leſſee or Aſſignee*, and it ſhall be intended that he would have charged *the Aſſignee* for Rent incurred after the Releaſe given to the Leſſee. *Moor* 544. *Collins* verſus *Harding*, for the other Point, ſee *Rent.* (A) 5. *S. C.*

Cro. Eliz.

* Poſtea, (F) 10.

6. Debt for Rent againſt an Executor, who pleaded an Aſſignment of the Term, and an *Acceptance* of the Rent of the Aſſignee by the Leſſor, the Parties were at Iſſue upon the *Acceptance*, and the Plaintiff had a Verdict, but he could never get Judgment, becauſe Part of the Rent became due pending the Action. *Palm.* 524. *Trefrey* verſus *Rouſe.*

7. An

1 Lev. 127. S.C.

7. An Action of Debt was brought by the Leſſor againſt the *Adminiſtrator of the Leſſee*, who pleaded, that before any Rent became due, he aſſigned the Term to another; and upon a Demurrer to this Plea it was adjudged, that the *Adminiſtrator* ſhould be charged in an Action of Debt in the *Detinet*, upon the Contract of his Inteſtate, and ſhould pay as far as he had Aſſets, tho' he had aſſigned over the Term, becauſe the *Privity of Contract* ſtill remained between the Leſſor and ſuch Adminiſtrator of the Leſſee; and this was *Helier* and *Casbara's* Caſe. *Sid.* 266. 2 *Vent.* 209. * *Coghill* verſus *Freelove. S. P.*

* 3 Mod. 325. S. C.

8. Leaſe for *ninety-nine Years*, if *three Lives* ſo long ſhou'd live; this Leaſe was aſſigned to the Defendant, there being a Rent reſerved upon it, and the Reverſion after the Determination of the Eſtate for Lives was granted to the Plaintiff, who brought an Action of Debt againſt *the Aſſignee of the Term*, for the Rent; and upon a Demurrer to the Declaration the Plaintiff had Judgment, not upon the Merits, but becauſe the Defendant did not argue his Demurrer; the Fault in the Declaration was, that ſince the Plaintiff was entituled to the Rent as a *Grantee of the Reverſion*, he ought to be ſo named in the Writ, which he was not. 1 *Lutw.* 478. *Nicholls* verſus *Tymms.*

9. In Covenant, *&c.* for Non-payment of Rent, the Plaintiff declared, that the *Lady Purbeck* was ſeiſed of the Lands in Fee, and that ſhe demiſed the ſame to the Defendant, who covenanted to pay, *&c.* and that afterwards the ſaid Lady, by Indenture, for *the Conſideration therein mentioned, granted the Reverſion to the Plaintiff*, to which Grant the Defendant *attorned*, and for Rent arrear this Action was brought in the County where the Lands lie, as it ought, and by the *Grantee of the Reverſion againſt the Leſſee*, with a *profert hic in Curia Indenturam*, but it was not entered *in hæc verba*; the Defendant pleaded, that he *aſſigned* his Term to *T. S.* before the Plaintiff had any Intereſt in the Lands, but did not ſet forth, that the Plaintiff *accepted the Rent from the Aſſignee, or that he had any Notice of the Aſſignment*; and upon a Demurrer to this Plea it was adjudged ill, becauſe the Action lies by the Grantee of the Reverſion againſt the Leſſee, even after the Aſſignment of the Term, and this upon his expreſs Covenant to pay the Rent: But becauſe the Plaintiff did not declare *to whoſe Uſe the Grant of the Reverſion was*, nor upon *what Conſideration*, but only generally, upon Conſideration in the Indenture mentioned, the Judgment was ſtayed. 3 *Lev.* 233. *Edwards* verſus *Morgan. See* * Adminiſtration. (G) 20. *See* (F) *pl.* 5. See *Thurlby* verſus *Plant. S. P.*

* Batchelour v. Gage. (F) 11. S.C.

(F)

By what Covenants he is not bound, and where Executors and Adminiſtrators ſhall not be bound, after the Aſſignment of the Term. See *Nomine Pœnæ.* (A) 2.

2 And. 133. Moor 600.

1. A Leaſe was made to one, who afterwards died Inteſtate, and an Action of Debt was brought againſt the Defendant as Adminiſtrator, for Rent arrear after the *Death of the Inteſtate*; the Adminiſtrator pleaded, that before any Rent became due he *aſſigned the Term* to another, and that the Leſſor had Notice thereof, and afterwards had *accepted Rent of the Aſſignee*; and upon Demurrer to this Plea it was adjudged, that the Adminiſtrator was no longer chargeable after he had made *this Aſſignment. Cro. Eliz.* 715. *Marrow* verſus *Turpin. Antea* Acceptance. (C) 1. *S.C.*

Poph. 120. Goldsb. 120. Poſtea Rent. (B) 1. S.C. Antea (A) 2. S.P.

2. Leaſe for Years made by a *Prebendary*, rendring Rent, the Leſſee died, and his Executor *aſſigned* the Term, and in an Action of Debt brought againſt that Executor for Rent incurred *after the Aſſignment*, it was adjudged, that ſuch Action would not lie, 'tis true, the Executor would have been chargeable if he had not made *this Aſſignment*; not upon any *Privity of Contract*, for there was none between him and the Leſſor, but upon a *Privity in Law*, as having the Eſtate of the Leſſee, if he had not aſſigned it to another, but by the Aſſignment the Privity of Eſtate was gone from him. *Cro. Eliz.* 555. *Overton* verſus *Sydall.*

3. Leaſe of a *Stock of Cattle*, and the Leſſee covenanted for himſelf and *his Aſſigns*, to deliver them at the End of the Term in as good a Condition as he found them, or to pay ſo much Money, and afterwards the Leſſee aſſigned both the Term and the Stock to another; adjudged, in an Action brought againſt the *Aſſignee*, that he was not bound by this Covenant of his Leſſee, becauſe 'tis a *perſonal Contract* between him and the Leſſor, and therefore it binds only the Leſſee, and thoſe who repreſent him, which are his *Executors and Adminiſtrators*, but not his *Aſſigns*, becauſe there is no *Privity of Contract* between them and the Leſſor, this is the third Reſolution in 5 *Rep.* 16. *b. Spencer's* Caſe.

4. Leſſee for Years covenanted with the Leſſor to pay yearly during the Term, 20 *s. to the Church-wardens* of the Pariſh-Church of *S.* and to repair the Houſes, *&c.* he afterwards aſſigned the Term; and in an Action brought againſt the Aſſignee for Non-payment of the yearly Rent, there was Judgment againſt him; but upon a Writ of Error it was reverſed, becauſe the Covenant for Payment of this Rent being not to the *Leſſor himſelf* but to the *Church-wardens*, *&c.* 'tis for that Reaſon a meer *collateral Covenant*, and therefore the Aſſignee is not chargeable with it. 2 *Cro.* 439. *Mayhoe* verſus *Birkett. Poſtea* Damages. (F) 9. *S.C.*

2 Vent. 234. 4 Mod. 71. Shower 340. 1 Salk. 81.

5. *Leaſe for Years* rendring Rent, the Leſſee died, *his Executrix aſſigned the Term* to another; and in an Action of Debt for Rent brought againſt *the Aſſignee*, he pleaded, that before any Rent

became due he assigned the Term to another; adjudged, that the Action did not lie, because, when the Executor of the Lessee made an Assignment of the Term, the *Privity of Contract* was gone, for there could be none between the Lessor and the *Assignee of the Executor* of the Lessee; and when that *Assignee had made a farther* * *Assignment* to another, then the *Privity of Estate* was likewise gone, so that there was nothing to support the Action. 3 *Lev.* 295. *Pitcher* versus *Tovey.* † *Kighly's* Case. *Sid.* 338. *Raym.* 162. *Lev.* 215. denied to be Law. See *Pennant's* Case. See *Whitchot* versus *Fox.*

* *And that Assignment was compleat without Notice.* † *That was upon Point of Notice.*

6. *Lessee for Years* covenanted to *repair, &c.* and afterwards he assigned the Term, and the Lessor likewise *assigned the Reversion*; adjudged, that the *Assignee of the Reversion* shall maintain an Action of *Covenant* against the *Lessee* himself, or against the Assignee for not *repairing*, because this is a Covenant which runs with the Land, and not a collateral Covenant. 2 *Cro.* 399. *Brett* versus *Cumberland.* *Postea* Repairs. (B) 4. *S. C.* Godb. 271.

7. *Lease for Years*, rendring Rent, the Lessor assigned the *Reversion* to the Plaintiff, who brought an Action of Debt for Rent; the Defendant pleaded, that the Lessor demised the Land *prout, &c.* and that by the same Deed he covenanted with the Lessee, that if he should be at any Charge for Issues lost, in such Case he should *retain* so much of the Rent as he should be forced to pay; then he set forth, that Issues were lost, and that the Sheriff levied so much, *&c.* and that he retained the like Sum of the Rent; and upon Demurrer to this Plea, the Question was, that this Action being brought by the *Assignee of the Reversion* against the *Assignee of the Term*, whether such an Assignee could have any Remedy upon this Covenant by Way of *Retainer*; and adjudged, that he might, both at Common Law, and by the Statute 32 *H.* 8. because it was a Covenant which runs with the Land. *Cro. Car.* 97, 137. *Baylie* versus *Offord.* *Owen* 151. *Dennis* versus *Jennings.* *S. P.* *See* W. Jones 242. Baylie *v.* Hughes.

8. Feoffment, *&c.* in which the Feoffor covenanted *to make farther Assurance*; afterwards the Feoffee assigned his Interest to the Plaintiff, who brought an Action of Covenant against the Feoffor for not levying a Fine to make a farther Assurance; adjudged, that the *Assignee* should have the Benefit of this Covenant, because it runs with the Lands. *Cro. Car.* 361, 503. *Middlemore* versus *Goodale.* *Postea* Release. (B) 16. *S. C.*

9. *Covenant, &c.* in which the Plaintiff declared, that he made a Lease to the Defendant 1 *Novemb.* 29 *Car.* 2. *for sixteen Years*, and that the Defendant covenanted not to build upon a certain Parcel of the Ground demised to him, and assigned the Breach, that he did build thereon; the Defendant pleaded, that the Plaintiff was possessed, *&c.* for a Term of thirty Years, made to him by the *Mayor of London*, and being so possessed, demised to the Defendant for sixteen Years, and that afterwards, but before the Breach assigned, the Plaintiff *granted the Reversion* to *T. S.* to which the Defendant attorned; and upon a Demurrer to this Plea, the Question was, whether by the *Grant of the Reversion* this Covenant did pass to the Grantee, or whether it still remained with the Grantor, for if it did not, then he could not bring this Action; now, if the Covenant remained with the Grantor or Assignor, and only a Right of Action to sue thereupon by the Grantee or Assignee, by Vertue of the Assignment, and of the Statute of *H.* 8. then the Action may be brought, either by the one or the other, but not by both; it was insisted for the Plaintiff, that this being an *express Covenant*, he may bring an Action of Covenant after the Assignment, and that is * *Middlemore* and *Goodale's* Case, to which it was answered, that it would be very inconvenient, that the Covenant should remain with the Assignor after the Assignment, for then he might release it, as was done in *Middlemore's* Case, therefore it shall be transferred to the Assignee, together with the Land by Vertue of the Assignment, and this at Common Law; 'tis true, the Statute of *H.* 8. is in the Affirmative, that the Assignee shall have an Action on the Covenant, but that must imply, that the Assignor shall not, for otherwise the Assignment would subject the Lessee to two Actions: But the Plaintiff had Judgment upon another Point, (*viz.*) The Defendant had pleaded an Assignment of the Reversion, but it did not say, that it was by Deed, and for that Reason 'tis void, notwithstanding the Attornment. 3 *Lev.* 154. *Beely* versus *Parry.* See *Harper* versus *Burroughs.* *Antea 8.

10. *Covenant by the Assignee of the Reversion* for Rent arrear after the Assignment of the Lease on which the Rent was reserved; the Defendant pleaded, that *before any Rent was due*, the Lessor had *released* to him (the Defendant) all *Covenants and Demands*; and upon a Demurrer to this Plea it was held, that this * *Release*, after the Assignment made by the Lessor, did not Bar the Assignee from this Action of Covenant, because it was a Covenant which runs with the Reversion. *T. Jones* 102. *Harper* versus *Bird.* * Antea (E) 5.

11. *In an Action of Covenant in London*, upon a Demise of Lands in *Lincolnshire*, rendring Rent, brought by the Plaintiff, who was *Assignee of the Reversion*, and the Breach assigned was, for Non-payment of Rent; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Declaration was ill, this Action being *local*, and for that Reason it ought to be brought in *Lincoln* where the Lands lie, for if it had been an *Action of Debt for Rent* brought by an *Assignee of the Reversion*, it must be brought in the County where the Lands are, because such Action is maintainable only upon the *Privity of Estate*, there being no *Privity of Contract* between the *Assignee of a Reversion and a Lessee*, and 'tis the *Privity of Contract* which makes the Action *transitory*; now, an *Action of Debt for Rent* is an Action at *Common Law*, by which Law the Rent is annexed to the Reversion, and that entitles the Assignee of the Reversion to bring an *Action of* Sid. 401. Lev. 259. Vent. 10.

Debt for it at Common Law, by Reaſon of the *Privity of Eſtate*, which is always *Local*; if therefore an *Action of Debt for Rent* may be brought by an *Aſſignee of a Reverſion*, and ſuch Action is local by Reaſon of the *Privity of Eſtate* between the Leſſee and the Aſſignee of the Reverſion, and if 'tis the *Privity of Contract* which makes an *Action of Debt tranſitory*, then, tho' by the Statute 32 *H.* 8. *cap.* 34. the ſame Advantage is given *to an Aſſignee of a Reverſion to have an Action for not performing Covenants, as the Leſſor might have*, yet that muſt be intended to have an Action for the Non-performance of ſuch Covenants which concern the * Lands demiſed, as to *repair the Fences, Houſes, &c.* ſo that the Intent of this Statute was not to transfer any *Privity of Contract* to an Aſſignee of a Reverſion, as to any *collateral Covenants* for Payment of Rent, *&c.* but only as to ſuch Covenants which run with the Lands and concern the Thing demiſed, and to annex ſuch Covenants to the Reverſion, (as the Common Law had annexed the Rent) that they might paſs like the Rent, as incident to the Reverſion, and that the Aſſignee thereof might maintain an Action of Covenant upon the *Privity of Eſtate* between him and the Leſſee; ſo that for theſe Reaſons it was inſiſted, that this *Action of Covenant was local*, and the rather, becauſe at Common Law an Aſſignee of a Reverſion might have maintained an Action of *Covenant* for any Thing which concerned the Land it ſelf, for ſo is *Spencer's* Caſe. 5 *Rep.* 17. and *Cro. Car.* 122. *Cogham* verſus *King*: But adjudged, that tho' an *Action of Debt for Rent brought by an Aſſignee of a Reverſion, is local*, becauſe ſuch Action is only maintainable upon the *Privity of Eſtate* between him and the Leſſee, and between whom there can be no *Privity of Contract*, as it hath been ruled in the Caſes of *Pine* verſus *Counteſs of Leiceſter*. *Hob.* 73. and in *Cro. Car.* 143. *Long* verſus *Nethercott*, and 143. *Board* verſus *Cudmore*; yet now by the Statute 32 *H.* 8. the *Privity of Contract* of the Leſſee is transferred to the Aſſignee of the Reverſion by the Words before-mentioned, ſo as now he may maintain an *Action of Covenant* againſt the Leſſee upon the *Privity of Contract* between them; beſides, an *Action of Covenant* is not like an *Action of Debt for Rent* reſerved upon a Leaſe, for if the Leſſee aſſigns his Leaſe, and afterwards the Leſſor *accepts* the Aſſignee for his Tenant, he ſhall never after ſuch Acceptance bring an *Action of Debt for Rent* againſt the Leſſee, becauſe by ſuch *Acceptance* he had extinguiſhed the *Privity of Contract* which was between them, and this was *Walker's* Caſe. 3 *Rep.* 24. and 2 *Cro.* 334. *Marſh* verſus *Brace*; but yet even after ſuch Acceptance he might maintain an *Action of Covenant* againſt the Leſſee, and ſo it was adjudged in *Cro. Car.* 188. in *Batchelour* and *Gage's* Caſe: But the Court relied upon *Batchelour* and *Gage's* Caſe. 2 *Cro.* 521. which was, *Queen Elizabeth* made a Leaſe to *T. P.* reſerving Rent, and *T. P.* covenanted to pay it, the Reverſion deſcended to *King James*, *T. P.* aſſigned his Leaſe to *R. W.* who paid the Rent to the King, and then the King aſſigned the Reverſion by Letters Patents, and the Patentee accepted the Rent from *R. W.* the Aſſignee of the Term, and afterwards he brought an *Action of Covenant* againſt the Executor of *T. P.* the firſt Leſſee; and adjudged, that it would lie, not upon any *Privity of Eſtate*, that was between them, for 'tis plain there was none, becauſe the Leſſee had aſſigned his Term before the King had granted the Reverſion to the Patentee; and it could not be upon any *Privity of Contract* between them, unleſs ſuch Privity had been transferred by the Statute. 1 *Saund.* 238. *Thurſby* verſus *Plant.*

* 3 Mod. 336. Barker v. Damer.

12. Debt for Arrears of Rent brought againſt an Aſſignee of a Term for Years, wherein the Plaintiff declared, that he was ſeiſed in Fee of a Meſſuage, and demiſed the ſame to one *Clement* for ſeven Years, rendring Rent, by Vertue whereof the ſaid *Clement* was poſſeſſed, and afterwards ſhe granted all her Intereſt, *&c.* to the Defendant, who entered and was poſſeſſed, and for ſo much Rent due *after the Aſſignment* this Action was brought; the Defendant pleaded in Bar, that from the Time of the Aſſignment, and ſo from Time to Time hitherto, the Plaintiff hath not acknowledged, but altogether refuſed the Defendant to be his Tenant, as by ſeveral Acquittances under his Hand it appears, made in the Name of the ſaid *Clement, & hic in Curia prolat'*; and upon Demurrer to this Plea it was adjudged ill, becauſe the Plaintiff might refuſe and accept an Aſſignee when he would, and ſo might ſue the Aſſignee or Leſſee at his Pleaſure. 2 *Saund.* 181. *Deveureux* verſus *Barlow.*

1 Lev. 308. Raym. 194. 1 Vent. 98.

13. Debt for 260 *l.* Rent arrear for five Years, reſerved on a Leaſe of twenty-one Years, of a *Portion of Tithes, &c.* The Defendant, as to 52 *l.* of the ſaid Rent for the firſt Year of the ſaid five Years, pleads *Nil debet*, and as to the Reſidue he pleaded in Bar, that after the Demiſe, and before any Part of it was due, (*viz.*) 4 *Jan. &c.* he *aſſigned* the ſaid Term and all his Intereſt therein to *I. V.* who entered and was poſſeſſed, and that afterwards the Plaintiffs having Notice of the Aſſignment, (*viz.*) 25 *Martii accepted* of the ſaid *I. V.* the Rent ſo reſerved, (*viz.*) *ſex denarios de redditu præd'*) and him to be their Tenant *of the ſaid Tithes*; and upon Demurrer to this Plea the Queſtion was, whether a Rent reſerved upon a Leaſe of a *Portion of Tithes* (and not out of any corporeal Thing out of which a Rent might properly be reſerved) is ſuch a Rent, which, together with the *Tithes*, paſſes to the Aſſignee, ſo that by the Acceptance of it from him, the Leſſee is for ever diſcharged, or whether ſuch a Rent reſerved *out of Tithes* lies only in *Privity of Contract*, ſo that the Aſſignee of the Tithes is not chargeable with it, and by Conſequence the Acceptance of the Rent from him will ſignify nothing as to that Point, but that notwithſtanding ſuch Acceptance, the firſt Leſſee will be always chargeable with the Rent; it was argued for the Plaintiffs, that this is not properly a Rent which ſhall go with the Tithes, ſo as to charge the Aſſignee, becauſe 'tis reſerved out of an *incorporeal Inheritance*, but 'tis a meer Duty upon a *perſonal Contract*; for if a Leaſe is made of *Lands and Tithes*, rendring Rent, 'tis plain that the Rent iſſues out of the Lands and not out of the Tithes, for which *Jewell's* Caſe is an Authority in

in Point, for there a Rent was reſerved out of a *Fair*, which is an incorporeal Thing; and it was adjudged good, but it was by way of Contract between the Leſſor and Leſſee, 'tis not incident to the Reverſion, and therefore, tho' the antient Rent was reſerved upon it by the Biſhop, who made a Leaſe, yet his Succeſſor ſhall avoid it: But on the other Side it was argued, that if this is not a *Rent*, but a *Duty ariſing upon the Privity of Contract*, then the Plaintiffs cannot bring an Action for it till the laſt Day of Payment is paſt, but this is a Rent, and 'tis payable, tho' not iſſuing out of the Tithes; for if a Leaſe ſhould be made of Tithes and a Barn, rendring 100 *l. per Annum* Rent, this is a Reſervation, as well in Reſpect of the Tithes as of the Barn; but if the Leſſee ſhould be evicted of the Tithes, in ſuch Caſe the Rent muſt be *apportioned*, otherwiſe the Leſſee will pay 100 *l. per Ann.* for the Barn, which may not be worth 40 *s. per Ann.* ſo that tho' the Rent is iſſuing out of the Barn in Point of *Remedy*, yet 'tis iſſuing out of both in Point of *Render*, and this is *Dubytoft and Curteen*'s Caſe. 2 *Cro.* 453. So if a Biſhop make a Leaſe *for Years of the Tythes*, reſerving the *Antient Rent*, this ſhall bind the Succeſſor, becauſe he has a proper Remedy by an Action of Debt to recover the Rent; but if the Leaſe had been made *for Life*, it had been otherwiſe, becauſe the Succeſſor had no Remedy for the Rent by an Action of Debt, and this is *Valentine* and *Denton*'s Caſe. 2 *Cro.* 111. And 'tis probable that *Jewell*'s was upon a *Leaſe for Life*, for it doth not appear by the Report, whether it was ſo or not, only at the End of that Caſe there is an extrajudicial Opinion, *upon the Point of a Leaſe for Years*: Now if a Succeſſor of a Biſhop ſhall have an *Action of Debt* for Rent reſerved upon a *Leaſe for Years of the Tithes* made by his Predeceſſor, it muſt be founded only on the *Privity of Eſtate (viz.) on the Reverſion*; for 'tis plain there can be *no Privity of Contract* between a Biſhop and his Succeſſor. The Court inclined, that this was a Rent which went with the *Reverſion*; but it was objected againſt the Plea as to the Acceptance of the Rent, that it was inſenſible, for the Defendant ſets forth, that the Plaintiffs had accepted the Rent, (*viz.*) *ſex denarios de redditu præd'*, and for this Fault Judgment was given againſt the Defendant. 2 *Saund.* 302. *Dean and Chapter of Windſor* verſus *Gover.*

14. *An Aſſignee of a Reverſion* brought an *Action of Debt for Rent*; the Defendant pleads, that before any Rent became due, he aſſigned the Term to another; and upon Demurrer to this Plea, the Plaintiff had Judgment, becauſe the Defendant did not ſet forth in his Plea, that he gave *Notice* to the Plaintiff that he had aſſigned the Term: *Twiſden* of a contrary Opinion. *Raym.* 162. *Knight* verſus *Buckley.* See *Cro. Eliz.* 22. *Serjeant* verſus *Gibſon. S. P.*

15. *Covenant, &c.* againſt the Defendant as *Aſſignee* of one *John Vaux*, and the Breach aſſigned was, that neither the ſaid *John Vaux in his Life-time*, nor the Defendant ſince his Death, (whoſe Aſſignee he is) had kept the *Fences, &c.* in repair; the Defendant pleads, that he and the Aſſigns of *John Vaux* had kept the Fences in repair, and upon this they were at Iſſue, and the Plaintiff had a Verdict, but could never get Judgment, becauſe an Action of *Covenant* doth not lie againſt *an Aſſignee* for a Breach of that Covenant *in the Life-time of the Aſſignor*, and this Breach beeing aſſigned for a Default done as well in the Life-time of the Aſſignor, as by the Defendant *ſince his Death*, and intire Damages given, it muſt be Wrong. 1 *Lutw.* 360. *Britton* verſus *Vaux.*

16. In a Special Verdict in Ejectment, the Caſe was, *Leaſe for Years* upon Condition, that the Leſſee ſhould not aſſign the Term to any but to his Kindred, without Licenſe of the Leſſor; afterwards the Leſſor *granted the Reverſion* to *T. P.* and the Leſſee aſſigned the Term to one who was not of kindred to him; the better Opinion was, that this was a *collateral Condition*, according to *Penant*'s Caſe, and that 'tis not ſuch a Condition as is within the Statute 32 *H.* 8. *cap.* 34. of which the *Grantee of the Reverſion* may take any Advantage for the Breach thereof. *Raym.* 850. *Lucas* verſus *How.*

17. The Leſſee covenanted for himſelf and his *Aſſigns, to rebuild and finiſh a Houſe before ſuch a Time*, which he did not do, but after the Time was expired he aſſigned the Term; adjudged, that this Covenant will not bind the Aſſignee, becauſe it was broken before the Aſſignment made. 1 *Salk.* 199. *Greſcott* verſus *Green.*

18. *In a ſpecial Verdict in Debt*, the Caſe was, the Leſſor being ſeiſed in Fee made a Leaſe to *T. S.* for ſeven Years; the Leſſee re-demiſes the Lands to the Leſſor for the whole ſeven Years, reſerving the Rent of 20 *l. per Annum*; the Leſſor died, his Widow entered as Guardian to the Son and Heir of the Leſſor, and receives the Profits, and the Rent not being paid, *T. S.* the Leſſee brought an Action of Debt againſt her as *Executrix de ſon tort* in the *Debet* and *Detinet*; it was admitted, that an Action of Debt would lie upon the Contract where the whole Term is aſſigned, and that there might be an Executor *de ſon tort* of a Term for Years; but *per Curiam*, it will not lie againſt one in the *Debet & Detinet*, as Executor *de ſon tort*, where there is no Term at all, as in this Caſe, for when the Leſſee aſſigned the whole Term back to the Leſſor, this was a Surrender in Law; and if ſo, then it lies upon the Contract of the Teſtator only, and by Conſequence 'tis wrong againſt the Defendant in the *Debet & Detinet.* 2 *Mod.* 174. *Loyd* verſus *Langford.*

Aſſiſe.

Of what it lieth, and particularly of Offices, Nuſances, &c. (A)
Who may have it, and who not, and where it lieth. (B)
Againſt whom it lieth, or not. (C)
Of Rents and other Things. (D)

(A)

Of what it lieth, and particularly of Offices, Nuſances, &c. Poſtea (D) per Totum.

1. IN an Aſſiſe for a *Cellar*, the Tenant pleaded in Abatement, that the Demandant had *entered* after the *laſt Continuance*; the Jury found a Special Verdict, that the Demandant had entered, but it was at the Requeſt of the Tenant, and only to view the Antiquity of the Cellar; adjudged, that by ſuch Entry the Writ was not abated. *Plowd. Com.* 92. *Pannet* verſus *Corp. of Mercers.*

2. An Aſſiſe was brought of the Office of a *Filazer* of the Court of Common Pleas, and the Demandant counted *de libero tenemento*, and alledged Seiſin, by taking Money for a *Capias*, and the *Poſt* was put in *View*, where the Officer ſate. *Dyer* 114.

3. There were but *two Writs of Aſſiſe at Common Law*, (*viz.*) an Aſſiſe of *Common of Paſture* for Cattle, and an *Aſſiſe of Novel Diſſeiſin*, the laſt of which doth lie for ſeveral Things, (*viz.*) *Lands*, *Rents*, *Offices*, *Tithes*, and generally for every Thing of which a *Præcipe quod reddat* did lie, and in ſome Caſes where ſuch *Præcipe* did not lie; as for Inſtance, *de uno croſto*, becauſe it may be put in View to the Recognitors, (*i. e.*) to the Jury. 2 *Bulſt.* 214. *Style* 30. *S. P.*

4. An Aſſiſe will likewiſe lie in ſome Caſes where Treſpaſs *Vi & armis* will not; as where a Tenant holds of his Lord, by rendering Rent and Services, and the Lord enters, and ſo often diſtrains, tho' nothing is due, that the Tenant is diſturbed in the manuring his Lands; in ſuch Caſe he may have an Aſſiſe *de ſovent foits Diſtreſs*; but he cannot have *Treſpaſs vi & armis* againſt his Lord, becauſe he is prohibited by the Statute of *Marlbridge cap.* 3. *See Bevill's* Caſe; 'tis true, there was no Remedy at Common Law for theſe Profits *apprender in alieno ſolo*, for an Aſſiſe in ſuch Caſes was given by the Stat. *Weſtm.* 2. *cap.* 15. and ever ſince it lieth of *Eſtovers*, to be taken in the Woods of another, of *Nuts and Acrons* to be taken in ſuch Woods, of a *Corody* of the ſeveral Sorts of *Tolls*, all which a Man may likewiſe have in his own Lands, and yet, if he be diſſeiſed of them he may have an Aſſiſe; ſo of *Pontage*, *Paſſage*, *Pannage* and ſuch like Things. 8 *Rep.* 47. *Jehu Webb's* Caſe. *See pl.* 8, 9.

5. It lies where Men are diſſeiſed of their *Offices* of Profit, and therefore an Aſſiſe was brought wherein the Demandant counted *de officio Magiſtri ludorum pilarum palmarum Domini Regis*, *Anglice*, The Office of Maſter of the King's Tennis Plays, that is, of the Tennis Plays of the King's Houſhold, and not only when the King himſelf plays in Perſon, for the Grant of the Office ſhall have a reaſonable Conſtruction, and the Aſſiſe ſhall be *de officio cum pertinentiis*, where a Man is diſſeiſed of the whole Office, but where only of Part, he ſhall have an Aſſiſe of that Part, and no more. 8 *Rep.* 46. *Jehu Webb's* Caſe.

6. An Aſſiſe was brought of the Office of *Clock-keeper* of *Weſtminſter*, and it was adjudged to be well brought; but then the Demandant muſt aver, that it was an *Antient Office*, and prove it at the Trial, otherwiſe he muſt be nonſuited. *Brownl.* 28. *Cæſar* verſus *Bull.*

7. An Aſſiſe was brought of the Office of *Sadler to the Queen*, granted to the Demandant by the King; and it was adjudged, that it would not lie, becauſe the *King* could not make ſuch an Officer for the *Queen*; and becauſe there was no Place mentioned in the Patent where the Perſon ſhould exerciſe and enjoy this Office, and therefore it could not be put in *View* to the Recognitors; ſo if the King grant the Office of *Uſher* to the Prince of *Wales*, an Aſſiſe will not lie. 1 *Brownl.* 28.

8. Aſſiſe of the Office of *Rigeſter of the Admiralty*, and the Demandant laid a Preſcription to it, (*viz.*) *quod quilibet hujuſmodi perſona*, which ſhould be named by the Admiral, ſhould be Regiſter of the Admiralty for Life. *Dyer* 153. *Hunt's* Caſe. 176. *Scrogg's* Caſe. *S. P.*

9. It lieth of Offices of *Woodward*, *Park-keeper*, and *Keeper of Chaſes*, *Warrener*, *&c.* but theſe are not at Common Law; but by the Statute of *Weſtm.* 2. becauſe they are of Profits to be taken *in alieno ſolo*; it likewiſe lieth of all other Offices and Bailiwicks in Fee. 8 *Rep.* 47. *Jehu Webb's* Caſe.

10. In an Aſſiſe of a *new Office*, it ought to be ſhewed what Profits belongeth to it; but 'tis otherwiſe of an Antient Office, becauſe 'tis preſumed, that the Profit thereof is ſufficiently known. 8 *Rep.* 45. *in Jehu Webb's* Caſe.

11. If a *Maſter of an Hoſpital* is deprived of his Office by a Lay Patron, without Cauſe, he may have an Aſſiſe, becauſe he hath no other Remedy; but if ſuch a Maſter is *Eccleſiaſtical*, and deprived by the *Ordinary* without Cauſe, he ſhall not have an Aſſiſe, becauſe he may appeal to the Viſitor. 11 *Rep.* 99. *in James Bagg's* Caſe.

12. Error of a Judgment in an Aſſiſe of the Office of a *Park-Keeper*, which was granted in *Reverſion* to the Demandant, and afterwards the *Park* it ſelf was granted to another, who entered and kept out the Reverſioner after the Death of the Tenant for Life, for which he brought an Aſſiſe, and after the Verdict, and before Judgment, enter'd into the Park, and there did hunt and kill a Deer, and this Entry was aſſigned for Error, for that it had abated the Writ, and made the Judgment erronious; but the Court was not of that Opinion. 1 *Bulſt.* 5, 6. *Earl of Shrewsbury* verſus *Earl of Rutland.*

13. Aſſiſe of the *Superſedeas Office*; the King's Counſel came into Court, and ſaid to the Judges, *The King doth greet you well*, and as to the *Aſſiſe*, it concerned the King and his Prerogative, and that they were no farther to proceed therein, and ſo delivered to them a Writ *de non ulterius proſequendo Rege inconſulto*, which the Court received, and yet the Counſel for the Demandant argued againſt the Writ, which at firſt the Court doubted whether they might or not; but they agreed, that after the Writ was allowed, they could not proceed upon the Aſſiſe without a *Procedendo ad loquelam*, and likewiſe a *Procedendo ad Judicium.* 3 *Bulſt.* 32. *Brownlow* verſus *Mitchell.* 1 Roll. Rep. 188, 206, 288.

14. Aſſiſe, *&c.* for that the Defendant *levavit quandam domum ad nocumentum, &c.* and ſhewed that he had a *Windmill*, and that the Defendant had built his Houſe ſo near that it hindered the Mill; the Jury found, that he *levavit domum*, and that *two Foot* of it did hinder the Plaintiff's Mill; it was inſiſted, that only the *two Foot* ſhall be abated, and not the whole Houſe; but the Chief Juſtice *Hobart* was of Opinion that could not be, for *levavit domum* is when an entire Houſe is built from the Ground; if it had been *erexit domum*, then the *two Foot* and no more might have been abated, becauſe *erexit* is when *Part* of an Houſe is ſet up; but the better Opinion was, that only the *two Foot* ſhall be abated. *Mich.* 11 *Jac. Godb.* 233. *Trehern's* Caſe. *See* Ac. Caſe. (S) 5. *Giles's* where *erigere Domum* is to build a Houſe from the Ground.

15. And tho' Ejectment is now the Common Action for thoſe Things, which were formerly recovered in Aſſiſe; yet in ſome Caſes an Aſſiſe will lie where Ejectment will not, as in the Caſe before mentioned, *de uno Crofto*; neither will an Ejectment lie *de Piſcaria*, becauſe the Sheriff cannot deliver Poſſeſſion of it, but an Aſſiſe will lie of it, for tho' 'tis *proficuum capiend' in alieno ſolo*, yet it may be put in View to the Recognitors. *Cro. Car.* 354.

16. In Aſſiſe for the Office of one of the four Clerks of the *Privy Signet*, it was ruled, that where 'tis brought for a Thing againſt *Common Right*, the Demandant ought to ſet forth his Title Specially; but where 'tis brought for *Lands*, there 'tis ſufficient to ſay *de libero tenemento*: That when an Aſſiſe is arraigned 'tis not enough to demand the *Recognitors*, and to read the Writ and the Count in *French*; but the Clerk ought to read the *Count in Latin*, as 'tis enter'd on Record, for till then the Court is not poſſeſſed of it, and if 'tis not read in *Latin* it may be a Queſtion whether the Aſſiſe is diſcontinued; but before this Aſſiſe was taken, it was excepted againſt the Writ, becauſe it was *Octavas* inſtead of *Octabis*, and becauſe it was returnable *coram nobis apud Weſtm'*, when it ought to have been *coram nobis ubicunq*; for the one is the Form in the Common Pleas, and the other in *B. R.* but adjudged, that *Octavas* is more near the Grammar than *Octabis*, and that *coram nobis apud Weſtm'* was well enough; and the Court held, that if a *Clerk of the Signet* abſented in his Waiting Month, it was a Forfeiture of his Office; ſo if the Reverſion is granted to him, and he doth not come when it is void, that is likewiſe a Forfeiture; and if a Grant is *poſt mortem vel forisfacturam* of him in Poſſeſſion, and afterwards he forfeits it, the Grantee of the Reverſion may enter without a *Scire facias*. *Sid.* 73, 80. *Windebanke* verſus *Beer.* See *Dyer* 197, 198.

17. Aſſiſe for the Office of the *Marſhall of B. R.* againſt *Mr. Lenthall* and four others, and the Counſel being ready to arraign it in *French*, the *Recognitors* did not appear, but the Writ was read, which may be returnable any Day, as well as on a Return-Day; neither did the Demandant appear, whereupon the Aſſiſe was adjourned to another Day, and then was arraigned, and the Tenant prayed, that the Demandant might come in and Count, who not being ready, prayed another Day, which was denied, for this is *feſtinum remedium*, and the Tenant is bound in Law to plead *inſtanter*, which he cannot do where there is no Count, therefore the Demandant was nonſuited; but he may bring a new Aſſiſe. 1 *Salk.* 82. *Savier* verſus *Lenthall.*

18. Adjudged, that in *Aſſiſe*, if the Tenant *plead in Abatement*, he muſt likewiſe plead over in *Bar* at the ſame Time, and that no *Imparlance* ſhall be allowed without ſome ſpecial Cauſe; and if there are ſeveral Tenants, thoſe who do not appear on the firſt Day, the *Aſſiſe* ſhall be taken againſt them. 1 *Salk.* 85. *Savier* verſus *Briggs.*

(B)

Who may have it, and who not, and where it lieth.

1. IT muſt be brought in the County where the Land lieth, and not elſewhere; for if 'tis brought in a Foreign County, tho' by the Aſſent of the Parties, 'tis erronious. *Dyer* 267. *Butler* verſus *Crouch.*

2. *Tenant by Statute*, or by *Elegit*, may have an Aſſiſe, tho' they have but a Chattel Intereſt, and they muſt count *ut de libero tenemento*, and not *de termino*, and in ſuch Caſe *Antient Demeſne* is a good Plea. 5 *Rep. Alden's* Caſe: But now the Law is held to be otherwiſe, becauſe in an Aſſiſe brought by a Tenant in *Elegit*, the Judgment is not to recover the Poſſeſſion of the Land, but only to have Execution done on the former Judgment. *Hob.* 47. *Cox* verſus *Barnſly.*

3. *Tenants in Common* ſhall each have a ſeveral Aſſiſe for his Moiety, or Part, becauſe they are ſeiſed by ſeveral Titles; but *twenty Jointenants* ſhall have but one *Aſſiſe* in all their Names, becauſe they have but one *Joint Title*; ſo if there are three Jointenants, and one of them releaſeth all his Right to one of his Companions, and then the other two are diſſeiſed of the Whole, they ſhall have but one *Aſſiſe* in both their Names, for the two Parts, becauſe they had a *joint Title* to it at the Time of the Diſſeiſin, and he to whom the Releaſe was given, ſhall have an Aſſiſe in his own Name, becauſe of that Part he is *Tenant in Common.* 1 *Inſt.* 196.

4. *In Aſſiſe*, which came on to be tried at the Aſſiſes, the Recognitors were at the Bar and ready to be ſworn, and the Defendant came into Court and confeſſed the Seiſin and Diſſeiſin, as the Demandant had declared, whereupon he demanded Judgment, and he had it, which was entered, *quod recuperet ſeiſinam per Viſum Recognitorum*; and upon this a Writ of Error was brought, and the Error aſſigned was, becauſe none of the Jury were ſworn, or had the View, and they were not Recognitors before they were ſworn; adjudged, that tho' they ſhould have the View of the Land, yet if they know it well enough, the Aſſiſe may be taken without the View; the Judgment was affirmed. *Mich.* 11 *Jac.* 2 *Bulſt.* 160. *Sir Chriſtopher Heydon* verſus *Sheppard.*

(C)

Againſt whom it lieth, or not.

1. A Diſſeiſor made a Leaſe for Years, and being about to leave the Realm, he ordered the Leſſee to keep the Poſſeſſion againſt the Diſſeiſee till he returned, which he did, and paid the Rent to the Uſe of the Diſſeiſor; the better Opinion was, that in this Caſe the Leſſee was ſuch a Diſſeiſor, that an Aſſiſe might be brought againſt him. *Dyer* 141. *Cutts* verſus *Wells.*

2. The Queen granted the Cuſtody of a *Park* to one for Life, with *all the Profits and Commodities* to the ſaid Office belonging, to which the *Herbage* and *Pawnage* of the Park did belong; and afterwards ſhe granted the Park to *T. S.* and his Heirs; the Grantee felled ſome Trees, and carried them away, now this being an Injury done to the Keeper in Reſpect of the *Pawnage*, he cannot bring Treſpaſs, but an Aſſiſe or Action on the Caſe; he cannot bring an Aſſiſe, for that doth not lie, becauſe he cannot have Seiſin of the Pawnage of the Trees, for thoſe are gone, therefore he may bring an Action on the Caſe and recover Damages; but he may have an Aſſiſe for the *Herbage.* 2 *And.* 7.

(D)

Of Rents, and other Things. See Antea (A) per Totum.

1. IN an Aſſiſe for *Tithes*, the Writ was *de libero tenemento*, and the Count was *de portione decimarum* in *R.* without mentioning the Certainty of the Tithes, and this was adjudged good, becauſe the Taking of Part ſhall be the Diſſeiſin of the Whole. *Dyer* 83.

2. Where an Aſſiſe is brought for a *Mill*, it ſhall be *de molendino* generally, without expreſſing certainly the Nature of the Mill, as *Griſt-Mill*, *Fulling-Mill*, *&c.* becauſe the Mill is the Subſtance, and the other are but Additions to ſhew the Quality of the Mill. 4 *Rep. in Lutterell's* Caſe.

3. In Aſſiſes for a *Rent-Charge*, *Rent-Service*, or *Rent-ſeck*, brought by Tenant for Life, in Fee or in Tail, the Writ muſt be general, *de libero tenemento* in *R.* but if 'tis of a *Rent-Charge or Seck*, all the Lands muſt be named in the Writ, but not in Aſſiſe for Rent-Service. *Dyer* 31.

4. *Aſſiſe*, *&c.* for a *Rent-Charge*, in which the Caſe was, Husband and Wife were ſeiſed of two Manors, which by Fine they conveyed (*inter alia*) to the Conuſee by the Name of two Manors, *&c.* and he by the ſame Fine rendered back to them an *yearly Rent of* 50 *l.* and to the Heirs of the Wife, and alſo rendered the two Manors to them for their Lives, the Remainder over in Tail; the Husband and Wife died, the *Rent* deſcended to the Plaintiff as Son and

Heir of the Wife, and he had Judgment in the Aſſiſe; upon which a Writ of Error was brought, and the Error aſſigned was, that the Fine was of two Manors (*inter alia*) which Words import, that other Lands, beſides the Manors, did paſs; if ſo, the Aſſiſe brought againſt the Tenant of the Manors only is not good, becauſe all the Tenants of the Lands compriſed in the Fine ought to be named, and this was adjudged good Cauſe of Error. *Cro. Eliz.* 226. *Garnon* verſus *Weſton.*

5. An Aſſiſe lieth of a *Rent*, (viz.) a *Rent-Seck* of 4*l. per Ann.* was granted, iſſuing out of an Houſe called, the *Unicorn in L.* payable at *Michaelmas* and *Lady-day*, *at the Houſe* of the Grantee in *L. &c.* and 6*d.* was given in the Name of Seiſin; now in this Caſe the Rent was iſſuing out of one Houſe, and to be paid at another, yet the Demand *at the Houſe where it was iſſuing*, and none being there to pay it, was adjudged a Diſſeiſin, for which the Aſſiſe was well brought. *Cro. Car.* 365. *Smith* verſus *Smith.*

6. Error of a Judgment in an Aſſiſe for *Rent arrear*, in which the Demandant counted, that the Rent was deviſed to him *for Life*, iſſuing out of ſeveral Tenements, naming them, and that the *Teſtator died*, and the Lands deſcended to *B. G.* and that he was ſeiſed of the ſaid Rent by the Hands of the ſaid *B. G.* until afterwards he was diſſeiſed by him, *&c.* the Errors aſſigned were, that this Aſſiſe being brought for the Arrears of Rent due upon a Deviſe, the Demandant had omitted to ſhew when the Teſtator died; for which Reaſon the Certainty of what was in arrear could not be known, neither did he ſet forth, or the Jury find, that the Rent was demanded on the Lands, for a Demand of the Perſon off the Land was adjudged not to be good, and for theſe Reaſons the Judgment was reverſed. *Cro. Car.* 374. *Morris* verſus *Price.* W. Jones 413.

7. An Aſſiſe lieth *de Cellaria*, *de Alneto*, *de Eullaria*, *de Salina*, *&c.* for tho' theſe and the like are incertain in the Count, yet becauſe they may be made certain in the Evidence at the Trial, it ſhall be good. *Cro. Car.* 399. *Sprigg* verſus *Rawlinſon.*

8. An Aſſiſe lieth of *Common of Paſture*, where the Commoner hath a Freehold in it, and the Lord or other People feed it ſo hard, that all the Graſs is eat up where the Common ſhould be taken; but then he muſt Count and ſet forth how long the Land was fed, and alledge *per quod proficuum ſuum per totum tempus ibidem amiſit*, for if 'tis only a ſmall Feeding, an Aſſiſe doth not lie, but in ſuch Caſe the Commoner may diſtrain the Cattle Damage-feaſant. 9 *Rep.* 112. in *Robert Mary's* Caſe. *Style* 164. *Ayre* verſus *Pincomb. S. P.*

9. Error to reverſe a Judgment in an Aſſiſe of *Novel Diſſeiſin* in an inferior Court, in which the Demandant counted, that the Tenant did diſſeiſe him *de uno muro lapideo*, and had built an Houſe in the Place of it, and all this Matter was aſſigned for Error; and adjudged, that he ought to have brought an *Aſſiſe of Nuſance*, and not an Aſſiſe of *Novel Diſſeiſin.* *Style* 145. *Colſon* verſus *Rees.*

10. Aſſiſe for the Office of *Serjeant at Mace to the Houſe of Commons*; at the Trial the Demandant made a Title by a Grant from *King James*, reciting a former Grant, and this to commence after the Determination thereof; adjudged, that this *Recital was not Evidence*, whereupon the Demandant went to the *Rolls*, and had Leave of the *Maſter of the Rolls* to bring the Patent into Court, which was done, then he was to prove Seiſin, which he did, by proving that he went to Houſe of Commons and demanded his Place, but received no Fees; but that in an Action on the Caſe for diſturbing him in his Office, he had recovered 300*l.* Damages, and this by *Hale* Ch. Juſt. was held a *ſufficient Seiſin*, the Damages being recovered in Satisfaction of his Fees whilſt he was out of Poſſeſſion; but by other Judges it was denied, whereupon the Matter was intended to be found ſpecially, but the Demandant, rather than agree to it, became Nonſuit. 2 *Lev.* 108. *Cragg* verſus *Norfolke.* 1 Mod. 122.

11. Afterwards the Demandant brought a new Aſſiſe for the ſame Office, and it being arraigned on the firſt Day of Term, the Tenant made Default, being demanded *Ideo capiatur Aſſiſa per defaltum*, then the Demandant counted and ſhewed the King's Patent, which was read, but the Jury being not yet ſworn, Day was given till *Wedneſday* following, at which Time the Tenant may appear and give what Evidence he can, but he cannot after this Default plead either in Bar or Abatement, nor challenge; and the Cauſe coming on to Trial, the Demandant proved Seiſin by compounding and taking 20*s.* of a Priſoner, who was committed by the Houſe of Commons to the Tenant *Norfolk*, who was then in Poſſeſſion of the Office, and by going to the Lobby and laying his Hands on the Mace whilſt it was on the Shoulder of *Norfolk*; and this was held ſufficient Seiſin and Diſſeiſin, and the Demandant had a Verdict. 2 *Lev.* 120. *Cragg* verſus *Norfolk.*

Attachment.

Awarded for Contempts and ill Practiſe. (A)
Where it ſhall not be granted for Contempts, Miſdemeanors, *&c.* (B)
Of Attachments upon Prohibitions. (C)
Where it lieth for Debts and other Things, *&c.* by the Cuſtom of *London.* (D)
Where it doth not lie for Debts, or Goods, by the *Cuſtom of London*, and other Places. (E)
By the Cuſtom of *London*, *&c.* Pleadings in it, good, and not good. (F)

(A)

Awarded for Contempts and ill Practiſe.

1. A *Judgment-Creditor* brought a *Sci. fa.* againſt the *Principal*, after the Death of the *Bail*, who had paid the Debt, and had a Releaſe and Satisfaction acknowledged; adjudged, that theſe Proceedings were undue, and in Contempt of the Court, and therefore an Attachment was granted againſt the Creditor. 2 *Bulſt.* 68. *Higgins* verſus *Sommerland.* *Poſtea* Execution. (F) 14. *S. C.*

2. In Debt upon a ſingle Bill, the Defendant pleaded Payment, upon which they were at Iſſue, and a Verdict and Judgment for the Plaintiff, afterwards the Defendant brought an *Audita querela*; and upon an Averment of Payment of the Money, he was bailed out of Execution; but upon a Motion to the Court by the Judgment-Creditor it was adjudged, that this *Audita querela* would not lie, and for that Reaſon, and becauſe the Defendant was bailed out of Court he was taken in Execution again by a Rule of Court, and an Attachment was granted againſt the Attornies who proſecuted the *Audita querela*, and got the Defendant bailed. 1 *Bulſt.* 140. *Terrey* verſus *Adye.*

3. In Ejectment to be tried at the Bar, the Defendant pleaded *Infancy* on purpoſe to put off the Trial, but it was found by Proof on Oath, and by Searching the Regiſter, that the Party was thirty-ſix Years old, and thereupon an Attachment was granted againſt him. 2 *Bulſt.* 67. *Lord* verſus *Thorneton.*

4. The Plaintiff had a Verdict, but before the Judgment was entered, he arreſted the Defendant, for no other Cauſe, but that he might have him in Cuſtody when the Judgment was entered, and this appearing to the Court by *Affidavit*, there was an Attachment granted againſt him. *Style* 211. *Lamb* verſus *Duff.*

5. The Plaintiff arreſted the Defendant by Proceſs out of the Court of King's Bench directed to the Sheriff of *Wilts*, and carried him to *Marlborough*, where he arreſted him again by a *Serjeant of that Town*, by Proceſs out of the *Corporation-Court*, and proceeded againſt him in that Court, and not upon the *Latitat*, upon which he was firſt arreſted; adjudged, that this was a Contempt of the Court, and thereupon an Attachment was granted againſt him, and an *Habeas Corpus cum cauſa* to bring up the Defendant. *Style* 239. *Brian* verſus *Stone.*

6. An Attachment was granted againſt an Attorney, who was *Mayor of Newbury*, for iſſuing out an Execution upon a Judgment obtained in the Corporation-Court after a *Writ of Error* delivered to him, and allowed; but he proving, that he was informed by Counſel, that the Record was not well removed by Reaſon of a Defect in the Writ of Error, he was diſcharged. *Style* 321. *Mayor of Newbury*'s Caſe.

7. A *Juſtice of Peace* proceeded upon an Indictment of Forcible Entry after a *Certiorari* delivered, and fined the Party; the Rule was, that he ſhould be examined upon Interrogatories, and return the *Certiorari*, and reſtore the Fine. *Style* 395. *Staple*'s Caſe.

8. A *Witneſs* who attended the Court in a Cauſe there to be tried, was arreſted, whereupon a *Superſedeas* was granted to diſcharge him, and an Attachment againſt the Perſon who arreſted him. *Style* 395. *Cullen*'s Caſe.

9. Attachment againſt the Defendant upon *Affidavit* made, that he, being ſerved with a Rule of Court, to ſhew Cauſe why an Information ſhould not be filed againſt him, ſaid, *He did not care a Fart for the Rule of Court*, tho' it was inſiſted for him, that he ſhould have a Rule to ſhew Cauſe why the Attachment ſhould not be granted; but it was held, that he ſhall anſwer in Cuſtody, for 'tis to no Purpoſe to ſerve him with one Rule who had deſpiſed the firſt, ſo he was brought in and bound in a Recognizance to anſwer Interrogatories. 1 *Salk.* 84.

(B)

Where it shall not be granted for Contempts, Misdemeanors, &c.

1. UPON an *Affidavit* made, that the Defendant had committed *Waste* after a Writ of *Estrepement* was directed to the Sheriff, and executed; the Court was moved for an Attachment, but it was not granted, because it appeared, that Waste was done upon an *Affidavit*, which was only the Opinion of him who made it, when it should have appeared, either by Pleading, or upon the Return of the Sheriff. *Winch* 15. *Sir Geo. Tipping*'s Case.

2. The Plaintiff was by Rule of Court of *B. R.* put into Possession of certain Lands; the Defendant, in Contempt of the Rule, *disturbed* him in the Possession; and upon a Motion for an Attachment it was denied, because it appeared, that the Plaintiff was only *disturbed*, and not put out of Possession, nor his Cattle drove off the Land. *Style* 277. *Smith* versus *Lord Dorset.*

3. Upon a Motion for an Attachment, for that the Defendant had put one out of Possession, who was put in by Vertue of an *Habere facias possessionem*; it was denied, because it was insisted on by the Defendant, that he came in by an elder Judgment, and an Extent upon it. *Style* 318. *Fountaine* versus *Johnson.*

4. An Attachment will not lie against a Corporation, but if 'tis granted *nisi causa*, and afterwards the Corporation will not restore a Member, in such Case the Court will grant Restitution. *Raym.* 152. See *Postea* (F) 9.

(C)

Of Attachments upon Prohibitions.

1. LIbel in the Spiritual Court for Tithes in the Year 1610, to which the Defendant pleaded a *Modus*, and thereupon a Prohibition was granted, and afterwards the same Person libelled for Tithes in the Year 1611; adjudged, that if the Libel had been for the same Tithes after the Prohibition granted, in such Case an Attachment should be against him for his Contempt, or the Defendant might have a special Action on the Case. 2 *Bulst.* 289. *Downes* versus *Hawkesby.*

(D)

Where it lieth for Debts and other Things, &c. by the Custom of London.

1. A *Citizen of London* was indebted to a *Foreigner* upon Bond, and the Foreigner was indebted to the *Citizen* upon a simple Contract, the Foreigner died, and upon Oath made by the *Citizen*, that his Debt was a just Debt, he levied a Plaint in *London* against the *Executor of the Foreigner*; and upon four Defaults recorded, he had Judgment, and then he attached the Debt in his own Hands, finding Sureties, that if the Debt was not disproved by the Executor within a Year and a Day, or the Judgment reversed, that then he should be discharged of so much of the Debt which he owed on the Bond; the Question was, whether this Custom did extend to *Foreigners as well as to Citizens*, it was not resolved. *Dyer* 199. *Harwood* versus *Lee.* *Postea* (F) *pl.* 1. *S. C.*

2. Debt upon Bond for 100 Marks, conditioned to pay 50 *l.* on such a Day, *&c.* the Defendant pleaded a *Tender* upon the Day, upon which they were at Issue, but afterwards he pleaded, that after the last Continuance the 100 Marks were attached in his Hands in *London*, at the Suit of another, *&c.* and upon Demurrer to this Plea the Court at first doubted, whether an Attachment was good pending an Action in the Courts at *Westminster*; but afterwards they held, that the 100 Marks were attachable after the last Continuance. *Cro. Eliz.* 101, 691. *Pell* versus *Pell.*

(E)

Where it doth not lie for Debts, or Goods, by the Custom of London, and other Places.

1. IN an Action on the Case the Plaintiff had Judgment against the Defendant, and he owing 60 *l.* to one *G. D.* he entered a *Plaint* against him in *London*, and attached the 60 *l.* in the Hands of the said Defendant against whom the Plaintiff had recovered as aforesaid, and had Execution according to the Custom, afterwards the Plaintiff brought a *Sci. fa.* against the Defendant, to shew Cause why he should not have Execution upon the Judgment which he had recovered, to which the Defendant pleaded the *Execution upon the Attachment*; and upon Demurrer to that Plea it was adjudged against the Defendant, because a Duty which accreweth by Matter *of Re-* Cro. Eliz. 63.

cord, cannot be attached by the *Cuſtom of London*; for Judgments obtained in the King's Courts ſhall not be defeated or avoided by ſuch particular Cuſtoms, they being of ſo high a Nature, that they cannot be reached by Attachments. 1 *Leon.* 29. *Flood* verſus *Sir John Perrott*. *Poſtea* Judgment (D) 1. *S. C. Mich.* 19 *Eliz.* 1 *Leon.* 321. *S. P.* 3 *Leon. Caſe* 333. *Sir Walter Waller's* Caſe.

2. Debtor and Creditor being both Citizens of *London*, the Debtor delivered ſeveral Goods to the *Exceſter* Carrier then in *London*, to carry and deliver them at *Exceſter*, and the Creditor attached them in the Hands of the *Carrier* for the Debt due to him from his Debtor; adjudged, that the Attachment ſhould be diſcharged, becauſe the *Carrier* is privileged in his Perſon and Goods, and not only in the Goods which are his own, but in thoſe of other Men, of which he is in Poſſeſſion, for he is anſwerable for them. 1 *Leon.* 189. *Edwards* verſus *Tedburie*.

3. Upon a Plaint affirmed in the Court of the City of *Exceſter* againſt the Defendant; the Money due to the Plaintiff was attached in the Hands of *G. D.* upon a Suggeſtion, that he owed Money to the Defendant, thereupon the ſaid *G. D.* appeared to the Attachment, and pleaded *Nil debet* to the Defendant; and upon Demurrer to this Plea there was Judgment againſt him, becauſe he ought to have pleaded not only *Nil debet*, but alſo, that *he had no Goods* of the Defendant's in his Hands, whereupon *G. D.* brought a Writ of Error, *&c.* and the Judgment in *Exceſter* was reverſed, for it was adjudged, that *Nil debet* alone was a good Plea. 1 *Leon.* 321. *Mitchell* verſus *Hoare*.

4. The Debter owed the Creditor 100 *l.* and *G. D.* owed the *Debtor* 12 *l.* the Debtor died Inteſtate, and the Ordinary granted Adminiſtration to *W.* afterwards the Creditor affirmed a *Plaint in London* againſt the * *Ordinary* for the 100 *l.* and upon his Suggeſtion and the Default of the Ordinary (being returned *nihil habet*, the 12 *l.* was attached in the Hands of *G. D.* and after the fourth Default of the Ordinary, it being returned *Non eſt inventus*, the Plaintiff recovered againſt *G. D.* afterwards the Adminiſtrator brought an Action of Debt againſt him for this 12 *l.* to which he pleaded in Bar this Cuſtom of foreign Attachment; and upon a Demurrer to this Plea the Adminiſtrator had Judgment, becauſe no Action did lie againſt the *Ordinary* after Adminiſtration granted, neither could the Adminiſtrator have any Action againſt *G. D.* the Debtor of the Inteſtate. *Dyer* 247. *Toft's* Caſe.

* Poſtea (F) 11.

5. A Sum of Money was to be paid at *Michaelmas*, and it was attached before that Day; adjudged, that a *foreign Attachment* cannot reach a Debt * *before 'tis due*; therefore, tho' the Judgment on the Attachment was after *Michaelmas*, yet the Money being attached before it was due 'tis for that Reaſon void. *Cro. Eliz.* 184. *Dalton* verſus *Selby*.

* Poſtea (F) 10. contra.

6. In Treſpaſs for Taking a Dyer's Furnace, it was found, that upon a Plaint levied, the Sheriff attached it, being faſtened to a Wall of the Houſe, and delivered it to the Defendant, againſt whom the Action was now brought; adjudged, that it being fixed to the Wall, it could not be attached. *Cro. Eliz.* 374. *Day* verſus *Bibithie*.

1 Lev. 306. S. C.

7. An Executor ſubmitted to an Award, and the Arbitrators awarded, that the Defendant ſhould pay the Executor 350 *l.* this Money is not attachable in his Hands by any Creditor of his Teſtator, tho' 'tis Aſſets in his Hands when recovered, becauſe it was not due to the Teſtator *tempore mortis*, and the Cuſtom of foreign Attachments extends only to ſuch Debts. 1 *Vent.* 111. *Horſam* verſus *Turges*.

(F)

By the Cuſtom of London, &c. Pleadings in it, good, and not good.

1. THE Plaintiff ſet forth the *Cuſtom* to be, that the Debt ought to be affirmed upon the Oath of the Party *in Curia Guildhall*, and then he alledged, that he had made Oath *in Curia Vicecomitis in computatorio*, *&c.* the Cauſe was ended by Agreement. *Dyer* 199. *Harwood* verſus *Lee*. *Antea* (D) *pl.* 1. *S. C.*

2. *Caſe by an Adminiſtrator*, in which the Caſe was, that *Tenant* was indebted to the Inteſtate by *Bond*, and the Inteſtate was indebted to *Heydon* upon a Contract, and that he (the Adminiſtrator) intending to put the Bond in Suit againſt *Tenant*, he promiſed, that if the Adminiſtrator would forbear, *&c.* he the Defendant would pay, *&c.* afterwards *Heydon* brought an Action of Debt upon the Contract againſt the Adminiſtrator in *London*, and the Money which *Tenant* owed to the Inteſtate was attached in *Tenant's* Hands; and now the Adminiſtrator brought an Action on the Promiſe againſt *Tenant*, who pleaded all this Matter; and upon a Demurrer it was inſiſted for the Plaintiff, that this Debt was not attachable by a *foreign Attachment*, becauſe the Promiſe being to pay at a Day to come, veſts altogether in *Damages*, and nothing is attachable but a certain and due Debt: *Sed per Curiam*, this Debt is attachable, for 'tis a due and certain Debt before the Promiſe made, becauſe the Promiſe was to pay the Debt due to the Inteſtate by Bond, but it might have been otherwiſe if the Debt had ariſen upon a Promiſe. 1 *Roll. Rep.* 105. *Spink* verſus *Tenant*.

3. If a Man ſue another in the *Mayor's Court*, *&c.* and a third Perſon is indebted to the Defendant as much as he owes the Plaintiff, and the Money is attached in the Hands of this third Perſon, and condemned, and afterwards Judgment is given againſt him, yet at any Time before Execution

cution the Plaintiff may reſort to the Defendant again, who is his principal Debtor, and get Judgment and Execution againſt him. *Hill.* 7 *Ed.* 6. *Dyer* 182.

4. A *Foreign Attachment* was pleaded to an Action of Debt; the Plaintiff in that Action replied, that he was not indebted to the Defendant in any Sum by which he might be attached to appear; and this was held a good Replication, becauſe 'tis iſſuable whether he was indebted or not, for if he was not indebted, then he could not be attached. *Cro. Eliz.* 598.

5. *Debt* was brought in *C. B.* upon a Bill Penal of 13 *l.* 13 *s.* 4 *d.* the Defendant pleaded in Bar a Foreign Attachment in *London*, made by one *Moulton* of 13 *l. in his Hands*; and upon Demurrer to this Plea it was adjudged ill, becauſe it did not appear, that the 13 *l. attached* was Part of the Debt of 13 *l.* 13 *s.* 4 *d.* due to the Plaintiff in the Original Action; but the chief Reaſon was, becauſe it appeared in the Plea, that the Attachment was made after the Return of the Original in the *C. B.* and ſo made pending that Action in that Court, which ought not to be. *Cro. Eliz.* 691. *Humfries* verſus *Barnes*.

6. *Action of Debt, &c.* The Defendant pleaded in Bar, that there was a *Cuſtom in London* to attach the Debt * before the Day of Payment came. *Et per Curiam*, ſuch a Cuſtom may be good, but to have Judgment to recover the Debt before the Day of Payment is come, cannot be a good Cuſtom, becauſe the Debtee himſelf could not recover in ſuch Caſe, and therefore he who made the Attachment ſhall not. This Cuſtom was pleaded, that the Debtee in Perſon, or *by his Attorney*, may ſwear that the Debt is due; but this cannot be good as to the Attorney: It was agreed, that Goods might be attached by a Foreign Attachment, and that the Value thereof ought to be found before Judgment; but that this Plea was ill, becauſe the Defendant did not aver it, (*viz.*) *& hoc paratus eſt verificare*. *W. Jones* 406. *Pearſe* verſus *Calcot*. * Antea (E) 5.

7. In an Action of Debt on Bond, the Defendant pleaded in Bar the *Cuſtom of London*, wherein the Caſe was thus: (*viz.*) *John North* owed the now Defendant *Winskell* 55 *l.* and *Winskell* owed *John North* 53 *l.* who being dead, and his Widow being Adminiſtratrix commenced this Action againſt *Winskell*, that he levied a Plaint in the Counter againſt the Adminiſtratrix, for this 55 *l.* (but did not ſet forth, that it was due to him at the Time of the Plaint levied); that ſhe was ſummoned by a *Serjeant at Mace* to appear at the next Court, who returned, that ſhe *nihil habuit*, within the City by which ſhe might be attached, and ſhe not appearing, *Winskell* affirmed *Ore tenus*, that he owed *John North* 53 *l.* (but did not ſet forth, that it was within the Juriſdiction of that Court) and prayed, that ſhe might be attached by that Money in his own Hands to appear, which was done accordingly, and ſhe not appearing in four Courts, afterwards, *Winskel* at the fifth Court prayed Execution of the ſaid Debt of 53 *l.* ſo attached in his Hands, and made Oath, that *John North* owed him that Money, and that his Adminiſtratrix detained it from him, and thereupon he had Judgment to recover the ſaid 53 *l.* in Part of the 55 *l.* due to him, and found Pledges to reſtore it, if the Debt ſhould be diſproved by the Adminiſtratrix within a Year next enſuing, and averred, that the Debt for which he was now ſued was Parcel of the ſaid 53 *l.* which could not be, becauſe the 55 *l.* was due to himſelf, and that the Bond upon which the Adminiſtratrix had declared againſt him, was given to her to ſecure Part of the Debt of 53 *l.* due from him to the ſaid *John North*, which is contradictory to what he had averred before; beſides, upon a Demurrer to this Plea, it was held, that the Debt muſt be due to *Winskell* before he made the Attachment; and he having not ſet forth, that it was due before that Time, he cannot levy a Plaint for a Debt before 'tis due, and by conſequence cannot have a Foreign Attachment to compel an Appearance to ſuch a Plaint. 2 *Lutw.* 977. *North* verſus *Winskell*. *Cro. Eliz.* 184. *S. P.*

8. Ruled, that Money owing on a Judgment obtained in the King's Courts, cannot be attached. 1 *Mod.* 103. See 3 *Cro.* 63.

9. The Plaintiff brought an Action of Debt in *London* againſt the *Harmbrough Company*, who not appearing upon a Summons, and a *nihil* returned, an * Attachment was granted to attach the Debts owing to the Company in the Hands of ſeveral Perſons, and this being removed by *Certiorari* into *B. R.* it was objected, that the Debts owing to a *Corporation* are not attachable; but a *Procedendo* was granted, for they are proper Judges below, whether this is within the *Cuſtom of London*; if there is no ſuch Cuſtom, and they Rule that there is, the Party grieved may have his Remedy at Law, ſo let them proceed according to their Cuſtom, at their Peril. 1 *Mod.* 212. *The Hamburgh Company*'s Caſe. * Antea (B) 4.

10. *Debt* upon Bond conditioned to pay 50 *l.* before ſuch a Day; the Defendant pleaded the Cuſtom of *London* of Foreign Attachment, (*viz.*) that where a Man is indebted to another, and that Man hath Money due to him from one in *London*, that the Creditor may attach it before it is due to him, and that ſuch a Creditor of the now Plaintiff did attach 50 *l.* in the Defendant's Hands before it was due to the Plaintiff, and gave Security, according to the Cuſtom, to repay the Debt, if it ſhould be diſproved within a Year and a Day, and that on ſuch a Day, (which was after the Date of the Bond) he paid the 50 *l.* to the Creditor, upon a *Sci' fa'* brought againſt him (the Defendant) according to the Cuſtom; and upon a Demurrer to this Plea in Bar, it was inſiſted, that a Cuſtom to attach * Money before it was due, could not be good; but adjudged, that it was, for tho' it might be attached as a Debt, it could not be levied before it was due; and ſo the Cuſtom was laid. *Sid.* 327. *Robbins* verſus *Standard*. * Antea (E) 5. contra.

11. The Caſe referred by the *Ch. Juſt. Holt.* at a Trial before him, for the Opinion of the Judges, was thus: ſſ. *Maſters* owed Money to *Gosfreight*, and died, and the Defendant *Lewes* after-

afterwards received 250 *l.* due to *Maſters* the Inteſtate; *Gosfreight* contended the Adminiſtration, and before it was granted, he levied a Plaint in the Sheriffs Court againſt the * *Archbiſhop of Canterbury*, for the Debt due to him from *Maſters* the Inteſtate, becauſe till Adminiſtration granted the Ordinary did repreſent his Perſon: Upon this Plaint there was a *Nihil* returned, and upon *four Summons*, there was a *Scire facias* and Judgment againſt the *Archbiſhop*, and this Money was attached in the Hands of the Defendant *Lewes*, as a Debt due from the *Archbiſhop* to the Inteſtate, and it was afterwards condemned and paid to *Gosfreight*; then Adminiſtration was granted to the Plaintiff *Maſters*, who brought an *Indebitatus Aſſumpſit* againſt *Lewes*; and upon *Non Aſſumpſit* pleaded, the Queſtion referred was, whether this Payment to *Gosfreight* was a good Diſcharge to *Lewes* by Vertue of the *Cuſtom of London of Foreign Attachment*? and adjudged, that it was not, becauſe the Plaint was levied againſt the *Archbiſhop*, who was neither *Debtor or Debtee*, therefore could neither ſue or be ſued: The Reaſon why Money is attachable in the Hands of the Garniſhee is to make the real Debtor appear, upon whoſe Appearance the Garniſhee is diſcharged, and then the Debtor muſt put in Bail to render his Body, or pay the Condemnation Money; but the * Archbiſhop cannot be compelled to do either, and therefore he is not within the Cuſtom, nor the Defendant *Lewes* neither, becauſe he was never indebted to the *Archbiſhop*, and therefore could not be compelled to appear by levying a Plaint againſt the *Archbiſhop*, to whom nothing was due; the Plaintiff had Judgment. 5 *Mod.* 75, 92. *Maſters* verſus *Lewes*.

*Antea (E) 4.

*T. Jones 166. Smith v. Ridges. S. P.

12. The Caſe, ſi. *Wallis* owed *Snell* 500 *l.* and *Parker* owed *Wallis* 220 *l.* which he aſſigned to *Snell* in Part of his Debt; *Wallis* being alſo indebted to *Lewes* in 250 *l.* he levied a Plaint againſt *Wallis* in the Sheriffs Court of *London*, ſuggeſting, that *Parker* owed him 220 *l.* which *Lewes* attached in the Hands of *Parker*, and *Snell became Bail for Wallis* at the Suit of *Lewis*, and afterwards brought an *Habeas Corpus*, and removed the Plaint into *B. R.* and was alſo Bail for *Wallis* there, and *Lewis* declared againſt him there: Afterwards *Wallis* came before a Judge of *B. R.* and declared, that he never conſented that *Snell* ſhould be Bail for him, either upon the Attachment, or upon the *Habeas Corpus*, and that all was done without his Knowledge, whereupon he prayed a *Procedendo* to the Action in *London*, which the Judge granted, it being confidently affirmed to him, that no Bail could be put in upon a Foreign Attachment, unleſs the *Lord Mayor* was preſent, nor then, if the Defendant did not conſent; and upon this *Procedendo Wallis* confeſſed the Action below at the Suit of *Lewis*, and he had Judgment, and *Snell*, who was his Bail, was taken in Execution, and paid the Money to *Lewis*. *Et per Curiam*, after *Wallis* had aſſigned to *Snell*, the Debt due to him from *Parker*, it then became the Right and Property of *Snell*, and *Wallis* was then no more than a Truſtee for *Snell*; if ſo, then *Snell* being Bail to the *Foreign Attachment*, it was *quaſi* for *Wallis*, and by his Aſſent, and that being done, both the Foreign Attachment, and all Proceedings on it, are at an End; for the Deſign of a Foreign Attachment, is only to compel the Defendant in the Original Action to appear, and after Bail was put in upon the *Habeas Corpus*, and *Lewis* had declared in *B. R.* then the Court was poſſeſſed of the Cauſe, and it ſhall never be reſtored afterwards to the Inferior Court by any Suggeſtion of the Defendant, as it was done in this Caſe by *Wallis*, therefore a *Superſedeas* was awarded to the *Procedendo quia improvide, &c.* by which the Judgment, and all the Proceedings in the Sheriffs Court were *coram non judice*, and Reſtitution was ordered to be made to *Snell*, and *Lewis* was left to proceed upon the Action removed by *Habeas Corpus*. *T. Jones* 222. *Lewis* verſus *Wallis*.

13. Where a *Foreign Attachment* is pleaded to an Action, the Cuſtom is ſet forth, that he who levied the Plaint ſhall have Execution of the Debt owing by himſelf, and by which he was attached, if the Plaintiff in the Original Action ſhall not diſprove it within a Year and a Day; now if the Plaintiff in the Action below doth not ſet forth ſuch conditional Judgment given by the Court, 'tis wrong, becauſe he doth not bring his Caſe within the Cuſtom. 2 *Lutw.* 985. *Scarpe* verſus *Young*. *Latch.* 208. *S. P.* 1 *Brownl.* 60. *S. P. Dyer* 146. *S. P.*

14. *In Aſſumpſit, &c.* there was Evidence given, that the Debt was attached by the *Cuſtom of London* before the Action brought, and that it was condemned there before the Plea pleaded; and this Evidence was given upon the general Iſſue *Non Aſſumpſit*, and it being inſiſted for the Defendant, that this ſhould relate ſo as to defeat the Plaintiff's Action; it was adjudged, that where there is an Attachment and Condemnation before the Action brought, it may be given *in Evidence* upon the general Iſſue, becauſe there is an Alteration of the Property; but if the Attachment be only before the Action brought, and the Condemnation afterwards, the *Attachment* may be pleaded in *Abatement*, and the *Condemnation* may be pleaded in *Bar*, but ſhall not be given in Evidence on the General Iſſue, becauſe by the *Condemnation*, the Property is altered, but not before. 1 *Salk.* 280. *Brook* verſus *Smith*.

15. *In Aſſumpſit*, the Defendant in Diſcharge of the Note upon which the Action was brought, produced the Record of a *Foreign Attachment*, wherein the ſaid Debt was attached and condemned, and *Trevor Ch. Juſt. of C. B.* held this a good Diſcharge; but if the Plaintiff could have ſhewed an Original Precedent to the Attachment, ſo that it might appear, that the Court was poſſeſſed of the Action before the Attachment, the Plaintiff might have recovered, notwithſtanding the Debt was attached and condemned; but in this Caſe the Declaration was between the Time of the Attachment and the Condemnation. 1 *Salk.* 291. *Savage*'s Caſe.

16. *W. R.* broke and went beyond Sea; but before he went he aſſigned his Goods to three Perſons for the equal Benefit of his Creditors; two of theſe Aſſignes being his Creditors, ſet up a Truſtee for them to attach the Goods in *London*: Now upon an Attachment there always goes a

Scire facias by way of *Garniſhment*, to which thoſe two Aſſigns who were Creditors, would not appear, but the third Aſſignee, who was no Creditor, offered to appear and plead, but the Judge of the Court refuſed his Plea, unleſs he would appear for the other two, and thereupon he moved for a Prohibition, and the Court inclined againſt the Cuſtom to compel one Garniſhee to appear for the Reſt; but the *Common Serjeant* ſaid, that if he put in Bail and wage his Law alone, that would have diſſolved the Attachment. *Mod. Caſes* 78. *Smith* verſus *Mayor of London.*

Attainder.

Where the Heir ſhall inherit, tho' his Anceſtor was attainted, where not, and what is forfeited by an Attainder of Treaſon, and of Attainders in Treaſon. (A)
Of Felony. (B)

(A).

Where the Heir ſhall inherit, tho' his Anceſtor was attainted, where not, and what is forfeited by an Attainder of Treaſon, and of Attainders in Treaſon. See *Remainder.* (F) *Treaſon.* (C) per Totum.

1. *Husband and Wife* were Tenants in *Special Tail*; they had Iſſue a Son, the Husband was attainted of Treaſon, and died, the Wife continued in Poſſeſſion as Tenant in Special Tail, and the Son was reſtored by Act of Parliament and made inheritable to his Father, *ſaving to the King all Advantages which he might have by the Attainder*; the Wife died; adjudged, that the Father had not any Eſtate forfeitable, for the *Wife* being likewiſe *Tenant in Special Tail*, the Eſtate ſurvived to her, and was not impeached by the Attainder, and ſhe dying, the Son is then inheritable to the Eſtate-tail, which might certainly have been barred by a Common Recovery ſuffered by the Wife, and in ſuch Caſe the King would have been bound. *Mich.* 31 *Eliz.* 1 *Leon.* 157.

2. *Grandfather*, *Father* and *Son*; the *Grandfather* was *Tenant in Tail*, the *Father* was attainted of Treaſon; here, tho' the Blood is corrupted, yet the Son would formerly inherit *per formam Doni*; but now ſince the Statute 26 *H.* 8. which gives the Forfeiture of the *Lands of Tenant in Tail* for Treaſon, the Law is otherwiſe, and by the Attainder of the Tenant in Tail, the Iſſue in Tail is barred. 8 *Rep. in Diglie's* Caſe 3 *Rep.* 10. the *Lord Lumley's* Caſe, cited in *Dowtie's* Caſe.

3. There was a Gift of the Caſtle and Manor of *Mulgrave* to a Man and the *Heirs of his Body*, which by ſeveral *meſne Deſcents* came to *Sir Ralph Bigod*, who *Anno 6 H.* 8. made a Feoffment thereof to the Uſe of his laſt Will, and died, and the Right of the Land, together with *the Intail*, after the Will performed, *deſcended to Sir Fra. Bigod, who made a Feoffment of the Caſtle and Manor to the Uſe of himſelf and Katherine his Wife, and the Heirs of their two Bodies*; they had Iſſue a Son and a Daughter; then the Statute 26 *H.* 8. *cap.* 13. was made, by which the Lands of Tenant in Tail were made forfeitable for Treaſon, and three Years after *Sir Francis Bigod* was attainted of Treaſon, and executed, and notwithſtanding the ſaid general Act of Parliament *Anno* 26 *H.* 8. of Forfeiture of Lands by Tenant in Tail for Treaſon, a ſpecial Act was made for the Attainder of *Sir Francis*, and the Forfeiture of his Lands: *Anno 6 Eliz.* his Son was reſtored in Blood by the Parliament, and died without Iſſue, and his Daughter m rried *Roger Ratcliffe*, the *Queen* ſuppoſing ſhe had a Right to the intailed Lands by Vertue of the Attainder of *Sir Francis Bigod*, *Anno* 34 of her Reign, granted the ſaid Manor and Caſtle to *Edmund Lord Sheffield*, and the Heirs Males of his Body, between whom, and *Roger Ratcliffe*, the Grandſon of *Sir Francis Bigod*, there was a Suit in the Exchequer concerning the Title to the Lands; and it was adjudged, that *Sir Fra. Bigod*, who had the Eſtate-tail in Poſſeſſion, had alſo a Right to *a Remainder of the old Eſtate-tail* veſted in him at the Time of his Attainder, which was forfeited to the King by Vertue of thoſe Statutes and his Attainder, and by conſequence it was veſted in the Queen, and her Grant of the Eſtate to the *Lord Sheffield*, was good, under which Grant 'tis enjoyed at this Day. *Hob.* 334. *Ratcliffe's* Caſe. Godb. 300.

4. There were two Brothers, the youngeſt was attainted of Treaſon, and executed, leaving Iſſue one Son; the elder Brother *having ſome Cauſe for a Petition of Right* to certain Lands in the King's Hands before the Attainder, died without Iſſue, and then the Son of his younger Brother was his next Heir in Blood, and he was reſtored in Blood by Parliament by theſe Words, (*viz.*) That he and his Heirs ſhall be enabled only in Blood as Son and *Heirs of his Father*, and ſhall have and enjoy all ſuch Lands which ſhall deſcend, remain or revert from any *collateral Anceſtor* of

of his ſaid Father; but that the ſaid Act ſhall not extend to any Lands which were in the King's Hands, or of any other Perſon by the Attainder; the Queſtion was, whether by theſe Clauſes he was enabled to have the *Petition of Right* as Heir to his Uncle, who was his Father's elder Brother? and adjudged, that he was, for it appears, that the Intention both of the King and the Parliament was liberal to the Son, who was thus reſtored. *Paſch.* 10 *Eliz. Dyer* 274.

5. *Covenant to ſtand ſeiſed* to the Uſe of himſelf for Life, Remainder to *Thomas Palmer* the eldeſt Son of his Brother *John Palmer* for Life, Remainder to the eldeſt Son of *Sir Thomas Palmer* in Tail Male, Remainder to his own Right Heirs; afterwards the Covenanter was attainted of Treaſon, and executed before the Birth of any Son of *Thomas*; adjudged, that this Attainder was a Bar to the After-born Son, and that the Fee-ſimple was veſted in the Crown, diſcharged of all Remainders. *Moor.* 815. *Sir Thomas Palmer's* Caſe.

6. Three of the *Regicides*, (viz. *Corbett*, *Okey*, and *Berkſted*, were brought from the Tower to the Bar by *Habeas Corpus*, *&c.* and by a *Mittimus* out of Chancery, directed to the Chief Juſtice, *& ſociis*; the Tranſcript of the Act of Parliament (by which they were attainted by High Treaſon) was certified by *Brown the Clerk of the Parliament*, and ſent into *B. R.* under the Great Seal, encloſed in Wax like a *Subpœna*, and the Priſoners being ſeverally demanded, what they could ſay why Execution ſhould not be awarded, they ſaid they were not the ſame Perſons mentioned in the Act of Attainder, upon which the Attorney General joined Iſſue, and the Sheriff of *Middleſex* returned a Jury within an Hour, (ſitting the Court) and they were found by Verdict to be the ſame Perſons; then they objected, that this Court could not award Execution, becauſe they had no Record of their Offence before them, and that there was no Addition to their Names; but theſe Exceptions being over-ruled, they had Sentence, and were executed at *Tyburn* on *Saturday* 19 *April*, 14 *Car.* 2. *Sid.* 72. *The King* verſus *Corbett* and *Okey*, *&c.*

7. In all Attainders of Treaſon, Corruption of Blood is made, wherever the Treaſon is done; ſo adjudged, where on a Commiſſion of *Oyer* and *Terminer* upon the Statute 28 *H.* 8. *cap.* 15. one *Morphew* was indicted of Treaſon, and demanded by the Benefit of the Statute 7 *Will.* 3. *cap.* 3. 1 *Salk.* 85. *The King* verſus *Morphew.*

8. *T. S.* having an Eſtate for three Lives, was attainted on the Statute 8 *& 9 Will.* 3. of Treaſon, for counterfeiting *the Coin*, by which Statute *Corruption of Blood* is ſaved, and for that Reaſon it was a Queſtion, whether the Lands were forfeited to the King, which were given to *Baron Lovell* as forfeited, who brought a Bill in the Exchequer to redeem, and had a Decree, from which there was an Appeal to the Houſe of Lords, where the Judges held, that in Treaſon the Lands came to the King as an *immediate Forfeiture*, which was a diſtinct Penalty from *Corruption of Blood*, for the *Corruption* may be ſaved, and the Forfeiture ſtill remain. 1 *Salk.* 85. *Sir Selathiell Lovell's* Caſe.

(B)

Of Felony.

1. A Man being convicted of *Felony*, and in *Newgate*, and there being a Judgment againſt him in Debt upon a *Ca. ſa.* directed to the Sheriffs of *London*, they ſerved it upon his Body in *Newgate*, and afterwards he was pardoned, the Queſtion was, if the Execution was lawful? and if it was, whether it was not diſcharged by the Pardon; and adjudged, that the Sheriff might chooſe whether he would ſerve it or not, becauſe by the Attainder for Felony the King had an Intereſt in the Body of the Felon, and ſuch an Intereſt as would Privilege the Felon againſt any Action or Execution of a Subject; but if the Sheriff will ſerve the Execution, then the Felon ſhall be in Execution for the Debt, but ſtill ſubject to the Judgment for the Felony, and if he eſcapes, the Gaoler ſhall be anſwerable both to the King and to the Party; and if he eſcapes after a Pardon, or is diſcharged by the Gaoler, he ſhall be anſwerable for the Debt; ſo that the Attainder doth not extinguiſh the Debt of a Subject, nor the Pardon neither, for by the Pardon the Execution is revived. *Moor* 178, 276. *S. P.*

2 And. 38. Cro. Eliz. 506. Bannister *v.* Truſſell.

2. In an Action of Debt, the Defendant pleaded, that after the Debt became due he was attainted of Felony, and upon a Demurrer, this was adjudged an ill Plea; and one of the Judges cited the *Lord Northampton's* Caſe, who after he was pardoned, was compelled to pay his Debts. *Moor* 753. *Hall* verſus *Truſſell.*

Owen 69.

3. Adjudged, that an Attainder of Felony makes a Forfeiture of the Eſtate to the Lord only by Way of Eſcheat *pro defectu Tenentis*, and the not Deſcending is the Conſequence of the Corruption of Blood. 1 *Salk.* 85.

Attaint.

Who ſhall have an Attaint. (A)
In what Caſes it doth lie. (B)
In what Caſes it doth not lie. (C)
Of the Evidence and Proceedings in Attaint. (D)
Of Pleadings in Attaint. (E)

(A)

Who ſhall have an Attaint.

1. HE who had a *Reverſion* after the Death of a Tenant for Life, might have an *Attaint* at Common Law upon a *falſe Verdict* given againſt the Tenant for Life; and now by the Statute 1 *R.* 2. *cap.* 3. he may have it even in the Life-time of the Tenant for Life. *Dyer* 1. 3 *Rep. Marqueſs of Wincheſter*'s Caſe. *S. P.*

2. In Treſpaſs againſt the Defendant, who pleaded, that he, with another, committed the Treſpaſs, *&c.* and averred, that it was the ſame, *&c.* and that the Plaintiff did releaſe him; now, if it ſhould be found againſt the Defendant, and Damages given, yet he who was no Party to the Iſſue may have an *Attaint* as well as his Fellow. *Hob.* 66. *Coke* verſus *Jenner.*

3. Attaint was brought upon the Statute 23 *H.* 8. againſt the *Executors of Sir John Baker*, whereas the Verdict was in a Cauſe between him and one *Auſtin*, and the Statute gives an Attaint between *the Parties*, and doth not mention *Heirs or Executors*, yet this Attaint was held good, ſo an Executor ſhall have Reſtitution upon the Statute 21 *H.* 8. tho' that Statute doth not mention Executors. 1 *And.* 24, 25. *Auſten* verſus *Executors of Sir John Baker.* Moor 17. Dyer 202.

(B)

In what Caſes it doth lie.

1. ATtaints were frequent in the old Books, but very rare in the New; 'tis a Writ which lieth where a falſe Verdict is given in a Court of Record, either againſt the Plaintiff or Defendant, if the Duty or Damages doth exceed 40 *s.*

2. It lieth in an *Aſſiſe of freſh Force* brought in *London.* *Goldſ.* 42. *Sir Wolſton Dixey* verſus *Sir John Spencer.* *Poſtea* Forfeiture. (A) 2. *S. C.*

3. It lies upon a *falſe Verdict* given in Caſes of *Felony.* 6 *Rep.* in the Caſe of Pardons; but where the Queen is ſole Party, and the Jury find for her, no Attaint lies; *aliter* where the Suit is *tam pro Domino Rege quam pro ſeipſo.* 4 *Leon.* 46.

4. In a Writ *de valore Maritagii*, Iſſue was joined upon the *Tenure* and found for the Plaintiff, and Damages to 40 *s.* and Coſts to 20 *s.* but the Jury did not find the *Value of the Marriage*, which they ought to have done; and if they had found an exceſſive Value or exceſſive Damages, an Attaint lieth againſt them, and this Defect of the Verdict ſhall not be ſupplied by a *Writ of Enquiry* of the Value, becauſe that would prevent the Party of his Remedy by Attaint. 10 *Rep.* 118. *Cheyney*'s Caſe. *Mich.* 11 *Jac. Godb.* 207. *Cook*'s Caſe. *S. P.*

(C)

In what Caſes it doth not lie.

1. WHere a Jury finds a Thing which is *out of the Iſſue*, there a Verdict is void, becauſe they are ſworn to try the Iſſue between the Parties, according to the Evidence given; ſo that whatſoever they try beſides the Iſſue is not *per juratores*; and therefore if that Matter ſo tried is falſe, 'tis no Perjury, nor doth an Attaint lie againſt them. *Hob.* 53. *Foſter* verſus *Jackſon.* *Poſtea* Verdict. (D) 13. *S. C.* Execution. (K) 2. *S. C.* Moor 857. S. C.

2. Debt upon Bond for Performance of Covenants, one of which was, that in Conſideration the Plaintiff would build a new Mill upon the Lands demiſed to him by the Defendant, and bring a Water-courſe to it, he the ſaid Defendant would Leaſe the ſame to the Plaintiff, and the Plaintiff aſſigned the Breach in Stopping the Water-courſe; the Defendant pleaded, that he did not ſtop it, upon which they were at Iſſue, and it was found for the Plaintiff; afterwards the Defendant brought an Attaint againſt the Jury, and the falſe Oath was found, and it was moved in Arreſt of Judgment, that here was no Iſſue, and by Conſequence no Verdict, and if ſo, then there could be no falſe Oath, and by Conſequence no Attaint would lie; now the Iſſue in this

this Caſe was taken upon the *Stopping the Water-courſe*, which is no Cauſe of Action upon the Party's own Shewing, for there was no expreſs Covenant in the Leaſe, that the Plaintiff ſhould enjoy the Water-courſe; beſides, the Defendant in the Action might have alledged this Matter in Arreſt of Judgment, and ſo he ſhall not be helped by an *Attaint*, neither doth it appear, that Execution was taken out againſt the Defendant; and then this Attaint being brought upon the Statute 23 *H.* 8. *cap.* 3. which gives this Remedy to the Party grieved, for that very Reaſon it will not lie, becauſe before Execution the Defendant is not a Party grieved; the firſt of theſe Objections was not anſwered, but as to the other Objection, the Defendant ſeemed to be *Pars gravata*, becauſe he is ſubject to the Judgment, and ſo liable to the Execution. 1 *Leon.* 278. *Huddy* verſus *Fiſher*.

3. In Ejectment the Plaintiff had a Verdict for the Land, and the Defendant brought an *Attaint*, and pending the Writ, a Feoffment was made of the Land; adjudged, that the *Attaint* is extinguiſhed and gone; for tho' 'tis collateral to the Right of the Land, for no Land is demanded by an Attaint, 'tis only to reform the erroneous Proceedings, (*viz.*) the falſe Oath, yet becauſe by a Verdict in Attaint the Land ſhall be deveſted and the Right removed, the Attaint is barred, and extinct by the Feoffment. 1 *Rep.* 111. in *Albany's* Caſe.

(D)

Of the Evidence and Proceedings in Attaint.

1. ATtaint is given to the Party grieved by the Statute 23 *H.* 8. *cap.* 3. and it was brought againſt the Defendant upon a falſe Verdict in an Aſſiſe, who died pending the Writ; but it was ruled, that the Attaint ſhould not abate by his Death. *Dyer* 139. *Heydon* verſus *Ibgrave*. *Hob.* 227. in *Needler* and *Biſhop of Winton's* Caſe. *S. P.*

2. Adjudged, that the Plaintiff in Attaint may not produce more Witneſſes, nor give farther Matter in Evidence than what was depoſed in the firſt Action, but the Defendant in Attaint may give new Matter in Evidence to enforce the firſt Verdict, and the Plaintiff ſhall have Time to diſprove it, if he can. *Dyer* 59. *Rolfe* verſus *Hamden*, and 202. *Paramour's* Caſe, and 302. in *Cheyney's* Caſe. *S. P.*

3. An Attaint as well as a Writ of Error ſhall follow the Nature of the Action upon which 'tis founded, ſo that if Summons and Severance lies in the firſt Action, it ſhall do ſo likewiſe in the Attaint, but this is not a * *Superſedeas* as a Writ of Error is; adjudged likewiſe, if Damages are recovered againſt ſeveral in an Action of Conſpiracy, all of them muſt join in an Attaint, and the *Nonſuit* of one of them ſhall not hurt the reſt. 6 *Rep.* 25. in *Ruddock's* Caſe.

* Poſtea 1.

4. But adjudged, that where an Aſſiſe was brought againſt *three Coparceners*, who all pleaded, that there was no Tenant of the Freehold named in the Writ, and the Jury found that two of them were Diſſeiſors and Tenants, *&c.* and that the *Third had nothing*, *&c.* and afterwards they all Three joined in an Attaint, and after Appearance the third Siſter, who was acquitted, as aforeſaid, by the Verdict, was now nonſuited in the Attaint, in that Caſe the Attaint was abated, becauſe ſhe had no Cauſe to bring an Attaint, for there was no Verdict againſt her. 1 *Leon.* 317. *Piggot* verſus *Harrington*.

5. In Attaint the Parties and the Jury appeared and demanded *Oyer* of the Record, upon which the Attaint was founded, which Record being in the Common Pleas, they had it, and thereupon the Plaintiff aſſigned the *falſe Oath*; the Defendants pleaded, that they made a good and lawful Oath, upon which they were at Iſſue, and in the ſame Term the Record was removed by a Writ of Error into the King's Bench; adjudged, that notwithſtanding it was thus removed, the Court of Common Pleas might proceed, if the Proceſs for the Grand Jury were returned. *Paſch.* 11 *Eliz. Dyer* 284.

6. So that Court may write to other inferior Courts to have the Record certified to try a Thing depending before them; for the *Common Pleas* hath a Juriſdiction to hold Plea, either in Error or Attaint, upon a Judgment or falſe Oath given in other Courts. *Paſch.* 8 *Eliz. Dyer* 250.

7. Judgment was given in the Exchequer, and an Attaint was brought in *London*, and before Execution, the Record was removed by *Certiorari* into the King's Bench, and the Plaintiff prayed Execution upon it, and had it; for an Attaint is not a * *Superſedeas* as a Writ of Error is, nor doth a *Superſedeas* lie in Attaint. *Hill.* 7 *Ed* 6. *Dyer* 82. *Sir John Ailiff's* Caſe.

* Antea 3.

8. In antient Times it was held, that where a Man recovered a Debt upon a Bond, the Judgment was, that the Bond ſhould be damned, that is, cancelled; but now, ſince Attaints and Writs of Error are ſo frequent, the Judges have thought it dangerous to cancel Deeds, either where the Plaintiff recovers, or where the Verdict and Judgment is againſt him, becauſe in both Caſes it may be reverſed by Writ of Error or Attaint. 6 *Rep.* 45. in *Higgins's* Caſe. *Poſtea* Judgment. (D) 2. *S. C.*

9. Attaint was brought in the Common Pleas againſt a Jury, for a Verdict given in the King's Bench, whereupon the Record was removed from that Court to the *Common Pleas*, and there the Verdict was affirmed; adjudged, that the Plaintiff in the Action ſhall have Execution according to the Verdict, for the Record is in the King's Bench, and nothing but the *Tenor* thereof in the Common Pleas, but if the Verdict had been ſet aſide, and Execution had been put upon it before

before it was ſet aſide, then the Court of Common Pleas might have awarded Reſtitution to the Party grieved. *Hill.* 37 *Eliz. Cro. Eliz.* 371. *Yorke* verſus *Allen.*

10. Upon a *Certificate* from a Judge, that the Jury gave a Verdict againſt his Opinion, the Judgment was ſtayed; but upon Motion to the Court for Judgment, it was granted, and accordingly it was entered; for the Party may have an Attaint againſt the Jury, and there is no other Remedy for him. *Style* 138. *Slade's* Caſe. See *Cro. Eliz.* 309. *Ingerſall's* Caſe. See *Buſhell's* Caſe.

(E)

Of Pleadings in Attaint.

1. THE Teſtator had a Verdict upon a *Quo minus* brought by him in the *Exchequer*, an Attaint was brought againſt his Executors; adjudged, that it lieth againſt Executors by the Equity of the Statute 23 *H.* 8. *cap.* 3. which was made in Mitigation of the Common Law, for it lies againſt any one who hath the Benefit of the Thing recovered; and in this Caſe the Executors pleaded a *Concord* made between the Plaintiff and their Teſtator, upon which Plea the Plaintiff demurred; and it was adjudged, that in all Actions founded upon a *Wrong*, as *Treſpaſs, Conſpiracy, &c.* where nothing certain is in Demand, nor any Thing to be recovered but Damages, there *Concord* is a good Plea. *Dyer* 202. *Auſtin* verſus *Baker.* 1 And. 24. Moor 17. Antea (A) 3.

2. The Plaintiff had a Verdict in an Action of Treſpaſs, and the Defendant brought an Attaint, and one of the Jury pleaded an *Accord* with Satisfaction between the Plaintiff and the Defendant in the Action, and adjudged a good Plea; for the Writ of Attaint is not grounded alone upon the Record, where the Matter is made certain, but upon Matter of Fact, for the Suppoſition of the Falſity of the Oath is Matter of Fact. 6 *Rep.* 44. in *Blake's* Caſe. 7 *Ed.* 6. *Dyer* 75. *S. P.*

Attorney.

Who ſhall be an Attorney, and in what Cauſes, and in what not. (A)
Privileges of Attornies allowed. (B)
Privileges of Attornies not allowed. (C)
Appearance by Attorney, good, and of his Conſent, and of Warrants of Attorney. (D)
Appearance by Attorney, not good. (E)
Actions for his Fees. (F)
Puniſhable for Miſdemeanors in his Office. (G)
Letter of Attorney good, and the Authority well executed. (H)
Letter of Attorney, *&c.* the Power not well executed. (I)

(A)

Who ſhall be an Attorney, and in what Cauſes, and in what not.

1. FOrmerly Attornies were not allowed in any Suit, or in any Court, for the Words of the Writ command the Defendant to appear, which muſt be intended *in Perſon*, and at this Day a Man cannot do his Suit, either at a *Leet*, or at the Sheriff's Torn by Attorney, but he muſt appear in Perſon; but now, by the Statute of *Merton, cap.* 10. and by other ſubſequent Statutes, a Man may make an Attorney to appear for him in any Actions in the Courts of Record at *Weſtminſter*, and likewiſe in inferior Courts. 6 *Rep.* 58. in *Beecher's* Caſe.

2. An Attorney thus made by his Client muſt not pervert Juſtice, for that is contrary to his Oath, and 'tis an Injury to the Court where he ſerveth; he muſt alſo be faithful and diligent to his Client, and not reveal what is committed to him in Charge. *Hob.* 9.

3. Caſe, *&c.* againſt an Attorney, in which the Plaintiff declared againſt him as *Clerk*; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that the Declaration is ill, becauſe of the Addition of *Clerk*, when it ſhould be againſt ſuch a one *Attornatum, &c.* for Attornies are of Record, as it appears by antient Records in the Tower, before the Reign of *H.* 7. but the Plaintiff had Judgment. 1 *Roll. Rep.* 3. *Hudſon* verſus *Hancocke.*

4. The *Pronotary of Stepney-Court* refuſed to admit one *Haſtings*, who was an Attorney, and had been Under-Sheriff of *Middleſex*, to appear for his Client in that Court, and *B. R.* directed him

him to bring an Action againſt the Pronotary for refuſing it. *Sid.* 410. *Haſtings's* Caſe. See *Mod.* 23.

Sid. 410. 5. The *Steward of Havering Court in Eſſex* refuſed to let *Gilman*, an Attorney of *B. R.* appear for the Defendant, in an Action brought againſt him in that Court; thereupon he moved *B. R.* againſt the Steward, alledging, that the Attornies in the Courts at *Weſtminſter* might practiſe in any inferior Court, and that thoſe Courts had not a Preſcription or Charter for any certain Number of Attornies, and to exclude others; but becauſe it was the general Uſage of thoſe Courts to ſuffer no Attornies but their own to practiſe there, the Motion was denied. 1 *Vent.* 11. *Gilman* verſus *Wright.*

(B)

Privileges of Attornies allowed. See *Privilege.* (B) per totum.

1. AN Attorney of *B. R.* was choſen *Tithingman* of the Town of *C.* where the *Cuſtom* was, that the Inhabitants ſhould ſerve that Office according to their ſeveral Houſes; the Attorney thus choſen at the *Leet*, brought a *Writ of Privilege* to be exempted from executing the Office, for that he was an Attorney, *&c.* it was objected againſt the Allowance of this Writ, becauſe, tho' an Attorney may *generally* have ſuch a Privilege, yet where there is a *ſpecial Cuſtom*, that the Inhabitants ſhall be choſen in Courſes, that Cuſtom ſhall prevail againſt this Privilege; but adjudged, it ſhould not, an Attorney being a Perſon who by his Office is to attend this Court. *Cro. Car.* 283. *Prowſe's* Caſe.

March 10. 2. A Writ of Privilege was allowed by the Court of Common Pleas for a *Clerk* of the *Cuſtos Brevium* Office, to diſcharge him from being a *Soldier*, reciting, that 'tis a Cuſtom and Privilege of that Court, that neither *Attornies or Clerks* of that Court ſhall be preſſed for Soldiers, or choſe to execute any Office againſt their Wills, but that they ought to attend the Service of the Court. *Cro. Car.* 8. *Venable's* Caſe.

3. An Attorney hath the Privilege to be ſued in the proper Court where he is an Attorney, and not elſewhere, and therefore an Attorney of *B. R.* muſt be ſued *in Cuſtodia Marr'*, and ſo muſt a *Clerk of a Serjeant at Law* be ſued in the Common Pleas, for tho' a Serjeant may practiſe in any Court, yet he is *ex officio* to attend that Court more than any other; therefore *Serjeant Hetley's Clerk* being arreſted by a *Marſhals Court Writ*, he brought a Writ of Privilege, reciting, that *Serjeants at Law* attending the Court of Common Pleas, and *their Servants* waiting on them there, ought to have the Privilege to be ſued in that Court, and ſo it was adjudged. *Cro. Car.* 59. 2 *Bulſt.* 207.

4. Adjudged, that if an Attorney be ſued by Bill of Privilege, he ought not to find Bail, but 'tis otherwiſe if he is ſued by Original, and comes in by *Capias.* 2 *Brownl.* 134.

5. It was moved, that an Attorney at large, who had diſcontinued his Practiſe, might put in ſpecial Bail, but it was denied, for he hath the ſame Privilege with other Attornies, and is to appear in Court *de die in diem.* 1 *Vent.* 1. *Sir John How* verſus *Woolley.*

1 Lev. 261. Raym. 179. S. C. 6. A Writ of Privilege was prayed for an Attorney, who was a *Copyholder*, where the Cuſtom of the Manor was, for the Homage to chooſe one of the Tenants to be the *Lords Reeve*, and that he was elected; it was inſiſted, that to execute this Office was Parcel of the Tenure by which he held this Office, and the *Lord* ſhould not be deprived of it by this Privilege, but yet it was allowed; for it ſhall be preſumed that 'tis more antient than the *Tenure*, but at leaſt, it ſhall be preferred before it; becauſe the Office of an Attorney concerns the Adminiſtration of Juſtice, and therefore an Attorney ſhall not be amerced for not attending the *Lord's Court*, at ſuch a Time as his Attendance is required in *Weſtminſter-Hall.* 1 *Vent.* 16, 29. *Stone's* Caſe.

(C)

Privileges of Attornies not allowed. See *Privilege.* (B) and (C) per totum.

1. AN Attorney of the Common Pleas ſued as *an Adminiſtrator* by a Bill of Privilege, and an Exception was taken to it, for that in ſuch Caſe his Privilege is not to be allowed, becauſe he ſues not in his own Right, but in the Right of another, and therefore he muſt ſue by Original, and the Court was of that Opinion. *Hob.* 177. *Gage's* Caſe.

2. A *Chancery Clerk* married an Executrix to her former Husband, and the Clerk and his Wife being ſued in the Court of Common Pleas, he demanded his Privilege by Writ, to be ſued in the *Chancery*, but it was not allowed, becauſe his Wife was joined in the Action, and ſhe could not have the Privilege, therefore her Husband ſhall not. *Godb.* 10. *Pool's* Caſe.

(D)

Appearance by Attorney, good, and of his Conſent, and of Warrants of Attorney.

1. IN a *Quid juris clamat*, the Defendant upon a Suggeſtion that he was old and weak, had a *Dedimus* directed to the Chief Juſtice to make an Attorney, and accordingly the Appearance by Attorney was held good. *Dyer* 126. *Flowerdue* verſus *Cook*.

2. In *Audita querela*, a Writ was awarded out of the Common Pleas againſt the Defendant *ad reſpondendum*, to which Writ he appeared by Attorney, and held good. *Mich.* 13 *Eliz. Dyer* 297.

3. *Husband and Wife* Tenants in Tail, Remainder to the Right Heirs of the Husband; they had Iſſue a Daughter, and the Husband died; afterwards the Wife ſold the Lands in Fee, and the Daughter and her Husband joined in a Fine to confirm the Sale to the Purchaſer; the Daughter died without Iſſue, a Writ of Error was brought to reverſe this Fine, and the Wife who ſold the Eſtate, and the Husband of the Daughter who joined in the Fine, appeared by Attorney, and joined *Gratis* with the Plaintiff in Error, and their Appearance by Attorney was held good. *Mich.* 1 *Mariæ. Dyer* 89. *B.*

4. *Error in Debt, &c.* and the *Error* aſſigned was, that the Defendant appeared *by G. D. his Attorney*, and there was a Judgment againſt him by *Default*; but that the ſaid *G. D. was not an Attorney of the Court* at the Time of his Appearance, nor at any Time in that Term when the Judgment was entered; the Defendant pleaded *in nullo eſt Erratum*, and becauſe it was plain that the Defendant had not only appeared by the ſaid *G. D.* but had *imparled* to another Term, ſo that the Court had admitted him to be a Attorney, 'tis now againſt the Record to ſay, he was none, for that doth implicitly admit, that he was an Attorney. 2 *Cro.* 521. *Heydon* verſus *Mimms*.

5. A *Corporation aggregate* of many Perſons, cannot appear in Perſon, but by *Attorney*, and ſuch Appearance is good. 10 *Rep.* 32. in the Caſe of *Sutton's Hoſpital*.

6. In *Aſſumpſit*, the Defendant pleaded the *Statute of Limitations*; the Plaintiff replied, and the Defendant not joining Iſſue in due due Time, the Plaintiff's Attorney ſigned Judgment; but afterwards conſented to accept the Iſſue, and to go to Trial; and upon a Motion, and *Affidavit* made of the Matter, in order to compel him to accept the Iſſue, it was oppoſed; becauſe the Client having Notice of this Advantage, ordered his Attorney to inſiſt upon it, and the rather, becauſe this was a hard Plea; but it was ruled, to hold the Attorney to his Conſent, by which his Client is bound. 1 *Salk.* 86. *Latouch* verſus *Paſherant*.

7. An Attorney appeared *without any Warrant*, and Judgment was had againſt the Client; and upon a Motion to ſet aſide the Judgment, it was ruled, that the Judgment ſhall ſtand, if *the Attorney is reſponſible*, becauſe 'tis regular, and there is no Default in the Plaintiff; but if the Attorney is not *reſponſible*, it ſhall be ſet aſide, for otherwiſe the Defendant hath no Remedy, and may be undone. 1 *Salk.* 88. Mod. Ca. 16.

8. The Plaintiff had a Verdict in *C. B.* in an Action of Treſpaſs, and his Attorney entered *remittit damna*, as to Part, and had Judgment for the Reſt; adjudged, that by the making him Attorney, he had Power to remit the Damages, for that need not be *in propria perſona*, as a *Retraxit* muſt be. 1 *Salk.* 89. *Lamb* verſus *Williams*. Mod. Ca. 82.

(E)

Appearance by Attorney, not good.

1. DEBT upon Bond, the Defendant pleaded Payment at the Day upon which they were at Iſſue, and it was found for the Plaintiff; afterwards the Plaintiff *by his Attorney* came into Court, *& fatetur ſe in Curia hic ulterius nolle proſequi*, upon which Judgment was given, that the Defendant *eat inde ſine die, &c.* and upon a Writ of Error brought the Judgment was reverſed, becauſe a *Retraxit* cannot be *per Attornatum*, for it being in Nature of a Releaſe, it muſt be done by the Plaintiff himſelf in Perſon. 8 *Rep. Beecher's* Caſe. *Poſtea* Retraxit. 2. *S. C. Antea* Amerciament. (A.) 2. *S C.*

2. *Homage and Fealty* are Things inſeparably annexed to the Perſon, and therefore cannot be done by Attorney.

3. *T. S.* had a Warrant to appear for the Defendant, and afterwards there was Judgment againſt him; and upon a *Scire facias* againſt the Bail, the Defendant ſtill appeared by his old Attorney, who acted as ſuch thro' the whole Cauſe, and Execution was awarded againſt the Bail; and now, upon a Writ of Error brought, the Record of the Principal Judgment being certified, it was adjudged, that as ſoon as the *Scire facias* was returned, then the Plea began, and then a new Warrant of Attorney ought to have been entered thus; (*viz.*) That the Plaintiff *ponit loco ſuo, &c.* for the Warrant to appear in the Principal Action, is no Warrant to appear in the *Scire facias againſt the Bail*; becauſe 'tis a new Cauſe, and a different Record. 1 *Salk.* 89. *Burr* verſus *Atwood*.

(F)

Actions for his Fees. See *Ac. Caſe.* (H) 54. (W) per Totum.

1. PER *Coke Ch. Juſtice*, the Fees for *Knighthood* are not recoverable at Common Law; but by the Statute 13 *R.* 2. the Earl Marſhal, and the King, may appoint how much ſhall be given, and 20 *l.* hath been ordered to be paid for every one who is *Knighted*; and formerly the Suit was in the Court of Requeſts, where the Judges were in Nature of Arbitrators, for they could not commit for Non-performance of their Decree. 1 *Roll. Rep.* 87. *Pool* verſus *Redhead.*

2. Debt, *&c.* in which the Plaintiff declared, that the Defendant *retained* him *adtunc exiſten' one of the Deputy Clerks of the Inrollments*, to inroll certain Indentures for him, *capiendo inde pro labore ſuo & pro feodo clericorum*, 10 *s.* for every Roll; then he ſets forth, that by Vertue of the ſaid *Retainer* he did enroll ſo many Deeds: Upon *Nil debet* pleaded, the Plaintiff had a Verdict, it was argued in Arreſt of Judgment, that a *Deputy Clerk* could not have an Action of *Debt* for Fees, he may have an Action on the Caſe *pro labore*; but none but the Chief Officer can have an Action of Debt, *&c.* and ſo it was adjudged. 2 *Roll. Rep.* 474. *Orwell* verſus *Nicholſon.*

3. *In Debt, &c.* the Plaintiff declared, that he is an *Attorney* of the Common Pleas, and that the Defendant retained him to proſecute a Suit, in which he was Plaintiff againſt *G. D.* and agreed to pay his Fees, and ſhewed, that he had laid out ſo much, and that the Defendant had not paid him: Upon *Nil dicit* pleaded, the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error aſſigned was, that the Plaintiff was but a *Solicitor* and *no Attorney*, and ſo there is no Conſideration to ground this Action, for 'tis *Maintenance to ſolicite Suits*; beſides, Debt will not lie, becauſe there is no Contract between him and the Plaintiff, therefore he ſhould have brought an *Aſſumpſit, &c.* but theſe Exceptions were diſallowed, and the Judgment affirmed. *Cro. Car.* 76. *Sands* verſus *Trevilian.* Action on the Caſe. (N) 13. *S. C.* 2 *Cro.* 510. *Bradford* verſus *Woodhouſe. S. P.*

W. Jones 208. * *It muſt be on a Special Promiſe.*

4. It was the Opinion of the Court, that an Attorney may be a *Solicitor* for his Clients in other Courts as well as in the Court where he is an Attorney, and a Solicitor of an inferior Rank may take Recompence for ſoliciting Cauſes for his Clients; and an * *Aſſumpſit* for Money laid out in Fees is maintainable. *Cro. Car.* 159. *Thursby* verſus *Warren.*

* 2 Roll. Rep. 59. S. P.

5. *Prohibition to the Spiritual Court* upon a Libel there by a *Proctor for his Fees*; if it had been for a *Cuſtomary Fee* a Prohibition ſhould be granted; becauſe whatever ariſes out of a *Cuſtom*, is triable at *Common Law*; but where the Libel is for Fees in general in the *Spiritual Court*, ſuch Fees ariſe by *Provincial Conſtitutions*, and that * Court is the proper Place of Judicature in in ſuch Caſes; ſo the Prohibition was denied againſt the Opinion of *Atkyns*, who held, that the Retainer was an implied Contract, by Vertue whereof the Plaintiff had his Remedy at Law. 1 *Mod.* 167. *Horton* verſus *Wilſon.* 5 *Mod.* 238. *Johnſon* verſus *Lee. S. P.* but not adjudged.

* Allen 4. Eveley *v.* Livermore.

6. *Indebitatus Aſſumpſit, &c.* was brought by an Attorney in *B. R.* for his Fees and Diſburſments in defending a Suit in an *Inferior Court*: The Defendant pleaded the Statute 3 *Jac.* 1. *cap.* 7. adjudged, that this Statute may be as well pleaded to an *Indebitatus Aſſumpſit* as to an *Action of Debt*; but to a * *Special Promiſe* or an *inſimul computaſſet*, 'tis no Plea; and 'tis no Plea as to this Plaintiff, becauſe this Satute extends only to Attornies in the Courts in *Weſtminſter*, and not to thoſe in inferior Courts. 1 *Salk.* 86. *Berkenhead* verſus *Fanſhaw.*

7. Executor of an Attorney brought an Action for Fees and Diſburſments of his Teſtator; the Defendant moved *B. R.* to have the Plaintiff's Demand referred to the Maſter; but it was denied, becauſe the Buſineſs was not tranſacted in that Court, nor any Part of it. 1 *Salk.* 89. *Gregg's* Caſe.

(G)

Puniſhable for Miſdemeanors in his Office. See *Audita querela.* (A) 3.

1. AN Attorney muſt not be guilty of any undue Practiſe; therefore, if he cauſe another Attorney to appear on the other Side, and confeſs the Action which he began, he is puniſhable; ſo if he follow a Cauſe to be paid ſuch a Sum in Groſs, when the Thing is recovered, this is *Champerty. Hob.* 9. *Yardly* verſus *Ellis*, and 117. *Box* verſus *Barnaby.*

2. In Treſpaſs againſt the Defendant, for Breaking a Beam; the Defendant juſtified, for that he was an Officer, and for that the Plaintiff ſold Goods by this falſe Beam, he (the Defendant) by the Command of a *Juſtice of Peace*, did break it; the Plaintiff replied, and traverſed, that *he ſold falſly by the Beam*, upon which they are at Iſſue at the *Niſi prius*, and they having each of them an Attorney, the Plaintiff did not proceed, but retained one *Suliard* another Attorney, who altered the Paper-Book, by putting in a new Plea, without Motion, or the Defendant conſenting, and traverſed, that the *Beam was falſe*, of which the Defendant having Notice, took out a

Writ of Inquiry; and upon a Motion to puniſh the Attorney for this Abuſe, the Chief Juſtice was of Opinion to ſtrike his Name out of the Roll. 2 *Roll. Rep.* 459. *Suliard's* Caſe.

3. An Attorney proſecuted three ſeveral Actions of Debt, every one of them being 40 *l.* above and ſo a Fine was to be paid to the King in each Action, and he entered Judgments on all of them; there were no Originals ſued forth, but the Attorney had received the Charges, as if they had been ſued forth, and alſo the *Fines* due to the King; adjudged, that this being voluntary, and againſt his Oath, which is, *That he ſhall not Practiſe any Deceit*, he ſhall be put out of the Roll of Attornies, and be caſt over the Bar, and committed to the Fleet. *Cro. Car.* 52. *Jerom's* Caſe.

4. Where Writings come to an Attorney's Hands by Way of his Buſineſs, as an Attorney, the Court, upon Motion, will make a Rule for him to deliver them, but where they come to him in any other Manner, the Party muſt bring his Action. 1 *Salk.* 87. *Goring* verſus *Biſhop.*

5. A Writ againſt *Husband and Wife* being brought to an Attorney, he undertook to appear for both, but afterwards he refuſed; then the Plaintiff delivered a Declaration, which the Attorney received *de bene eſſe*, and Judgment was entered for Want of a Plea; the Court ſet it aſide, and committed the Attorney; for if he once undertake to appear, and afterwards refuſeth, upon a Summons before a Judge, he will be compelled to appear. *Mod. Caſes* 86. *Wigg* verſus *Rook.*

(H)

Letter of Attorney good, and the Authority well executed.

1. LEaſe of a Manor, and certain Lands in *H.* and the Leſſors made a Letter of Attorney to *G. D.* to enter on *the Manor and Lands*, and to ſeal and deliver the Leaſe in their Names, *&c.* The Attorney entered *on the Lands*, and executed the Deed accordingly; it was objected on a Special Verdict, that the Attorney had not purſued his Authority, becauſe he entered only *on the Lands*, when he ſhould likewiſe have entered *on the Manor*, according to the Letter of Attorney; but adjudged, that the Authority of the Attorney was well executed, becauſe the Jury did not find that there was *any Manor*; but if it had been found, that the Leſſors had ſuch a Manor, then the entering on the Lands, without entering on the Manor, had not been good. 1 *Leon.* 306. *Carter* verſus *Cleycole.*

2. Letter of Attorney to *G. D.* to make Livery, *&c.* is revocable before 'tis executed; but if *G. D.* by Vertue of that Letter of Attorney maketh Livery, the ſame is good, and the Power being once executed, cannot be revoked. 5 *Rep.* 90. In *Hoe's* Caſe.

3. *Two Jointenants* in Fee made a Feoffment to two Men and their Heirs, and a Letter of Attorney *for me and in my Name*, to make Livery, *&c.* the Attorney made Livery to *one of the Feoffees*; it was objected, that there was no Authority given to the Attorney to enter in the Name of both the *Feoffors*, becauſe the Words were in the ſingular Number, *(viz.) In my Name*, which cannot comprehend both; and an Attorney having only a bare Authority, it ought to be ſtrictly purſued, eſpecially in the conveying an Eſtate; but adjudged, that the Letter of Attorney was good, becauſe the Authority proceeds from *both* the Feoffors, and the Words *in my Name* ſhall be intended to be the Words of each of them; and tho' there was but *one of the Feoffees* preſent on the Land, yet the Livery is well executed to both, becauſe he who was preſent ſhall be Attorney to receive it for him, who was abſent; and therefore the Effect of the Letter of Attorney is well executed, tho' the Words were not. *Style* 284. *Trotman* verſus *Standard.*

(I)

Letter of Attorney, &c. the Power not well executed.

1. A Charter-Party was made at *Dunkirk*, between two Perſons, and *G. D.* by Vertue of a Letter of Attorney from one of them, did proſecute the other in the Admiralty-Court, and this Matter being found on a Special Verdict in an Action brought againſt the Attorney for ſuing in the Admiralty againſt the Statutes 13 & 15 *R.* 2. the Queſtion was, whether *G. D. the Attorney* was ſuch a Party as might proſecute a Suit in that Court within thoſe Statutes; and adjudged, that his Suing there was a Contempt, for it was *Malum prohibitum* within thoſe Statutes, and in ſuch Caſe, either the Client or his Attorney is puniſhable, and the Party grieved hath his Election to ſue either, and therefore having ſued the Attorney, the Action is well brought. *Godb.* 385. *Cremer* verſus *Tookey.* *See* Admiral. (B) 18. *S. C.* and Treſpaſs. (A) 22. *S. C.*

2. There were joint Attornies, who had an expreſs Authority to make Livery to the Leſſee; in ſuch Caſe Livery made by one in the Name of both, is not good, becauſe it doth not purſue his Authority; for the Power is not in him alone, but in both; for they make but one Attorney. 5 *Rep.* 94. *in Barwick's* Caſe.

3. Leaſe

1 Roll. 229. 3. Leaſe for Life, bearing Date 25 *Octob. Habendum from the Day of the Date*, and there was a Letter of Attorney to make Livery *ſecundum formam Chartæ*; the Attorney made Livery the next Day after the 25*th of Octob.* adjudged, that this was not a good Leaſe, for it was not well executed, being the *Day after the Date*; for a Freehold cannot commence *in futuro*. 2 *Bulſt.* 303. *Butler* verſus *Finch.*

Attornment.

Where 'tis good. (A.)
Where 'tis not good. (B.)
Where 'tis neceſſary, and where not. (C)
Who ſhall be compelled to attorn, and who not. (D)

*4 & 5 An. c. 16. All the Caſes under this Title are now made Uſeleſs by the Statute *4 & 5 *Annæ*, by which 'tis enacted, that *All Conveyances by Fine or otherwiſe of any Lands*, Rents, *Reverſions and Remainders, ſhall be good and effectual without any Attornment of the Tenants.*

Provided, that no Tenant be prejudiced by Payment of any Rent to the Grantor or Cogniſor, or by Breach of any Condition for Non-payment of Rent, before Notice given him of ſuch Grant by the Grantee or Conuſee; however it may not be improper to ſhew how the Law was before the making this Statute, which may be ſeen in the Caſes following:

(A)

Where 'tis good.

1. A Particular Tenant made a Surrender to him in Reverſion; this Surrender ſhall enure in the firſt Place to an Attornment, and afterwards to a Surrender. 19 *Eliz. Dyer* 358.

2. A Fine was levied of a Reverſion; but before the King's Silver was entered, the Conuſee wrote to the Tenant of the Lands to give him Notice of the Purchaſe, and to require him to attorn without Compulſion by Law; thereupon the Tenant returned this Anſwer by a Letter under his Hand, (*viz.*) *Since he who acknowledged the Fine was no longer to have the Land, he was glad ſo good a Perſon as the Conuſee was to have it*; this was held to be a good Attornment. *Dyer* 298. *The Counteſs of Hereford's* Caſe.

3. An Attornment gives no Manner of Intereſt, but only perfects the Grant of another, 'tis an Aſſent to his Act, which cannot be divided; therefore where a Leaſe was granted *to two* for their Lives, and the Reverſion was granted to *G. D.* to whom *one of the Grantees for Life* attorned, and afterwards ſurrendered all his Intereſt to the *Grantee of the Reverſion*; it was adjudged, that he ſhould be Tenant in Common with the other *Jointenants for Life*; becauſe the Attornment of his Companion did veſt the intire Reverſion in the Grantee thereof; for the Eſtate of the *Jointenants for Life* was intire, and the Attornment of one of them, is the Attornment of both; and ſo is an Attornment of Part, an Attornment to the Whole, becauſe 'tis only an *Aſſent*, which cannot be divided; therefore, if a *Reverſion is granted to two*, and the Tenant in Poſſeſſion *attorneth to one of them*, 'tis a good Attornment to both. 2 *Rep. 66. Tooker's* Caſe. 1 *Leon.* 234. *Lancaſter* verſus *Lucas. S. P.*

1 And. 113. Moor 99. 4. The Lord of a Manor made a Leaſe of Part of it for 21 Years, and afterwards he made another Leaſe of the Manor for twenty-ſix Years, to commence after the Expiration of the firſt; then he made a Feoffment in Fee to certain Feoffees, *to the Uſe of them and their Heirs*, upon Condition, that if they did not pay 2000 *l.* to the *Feoffor* within fifteen Days, that then the ſaid Feoffees ſhould *ſtand ſeiſed* of the Manor to the *Uſe of the Feoffor and his Wife* for their Lives, and afterwards to their Son in Tail, with divers Remainders over; the Feoffees did not pay the 2000 *l.* and afterwards the *Leſſee for twenty-one Years attorned* to them, but it was two Years after *Livery* had been made; adjudged, that this Attornment ſhall have Relation to the Livery, to paſs the Manor, but not to puniſh the Leſſee, if he had committed any *Waſte* between the Livery and the Attornment; but the Feoffment being now made perfect by the Attornment, the Eſtate ſhall paſs from the Feoffor to the Feoffees *ab initio*; 'tis true, the firſt Uſes limited by the Feoffment are determined by the Default of Payment of the Money, but by Virtue of this Attornment the Feoffees ſhall have the *Reverſion* of the Manor to the ſecond Uſes therein limited; for a Limitation

tion beyond *the first Uses* ſhall not be defeated for Want of an Attornment to thoſe Uſes. 1 *Leon.* 264. *Bracebridge*'s Caſe. *Moor* 99. *S. C.* By the Name of *Harwell* verſus *Lucas.*

5. So where there was Lord and Tenant rendring Rent to the Lord, and the Tenancy deſcended to an *Infant*, and afterwards the Lord granted the *Seigniory* to another, the *Infant* may attorn to the Grantee, and it ſhall be good, becauſe it gives him no Intereſt, 'tis only a bare Aſſent to the Grant, which is not perfected till the Tenant attorn to it. 2 *Brownl.* 84. *Crane* verſus *Bullock.*

6. So where there was a Leaſe for Years aſſigned to the Defendant, and the Leſſor levied a Fine of the Reverſion to the Plaintiff, and likewiſe made a Deed of Bargain and Sale thereof to the ſame Plaintiff, which was enrolled after the Fine; adjudged, that the Plaintiff, who was the Cogniſee, was in by the Fine and not by the Bargain and Sale; and therefore, having brought an Action of Waſte againſt the Defendant, it was adjudged, that Waſte would not lie before an Attornment by the Leſſee. 4 *Rep.* 70. *Hinde*'s Caſe.

7. A Feme Sole made a *Leaſe for Life*, rendring Rent, and afterwards *granted the Reverſion* to another, but before any Attornment ſhe * *married the Grantee*; adjudged, that the Marriage is no Countermand of the Attornment, for 'tis for the Benefit of the *Grantee*, who was now her Huſband, that the Tenant for Life ſhould attorn to him, becauſe by that Means the Reverſion doth paſs from his Wife to him. 4 *Rep.* 61. *In Force and Hemling*'s Caſe.

8. Leſſee for twenty Years made an Under-leaſe for two Years, rendring Rent, and afterwards he granted his whole Term and Intereſt to another; in this Caſe, if the Leſſee for two Years do attorn, the Reverſion ſhall paſs immediately; but if he ſhould not attorn, yet it will paſs after the Expiration of two Years. 4 *Rep.* 42. *Rawlins*'s Caſe.

9. The Feoffor being ſeiſed of two Acres of Land, made a Leaſe of one of thoſe Acres to one Perſon, and a Leaſe of the other Acre to another, and then entered and made a Feoffment, and ſeveral Liveries and Seiſin of each Acre, to the Uſe of his Laſt Will, and afterwards reciting this Feoffment in his Will, he declares the Uſes to himſelf for Life, Remainder over to a Stranger; it happened, that the Leſſee of one of thoſe Acres was abſent when the Livery was made, ſo he did not then aſſent to it, but afterwards he did aſſent, and *granted* his Eſtate to the Feoffor, who died; it was inſiſted, that this enures as a Grant of the Reverſion, firſt as an Attornment, and then as a *Surrender* of his Eſtate, as if it had been an actual Surrender, but adjudged, that this Grant did not enure to make an Attornment, as an expreſs Surrender would have done; becauſe that admits the Reverſion to be in him to whom the Surrender is made; but in this Caſe, before the Attornment, the Grantee hath nothing, and the Grant of the particular Eſtate ſhall not enure as an Attornment, becauſe immediately upon the Grant it was drowned in the Reverſion. *Hill.* 8 *Jac.* 2 *Brownl.* 51. *Bone* verſus *Stretton.*

10. Tenant in Fee made a Leaſe for Years, the Leſſee died Inteſtate, then Tenant in Fee entered, and afterwards *W. R.* took out Adminiſtration to the Leſſee inteſtate, and entered; adjudged, this was an Attornment, tho' there was no Adminiſtrator in Being at the Time of the Feoffment made. *Moor* 875. *Adams* verſus *Curwin.*

11. Upon Evidence to a Jury, it was agreed *per Curiam*, that where the Grandfather being Tenant for Life, perſwaded the Father to grant the Reverſion in Fee to the Son, and in Conſideration thereof, promiſed to pay his Debts, that this Perſwaſion and Payment precedent amounts to an * Attornment in Law, that where the Father did give, *grant*, enfeoff, and confirm to the Son, with a Letter of Attorney in the Deed to make Livery, intending to paſs the Lands as in Poſſeſſion, yet by the Word *Grant* the Reverſion paſſed with Attornment, but if a Manor had been *granted*, to which an Advowſon is appendant with a Letter of Attorney to make Livery, there 'tis otherwiſe, for if Livery is not made, the Advowſon will not paſs by the Deed. 2 *Roll. Rep.* 91. *Atwell* verſus *Harris.*

* Dyer 298. *Where the Tenant for Life wrote to the Grantee of the Reverſion,* I am glad that I ſhall have ſo good a Landlord as your Lordſhip, *this was an Attornment.* Antea 2.

12. Leſſee for Years, Reverſion in Fee to *T. S.* who granted his Reverſion to *G. D.* in Fee, then the Leſſee for Years *aſſigned all his Intereſt* to the ſaid *G. D.* who was the Grantee of the Reverſion, but made no Declaration, whether this ſhould be an Attornment, or not; but adjudged a good Attornment, and that the Reverſion paſſed. *W. Jones* 455. *Sheppard* verſus *Woodward.*

13. Tenant for Life, Remainder in Tail, he in Remainder granted it to the Plaintiff in Fee; the Tenant for Life having Notice of this Grant, ſaid to two Men who were Strangers to the Proceedings, *That he was pleaſed and contented, that the Grant was made to the Plaintiff, becauſe he was his Couſin*; adjudged, that this was a good Attornment, for 'tis not neceſſary it ſhould be made to the Grantee himſelf; 'tis ſufficient, that the Tenant having Notice of the Grant, gives his Aſſent to it. *Cro. Car.* 318. *Hilton* verſus *Bembridge.* *Paſch.* 29 *Eliz.* 1 *Leon. Arden*'s Caſe *contra.* *Poſtea* (B) 3. *S. C.* W. Jones 376.

14. In Debt for Rent, the Plaintiff declared, that *T. P.* being poſſeſſed of Lands for the *Term of ninety-nine* Years, by the Demiſe of *B. B.* made a Leaſe thereof to the Defendant for *twenty-one Years*, and that afterwards *B. B.* granted the Reverſion to the Plaintiff, and for Rent arrear the Action was brought; upon *Nil debet* pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not alledge that the Defendant had * *attorned* to this Grant of the Reverſion; but adjudged good after a Verdict, be- T. Jones 217, 232.

* *Nothing paſſes by this Grant for Want of an Attornment, for tho' the Reverſion was granted for a valuable Conſideration, yet 'tis not executed by the Statute of Uſes, for that extends only to Eſtates where the Perſon was ſeiſed, but here the Grantee was not ſeiſed, but poſſeſſed,*

cauſe

cauſe the Plaintiff muſt have been Nonſuit at the Trial, if he had not given the *Attornment in Evidence*, and where-ever it can be intended, that a Thing muſt neceſſarily be given in Evidence at the Trial, and that the Plaintiff could not recover without it, there the not mentioning it in the Record will not hurt after a † Verdict. *Raym.* 487. *Hitchins* verſus *Steevens.*

† 2 Roll. Rep. 489.

15. In Ejectment for a *Manor*, Parcel in *Rents* and Parcel in *Services*; upon Not guilty pleaded there was a Trial at Bar, and the Plaintiff was put to prove an Attornment of the Tenants; becauſe, having declared for a Manor, Part in Rents and Part in Services, thoſe would not paſs without Attornment, and of that Opinion was the Court. 3 *Mod.* 36. *Smith* verſus *Goodier.*

(B)

Where 'tis not good.

1. LEſſee for Years, the Reverſion to another *for Life*, Remainder to another in Fee, the Leſſee attorned to the *Grantee for Life*, who *releaſed* all his Right to him in Remainder, and afterwards the Remainder-man granted all his Right to another in Fee, to whom the Leſſee for Years paid the Rent, and then the *Grantee for Life* did again Releaſe all his Right to the Grantee in Fee; adjudged, that both theſe Releaſes were void, becauſe they had not the Words of Surrender in them, and that the laſt Releaſe by the Grantee for Life was not an Attornment to make the Remainder paſs. *Dyer* 151.

2. The Leſſee made an Under-leaſe to one for Years, rendring Rent, and after the Expiration of that Term, then he made another Under-leaſe to a ſecond Perſon for Years, rendring Rent, and then the Leſſee ſold all his Intereſt to the Defendant, to whom the *ſecond Leſſee*, who had not the Poſſeſſion, attorned; adjudged, that it was void. *Goldsb.* 57. *Moor* verſus *Hills.*

3. Leſſee for Years, he in the Reverſion made a Feoffment in Fee to ſeveral Feoffees to the Uſe of himſelf for Life, and afterwards to the Uſe of his eldeſt Son in Tail, but he made no *Livery*; afterwards he came to the Leſſee for Years, and ſaid, that he had made Feoffment, and to what Uſes, but did not tell him to whom; thereupon the Leſſee replied, *You have done very well, I am glad of it*; adjudged, this was no Attornment, becauſe it was not made, either to the *Feoffees* or to the *Grantee of the Reverſion* to whom it ought to be made. *Paſch.* 29 *Eliz.* 1 *Leon.* 58. *Arden*'s Caſe. *Antea* (A) 13. *contra.*

4. Tenant for Life, Remainder in Fee, the Tenant for Life made a *Leaſe for Years*, the Leſſee entered, and then the Tenant for Life granted the Lands to *G. D. for Life*, *habendum* from the Feaſt of *St. Michael next following*, then the Leſſee for Years attorned; adjudged, that the Grant *to G. D. for Life* was void, becauſe a Freehold cannot commence *in futuro*, and if ſo, the Attornment of the Leſſee cannot make it good, for that muſt be void in like Manner. 2 *Rep. Buckler*'s Caſe.

5. If Leſſee for Life or Years attorn upon a *Condition ſubſequent*, the Condition is void; for if the Reverſion or Remainder is once veſted, it ſhall not be deveſted by any Condition annexed to the Attornment; and where a Man attorns upon a *Condition precedent*, 'tis no Attornment till the Condition is performed. 2 *Rep.* in *Tooker*'s Caſe.

6. A Woman made a Leaſe for Life, and afterwards ſhe granted the Reverſion to another for 1000 Years, and before any Attornment ſhe * married, and the Tenant attorned to the Grantee of the Reverſion; adjudged, that it was not good, for it came too late. *Cro. Eliz.* 270. *Johns* verſus *Philips.*

* Antea (A) 7. S.P.

(C)

Where 'tis neceſſary, and where not.

See *Copyhold.* (h) 7. *County Palatine.* (A) 13.

2 And. 202.

1. A Man who was ſeiſed of ſeveral Manors and Lands, Part in *Leaſes for Years*, rendring Rents, and Part in *Copyhold*, *bargained and ſold* the ſame for *ſeventeen Years*, to commence after his Death; afterwards he *covenanted to ſtand ſeiſed* of the Premiſſes to the Uſe of himſelf and the Heirs of his Body, and died, *no Attornment being made in his Life-time to the Bargainee*; adjudged, that the Bargainee ſhould have the Demeſnes and *Rents* by Vertue of the Bargain and Sale without any Attornment; for if the Bargainee took his Eſtate as a future Intereſt at Common Law, then there ought to be an Attornment to him in the Life-time of the Bargainor, before the future Intereſt did begin, and for Want of ſuch Attornment he could not have the Rents reſerved upon the Leaſes for Years, therefore he ſhall take it without any Attornment. 2 *Rep.* 35. *Sir Rowl. Heyward*'s Caſe. 8 *Rep.* 94. *Fox*'s Caſe. *S. P.*

2. Tenant for Life of the Manor of *D.* Remainder to a Woman in Fee, her Husband and ſhe levied a Fine to *G. D.* for *fifty Years*, rendring Rent, and granted the *Reverſion* to the Husband and Wife, and to the Heirs of the Wife, *&c.* the Leſſee for fifty Years made his Son, who was an Infant Executor, and died, Adminiſtration, during his Nonage, was granted to *T. H.* afterwards the Husband and Wife levy another Fine of the ſame Manor, *to the Uſe of* F. *and* G.

and their Heirs, the Adminiſtrator aſſigns Part of the Term to another; the Tenant for Life dies, and the Aſſignee of Part of the Term entered, and *F.* and *G.* eject him; adjudged, that the Aſſignee having only an Intereſt of a Term after the Life of the Tenant for Life, he could not attorn to the Cogniſee in the Fine, and there needs no Attornment to the Declaration of the Uſes, for when 'tis not requiſite to the Fine it ſelf, it cannot be required to the Declaration of the Uſes; beſides, here the Reverſion was ſettled in the Cogniſee in Judgment of Law, and he cannot poſſibly compel the Tenant to attorn, therefore in ſuch Caſe he may have an Action of Waſte without any Attornment, for there were no Laches in him, tho' he had recited the particular Eſtates in the Fine, for preſently after it was acknowledged, and before it was engroſſed the Reverſion paſſed to the Cogniſee, and in that very Inſtant it was executed by the Statute 27 *H.* 8. *of Uſes*, ſo that it was not poſſible for him to compel the Tenant to attorn. 6 *Rep.* 63. *Sir Moile Finch*'s Caſe.

3. Adjudged, that for *Acts in Law* no Attornment is neceſſary, as where a Leaſe for Years, rendring Rent, is *aſſigned to a Woman for her Dower*, ſhe ſhall have the Rent without Attornment; ſo where the Sheriff returned an *Elegit*, that the Leſſor was ſeiſed in Fee, who made a Leaſe for Years, rendring Rent, and that by Vertue of the Judgment a Moiety of the Lands was delivered to the Plaintiff; adjudged, that he might have an Action for the Rent reſerved upon the Leaſe for Years, before the Judgment, and without Attornment. 1 *Brownl.* 33. in *Cambell*'s Caſe.

4. *The Counteſs of Derby* being Tenant in Dower, married the *Plaintiff*, *to whom* the Lands which ſhe had in Dower were *granted after her Death*; adjudged, that this being only a Leaſe in Reverſion, there needs no Attornment; beſides, one cannot grant a Reverſion *habendum*, after the Life of another. *Goldſ.* 39. *Earl of Kent*'s Caſe. *Plow. Com. Throgmorton* and *Tracy*'s Caſe. *S. P.*

5. There is a Difference between an *expreſs Attornment* made by the Party, and an Act *which in Law* amounts to an Attornment, as for Inſtance, if a Leaſe is made for Life, or Years, rendring Rent, and the Reverſion is granted to another by Fine, *&c.* and the Cogniſee, before any Attornment made to him, ejects the Leſſee, and makes a Feoffment to another, upon whom the Leſſee re-enters, this ſhall not amount in Law to make a Privity in the Feoffee, in order to enable him to diſtrain for the Rent, for he ſhall not be in a better Condition than the Feoffor himſelf; but 'tis otherwiſe *if the Leſſee had expreſly attorned to the Feoffee*; ſo where a Fine was acknowledged of a Reverſion, and *before Attornment* the Cogniſee by a Deed of *Bargain and Sale* conveyed it to another; adjudged, that the *Bargainee* ſhould not *diſtrain for Rent* before *Attornment*, becauſe he ſhould not be in a better Condition than the *Bargainor*, but if there had been an *expreſs Attornment to the Cogniſee*, then it had been otherwiſe. *Owen* 23. *Owſley*'s Caſe. *Cro. Eliz.* 264. *S. C.* reported by the Name of *Offley* verſus *Batts*; and ſee 5 *Rep.* 112. *Knotsford*'s Caſe vouched in *Mallory*'s Caſe; and *Cro. Eliz.* 354. *S. P.* Cro. Eliz. 264. Poſtea 10.

6. A Man in Conſideration of a Sum of Money, did *give and grant* a Rent to another, the Deed was enrolled within ſix Months, this ſhall paſs the Rent without any *Attornment*, tho' there were no Words of *Bargain and Sale*. *Cro. Eliz.* 165. *Taylor* verſus *Vale.*

7. *Leſſee for Life*, the Reverſion to *two Coparceners*, one of them made a Leaſe for Years of the Whole, rendring 10 *l. per Annum* to the Leſſee for Life, and afterwards 10 *l. per Annum* to the ſaid Coparcener who made the Leaſe; the Leſſee for Life and both the Coparceners join in a Fine to the Uſe of the Husband of that Coparcener, who made the Leaſe for Years; adjudged, that this being a Fine of a Reverſion to the Uſe of the Husband, an Attornment is not neceſſary, becauſe he is in by Vertue of the Statute 27 *H.* 8. *Cro. Eliz.* 284. *Farrer* verſus *Johnſon*. *Poſtea* Surrender. (B) 6. *S. C.*

8. Adjudged, that by the Feoffment of a Manor the Services do not paſs without an expreſs Attornment, but in Pleading they ſhall be intended to paſs if the contrary is not ſhewn. *Cro. Eliz.* 400. *Sir Humphrey Ferrers* verſus *Wigroll.*

9. A Man who was ſeiſed of a *Rent in Fee* levied a Fine thereof to the Uſe of another, the Cogniſee diſtrained for the Rent, and in Replevin he avowed for it without any Attornment; and adjudged, that the Avowry of a *Ceſtui que Uſe* without any Attornment was good. *Cro. Eliz.* 673. *Stephens* verſus *Lewis.*

10. In Replevin, *&c.* the Caſe upon a Demurrer was thus, (*viz.*) the Leſſor made a Leaſe for Years, rendring Rent, and afterwards he levied a Fine of the Reverſion to *G. D.* who before Attornment made by the Leſſee, entered and made a Feoffment, the Feoffee entered, and in Replevin avowed for the Rent due after the Feoffment and Entry; adjudged, that the Avowry was not good for Want of an Attornment. *Cro. Eliz.* 354. *Bach* verſus *Onſly.* Antea 5.

11. The Teſtator died ſeiſed of Rents iſſuing out of Freeholds, and his Executor brought an Action of Debt for the Arrears due in the Life-time of his Teſtator; adjudged, that the Action did not lie, becauſe the Plaintiff did not ſhew that the Tenants did attorn to his Teſtator; for when the Rent of any Freehold comes in Queſtion, he who demands it muſt convey a Privity between the Tenant and the Lord, which ought to be by Attornment, for Rents and Services will not veſt without it. 1 *Brownl.* 102. *Appleton* verſus *Bailie.*

12. The Leſſor made a ſecond Leaſe, and before the firſt expired, levied a Fine to *T. S.* and his Heirs, to the Uſe of the ſaid *T. S.* and his Heirs, afterwards the firſt Leaſe expired, then the ſecond Leſſee entered, againſt whom *T. S.* the Conuſee brings an Action of Debt for the Rent arrear; and upon Demurrer to the Declaration it was objected, that the Plaintiff had not ſet forth any At-

tornment of the ſecond Leſſee, but adjudged, that it was not neceſſary, becauſe the Fine paſſed only one Reverſion, which was expectant upon the Determination of the firſt Leaſe, that this Reverſion was not altered by the Making the ſecond Leaſe, for that was only an *intereſſe Termini*, and by Conſequence the Reverſion remained as before, therefore there could be but one Attornment, and that muſt be from the firſt Leſſee. 1 *Salk.* 90. *Gwam & al'* verſus *Roe.*

13. *In Replevin*, the Defendant claimed a Title by Vertue of a Grant of the Reverſion of the Place where, *&c.* expectant on the Determination of the Eſtate for Life, which the Plaintiff had in the Lands, to which Reverſion there was a Rent incident, *ad quam quidem conceſſionem* the Plaintiff attorned, who replied, *non conceſſit modo & forma*, upon which they were at Iſſue; and at the Trial the Queſtion was, whether the Plaintiff might give in *Evidence* the *Want of an Attornment* upon this Iſſue, which being made a Point for the Reſolution of the Court, it was adjudged, that he need not, becauſe the Grant was perfect as far as the Grantor could make it; 'tis true, it ought to have been pleaded by the Defendant, and ſo it was, and 'tis pleadable without a *Venue*, becauſe it muſt be tried where the Land lies; now, in this Caſe the Plaintiff had admitted there was an Attornment, becauſe 'tis a Thing traverſable, and whatever is traverſable and not traverſed, is admitted. 1 *Salk.* 90. *Hudſon* verſus *Jones.* See *Dyer* 91. 1 *And.* 220, 221. *Hutt.* 102. 2 *Rep.* 61. 1 *Lev.* 192.

(D)

Who ſhall be compelled to attorn, and who not.

1. IF *Tenant in Tail* had levied a Fine before the Statutes 4 *H.* 7. and 32 *H.* 8. the Tenant in Poſſeſſion could not be compelled to attorn; but now, ſince the ſaid Statutes which give Strength to *Fines* to bar the Iſſue in Tail, 'tis otherwiſe, therefore where there was Tenant for Life, Remainder in Tail, Reverſion in Fee, and the Remainder-man in Tail levied a Fine to *Juſtice Windham*, and his Heirs, who brought a *Quid juris clamat* againſt the Tenant for Life, to which ſhe pleaded, that the Conuſor, at the Time of the Fine levied, had but an Eſtate-tail *in Reverſion*, and ſhewed how, and demanded Judgment, if ſhe ſhould be compelled to attorn; and upon Demurrer this was adjudged an ill Plea, tho' it was a good one before theſe Statutes, but now the Tenant for Life ſhall be compelled to attorn. 3 *Rep.* 86. *Juſtice Windham's* Caſe vouched in the Caſe of Fines.

2. Tenant in Tail may attorn where the Reverſion of his Eſtate is granted over to another, tho' he is not compellable to attorn, becauſe he hath an Eſtate of Inheritance which may continue for ever; ſo where there was Leſſee for Life, Remainder in Tail, Remainder in Fee to the right Heirs of the Leſſee for Life; in this Caſe, if the Tenant for Life grant his Remainder in Fee to another, it paſſeth without any Attornment, for if any one ſhould attorn, it muſt be the Tenant for Life, and it would be in vain for him to attorn to his own Grant. 1 *Inſt*, 316, 319.

3. Tenant in Fee-ſimple being about to marry, covenanted to ſtand ſeiſed, *&c.* to the Uſe of himſelf and his intended Wife for their Lives, without Impeachment of Waſte, Remainder to the Uſe of *their firſt Iſſue Male* in ſpecial Tail, and for Default of ſuch Iſſue, to the Uſe of the Heirs Males of the Bodies of the Husband and Wife, and for Want of ſuch Iſſue, to *C.* in Tail, *&c.* they intermarry, and had Iſſue *D.* and no more; then the Husband died, the Wife entered, and afterwards a Barn being blown down by the Wind, ſhe converted the Timber to her own Uſe; in this Caſe it was adjudged, that until Iſſue born the Husband and Wife had an Eſtate tail executed *ſub modo*; and after Iſſue born, then they were Tenants for Life, Remainder in Tail to their Iſſue, Remainder to the Heirs Males of the Husband and Wife; for their Eſtate for their Lives was not abſolutely drowned till they had Iſſue Male; adjudged likewiſe, that Tenant in Tail, after Poſſibility of Iſſue extinct (as in this Caſe the Wife was) hath a greater Privilege in reſpect to the Quality of her Eſtate, than a bare Tenant for Life hath, and amongſt the reſt this is one, that ſhe ſhall not be compelled to attorn; but if ſuch a Tenant, after Poſſibility, *&c.* grant over her Eſtate, the Grantee by a *Quid juris clamat* brought againſt him, ſhall be compelled to attorn, becauſe by ſuch Grant the Privilege is gone. *Paſch.* 13 *Jac. Ewer's* Caſe. 11 *Rep.* 78. *Lewis Bowles's* Caſe. *Mich.* 40 *Eliz. Veal* verſus *Read.*

Moor 859. *at large.*

4. The Grantee of a Rent-charge of 20 *l. per Annum*, granted 5 *l. per Annum*, Parcel of it, to another by Fine, *&c.* by the Opinion of *Hobart*, the Tenant in Poſſeſſion is not compellable to attorn to this Grant. *Hob.* 23, 201. *Roll* verſus *Osborne.*

Audita Querela.

Where it lies upon the Suggeſtion of the Party, where not, to avoid Executions. (A)
Where it lies to avoid Executions on Judgments. (B)
Where it will not lie to avoid Executions on Judgments. (C)
Where it will lie by the Bail, where not. (D)
Of Proceedings in *Audita querela*. (E)

(A)

Where it lies upon the Suggeſtion of the Party, where not, to avoid Executions. See *Joinder in Action*. (A) 3. *Attachment*. (A) 2.

1. *Audita querela* lieth as well upon *Matter of Fact* ſuggeſted by the Party, as upon *Writings and Records*; as for Inſtance, an *Audita querela* was brought to avoid an Execution for 500 *l.* in which the Plaintiff ſuggeſted, that after the Judgment the * Money was paid to *Sir John Hawkins* in Diſcharge of the ſaid Judgment, whereupon a * *Sci. fa.* grounded on this *Audita querela* was awarded to the Sheriff, who returned, that *Sir John Hawkins* was dead; then the Plaintiff ſuggeſted, that his Wife was Executrix, and ſo a new *Sci' fa'* was awarded againſt her, who appeared and pleaded, that the ſaid 500 *l.* was not paid in Diſcharge of the Judgment, upon which they were at Iſſue, and the Jury found, that *illæ quingent' libræ ſolutæ fuerunt* to the ſaid Sir *John Hawkins* by *G. D. to have the Judgment aſſigned to him*; adjudged, that by the Finding, that *illæ Quingent' libræ ſolutæ fuerunt, &c.* it ſhall be intended to be the ſame Sum for which the Judgment was obtained, and that it was ſufficient for the Plaintiff's Iſſue, and that the Reſt was but *Surpluſage*; but becauſe this *Audita querela* was an Original out of Chancery, and the Sheriff had returned, that *Sir John Hawkins* was dead, his Executrix muſt not be charged without a new *Audita querela*; therefore this was abated, but the Plaintiff, who was in Execution, was bailed. *Cro. Eliz.* 634. *Malyns* verſus *Sir John Hawkins*.

* Poſtea 4.
* 1 Roll. Rep. 385. Morſten v. Morrice.

2. One in Execution upon a Statute-Merchant brought an *Audita querela*, and ſuggeſted certain Articles made between the Creditor and him to diſcharge him of the Statute, and thereupon moved, that he might be diſcharged out of Priſon; but it was denied, becauſe a Man in Execution is not bailable by Law, his Remedy in this Caſe, was to bring an Action of Covenant upon the Articles. 2 *Cro.* 218. *Breſton* verſus *Robinſon*, and 579. *Lutterford* verſus *Peter le Marie*. *S. P.* *See* Attachment. (A) 2. *contra*.

3. In *Audita querela*, the Plaintiff ſuggeſted, that he became bound with *G. D.* in a Bond, and that he was within Age, and proſecuted by the Obligee, who procured an Attorney to appear for him without his Notice, who accordingly appeared and ſuffered Judgment to paſs againſt him by Default, and afterwards he was taken in Execution, wherefore he prayed to be diſcharged; but adjudged, this was not a ſufficient Suggeſtion for his Diſcharge, he ought to take his Remedy by a *Writ of Deceit* againſt the Attorney. 2 *Cro.* 694. *Alley* verſus *Colley*.

4. The Debtor being taken in Execution, he brought an *Audita querela*, and ſuggeſted, that after the Judgment he had paid the whole Debt; adjudged againſt the Opinion of *Popham Chief Juſtice*, that this being a Suit in Equity, as well as at Law, it being only a Commiſſion to the Judges to examine the Matter, that this is a good Suggeſtion; for if the Money is paid, 'tis unreaſonable the Party ſhould lie in Execution. 2 *Cro.* 29. *Ognell* verſus *Randall*. *Antea placito* 1. *S. P.*

5. The Cogniſor of a Statute being taken in Execution, brought an *Audita querela* in Chancery, and ſuggeſted, that the Statute was void, and thereupon he found Sureties, who entered into a Recogniſance, that he ſhould *appear, &c. & ad ſtandum juri & ad proſequendum cum effectu*, and ſo he was diſcharged; afterwards it was adjudged, that this Suggeſtion was inſufficient to diſcharge the Cogniſor of this Statute, and thereupon the Cogniſee of the Statute brought a *Sci. fa.* upon the *Recogniſance againſt the Sureties*, and aſſigned the Breach, that the Cogniſor of the Statute had not paid the Condemnation-Money, nor rendered himſelf to Priſon; it was objected in Behalf of the Sureties, that their *Recogniſance* was only for the *Appearance* of the Cogniſor, *&c.* and that there was not a Word in it, that he ſhould render himſelf, or pay the Condemnation-Money; but it was adjudged, that it being for his Appearance *& ad ſtandum juri, &c.* thoſe Words muſt be *intended*, that if he be condemned he ſhould ſatisfy the Condemnation-Money, or render himſelf again in Execution for the Debt; for the other Words of the Recogniſance, (*viz.*) *to appear and proſecute with Effect*, are only, that he would not ſuffer a *Nonſuit*, or uſe any Delay; and if the Words, *ad ſtandum juri* ſhould not import, that he ſhould pay the Money

if he were condemned, then the Statute 11 *H.* 6. would be eluded, which was made to Remedy the Miſchief, that thoſe who were in *Execution* ſhould not be delivered upon Suggeſtions without good Sureties, which muſt be intended not only to appear, but to ſatisfy the Party if he be condemned, *&c.* 2 *Cro.* 67. *Woolrich* verſus *Maſſie.*

6. The Plaintiff obtained Judgment in an Action of Aſſault, and 200 *l.* Damages, and had the Body of the Bail in Execution, who brought an *Audita querela*, ſuggeſting, that the Principal had paid the * Money, and therefore prayed he might be diſcharged; but it was not allowed without an *Affidavit* of Payment of the Money. *Moor* 850. *Moſtyn* verſus *Peirce.*

* Antea 1, 4.

(B)

Where it lies to avoid Executions upon Statutes and Judgments.

See *Elegit.* (B) 8. *Sci. fa.* (A) 18. *Superſedeas.* (B) per Totum.

1. AN Executor obtained Judgment in *Accompt*, and the Defendant was taken in Execution for the Arrears; afterwards the Will of the Teſtator was made void in the Spiritual Court, for that he was an *Ideot*, and ſo not capable to make a Will, and the Record was removed out of that Court into Chancery, and ſent from thence into the King's Bench, where the Action of *Accompt* was brought, and thereupon the Defendant brought an *Audita querela*; it was made a Queſtion, whether it would lie; but we are told in *Dr. Drurie's* Caſe, that it was adjudged in the Exchequer-Chamber, that it would lie. 3 *Eliz. Dyer* 203. 8 *Rep.* 144. *in Dr. Drurie's* Caſe. See 1 *Brownl.* 29. *Beck's* Caſe.

Moor 44. 2. The Cogniſor of a Statute after it was acknowledged, made a Feoffment of *Part of* the Lands to the Cogniſee, and then he conveyed the *other Part* to his Son and *his Wife* for Jointure, *&c.* The Cogniſee ſued forth Execution, and the Son alone brought an *Audita querela*, without his Wife; adjudged, that it did lie, and that the Cogniſee, by purchaſing Part of the Lands, had deſtroyed his Statute. *Dyer* 193, 194. *Gaſcoigne's* Caſe.

3. Where a Statute or Recogniſance is acknowledged before one who hath Power to take it, and afterwards the Cogniſor makes a Feoffment of the Land to another, and the Cogniſee taketh out Execution, in ſuch Caſe the Feoffee may have an *Audita querela*, and avoid the Execution. 29 *H.* 8. *Dyer* 93.

4. A Statute-Staple was acknowleded, and the Cogniſor being ſeiſed of Lands in *two Counties*, afterwards made a Feoffment of his Lands in one County to *two*, and of his Lands in the other County, to another; the Cogniſee ſued out Execution, and extended the Lands of one of the two in one County only, and thereupon the *Feoffee of thoſe Lands* brought an *Audita querela*, and had a *Scire facias* returnable by the Sheriff of the other County where his other Lands were, to make the *Feoffee of thoſe Lands* contributory; to which he pleaded in Abatement, that the Plaintiff had omitted the Lands of *one of the two Feoffees* in the firſt County; adjudged, that this was an ill Plea, for the Plaintiff is not bound to take Notice of all the Lands of the Cogniſor which were liable to the Statute. 10 *Eliz. Dyer* 331. See *Poſtea* (C) 4.

5. A Man being in Execution, was ſuffered to go at Large, and whilſt he was at Large he paid the Money, and was afterwards taken again in Execution; but was diſcharged upon an *Audita querela. Cro. Eliz. Reynall's* Caſe.

6. A *Statute-Merchant* was acknowledged in *London*, which had but *one Seal* to it, when by the Statute 13 *Ed.* 1. *de mercatoribus*, it ought to have *two Seals*, and Execution being taken upon this Statute, the Cogniſor brought an *Audita querela*; it was objected, that a *Writ of Error* was the proper Remedy in this Caſe; but adjudged, that the *Audita querela* did lie, for where a Statute is erroniouſly acknowledged, 'tis for that Reaſon no Record, and therefore a *Writ of Error* will not lie, but an *Audita querela* is the proper Remedy to avoid the Execution. *Cro. Eliz.* 233. *Aſme* verſus *Fuliambe.*

7. An *Infant* entered into a Statute, and afterwards brought an *Audita querela*; adjudged, that it did lie either in *B. R.* or in the Court of Common Pleas, and upon Inſpection he was adjudged within Age, there he had a *Sci. fa.* againſt the Cogniſee. *&c. Cro. Eliz.* 208. *Clavell* verſus *Malloray.*

8. There were *three Cogniſors* in a Recogniſance, againſt whom the Cogniſee brought a *Sci. fa. &c.* and had Judgment therein to recover the Money, and thereupon he brought a *Levari facias* againſt all of them, and the Sheriff returned, that they had *nothing*, *&c.* then two of them were taken upon a *Ca. ſa.* and afterwards they *eſcaped*; whereupon the Cogniſee brought an Action of Eſcape againſt the Sheriff; and in this Caſe it was adjudged, that the Action did lie, for tho' the *Ca. ſa.* was erronious, becauſe the Bodies of the Cogniſors were not liable to the Execution by Law, yet the Sheriff could not take any Advantage of the Error in the Judgment, for he could not plead *Nul tiel Record*; ſo that ſo long as the Judgment is in Force, tho' there is an apparent Error in it, the Sheriff is chargeable for the Eſcape; but if the Judgment had been reverſed, then he might be relieved by an *Audita querela.* See *Poſtea* (D) 1. *contra.*

9. *Audita querela* upon a *Statute-Merchant*, was brought in the Court of Common Pleas; but upon a *Statute-Staple*, it muſt be brought in the Court of Chancery, or by *Sci. fa.* directed to the

Sheriff *quod ſit in Cancellaria.* 1 *Leon.* 140. *Dudley* verſus *Lacy*, and 308. *Glanvill* verſus *Mallary. S. P.*

10. The Cogniſor of a Statute-Staple was taken in Execution, and whilſt he was in Priſon the Money was brought into Court; thereupon he brought an *Audita querela*, and moved to be bailed, which was granted, and the Money to lie in Court till the *Audita querela* was determined; but the Cogniſor put in Bail to anſwer the Coſts of Suit. 1 *Leon.* 141. *Eſcue* verſus *Earl of Lincoln.*

11. An Action of *Detinue* was brought for a *Statute-Merchant*; the Defendant pleaded *Garniſhment*, the Plaintiff recovered againſt the Garniſhee, and had Judgment; now, tho' the Judgment was erronious, yet the Defendant delivered the Statute to the Plaintiff, who afterwards ſued out Execution; then the Garniſhee brought a Writ of Error, in which the Judgment was reverſed, and he was reſtored to all that he had loſt; but that would not avoid the Execution, but he might be helped in an *Audita querela.* 5 *Rep.* 90. *In the Caſe of Executions.*

12. *Audita querela* brought by ſeveral concerning perſonal Things, the *Nonſuit* of one ſhall not prejudice the other, becauſe the Writ is only by Way of Diſcharge of the Perſon, and therefore the Default of one ſhall not hurt the Reſt. 6 *Rep.* 25. *in Ruddock's* Caſe. *See* Releaſe. (C) 5. *S. C.*

13. An *Adminiſtrator durante minore ætate of an Infant Executor*, had Judgment in an Action of Debt brought by him for Money due to the Teſtator, and the Defendant being in Execution, the *Infant* Executor came of full Age, it was moved, that he might be diſcharged out of Priſon, becauſe the Authority of the Adminiſtrator being now determined by the Executors coming of Age, he could not acknowledge Satisfaction, tho' the Priſoner ſhould pay the Money; but the Court were of Opinion, that the Judgment was ſtill in Force, and that the Party might be relieved by an *Audita querela.* *Godb.* 104.

14. *Two* entered into a Recogniſance, and Cogniſee *extended* the Lands of one of them by *Elegit*, and took the Body of the other by a *Ca. ſa.* who brought an *Audita querela*, and was relieved; becauſe the Land of the other being *extended*, that ſhall be *intended* a full Satisfaction for the Debt. 5 *Rep. Blomfield's* Caſe. 2 *Bulſt.* 97. * *Cowley* verſus *Lydcott. S. P.* and 2 *Cro.* 338. and *Godb.* 257. *S. C.* and *Hob.* 2. *S. P.* *Goldſ.* 257. *S. C.* See *Poſtea* 31. and Execution. (B) 5. *S. C.* * 1 Roll. Rep. 8.

15. Upon a Judgment in Treſpaſs, the Plaintiff extended Lands in *Antient Demeſne*, by Vertue of an *Elegit*, but the Defendant was relieved by an *Audita querela.* *Hob.* 47.

16. In *Trover* by an Adminiſtrator for the Goods of the Inteſtate; the Defendant pleaded, that the Letters of Adminiſtration were repealed in the Spiritual Court, *per debitam Legis formam*, and granted to another; adjudged no good Plea, becauſe he might be relieved by an *Audita querela*, which is the moſt proper Remedy. *Yelv.* 125. *Kett* verſus *Life.* Adminiſtration. (O) 7. S. C.

17. The Cogniſee of a Statute took out a *Ca. ſa.* againſt the Cogniſor, upon which he was taken in Execution; but there being a *Defeaſance on the Statute*, which was not performed by the Cogniſee, thereupon the Cogniſor brought an *Audita querela*, and was bailed. 1 *Brownl.* 39. *Earl of Lincoln* verſus *Wood.*

18. There was Judgment againſt a Debtor, who afterwards ſold the Lands, and being unable to pay the Money, the Judgment Creditor brought a *Sci. fa'* againſt him, and had Judgment therein by Default, and by Vertue of an *Elegit* extended the Lands of the Purchaſor; but the whole being not extended, the Purchaſer had no Remedy but by an *Audita querela*, ſetting forth the Special Matter. 1 *Brownl.* 39. *Jowle's* Caſe.

19. *Two were taken in Execution* for Debt, and afterwards one of them *eſcaped*; adjudged, that an Action of Debt lies againſt the Sheriff for this Eſcape; and that after the Debt is recovered againſt him, the other, who was ſtill in Execution, ſhall have an *Audita querela*, and be diſcharged from his Impriſonment; for the Body can be no Satisfaction for the Debt, becauſe 'tis taken only to *enforce Satisfaction*, and the Debt being already ſatisfied by the Sheriff, the Body of the other ſhall no longer remain in Priſon. 2 *Bulſt.* 320. *Sutcliffe* verſus *Geo. Reynalds. Poſtea* Eſcape. (B) 12. *S. C.*

20. There was Judgment for the King, and the Informer upon an Information for *Recuſancy*; it was moved to ſtay Execution, for that the Defendant had *conformed*; but adjudged, that the Court cannot judicially take Notice of his *Conformity*, and that he hath no Remedy but an *Audita querela*, for that lies where he cannot plead, but not againſt the King; therefore the *Audita querela* doth not hinder the Execution as to the King, but he may have it againſt the Informer. 2 *Bulſt.* 324. *Dr. Foſter's* Caſe. *Poſtea* Recuſancy. (A) 2. *S. C.*

21. Judgment againſt the Defendant in Treſpaſs and Damages to 14 *l.* and Coſts to 5 *l.* 10 *s.* which Judgment was affirmed on a Writ of *Error*, and Coſts to 5 *l.* 10 *s.* for Delay of Execution: Now, after the Judgment in Treſpaſs, and before the Judgment on the Writ of Error, the Plaintiff *releaſed* all Executions and Demands, and notwithſtanding that Releaſe he ſued out Execution, as well upon the firſt as the ſecond Judgment, for the Damages and Coſts, upon which the Defendant in the Action brought an *Audita querela*, and ſet forth all this Matter, and the *Releaſe*, and Iſſue was taken upon the *Releaſe*, which was found againſt him; it was inſiſted in Arreſt of Judgment, that this Releaſe would not help the Plaintiff in the *Audita querela*, becauſe it was given before the laſt Judgment in the Writ of Error, and not pleaded, and Execution being now on that Judgment, he ſhall not have the Benefit of the *Releaſe*, which was given before it; but adjudged, that the Execution was for the Damages and Coſts upon the firſt Judgment in Treſpaſs, 1 Roll. Rep. 11,

Treſpaſs, as well as for the Increaſe of Coſts upon the Judgment in the Writ of Error, and he had no Time to plead the Releaſe to that Judgment, becauſe it came before it; and tho' the Execution is intire for the Whole, yet ſince the *Releaſe* diſcharges the firſt Judgment and Damages, the Plaintiff in the *Audita querela* ſhall have the Benefit of it. 2 Cro. 337. *Child* verſus *Durrant.* *Poſtea* Treſpaſs. (I) 5. *S. C.*

W. Jones 90. Palm. 410. 22. In a *Scire facias*, in the Nature of an *Audita querela*, the Plaintiff ſet forth, that *Sir William Blackſtone* was ſeiſed of Lands in *D.* and *of other Lands* in the Poſſeſſion of the Defendants, and that he acknowledged a Statute, and that the Lands which were in the Poſſeſſion *of the Plaintiff*, were taken in Execution, whereupon he brought this Action *ex gravi querela*, to be relieved againſt the Defendants by way of *Contribution*; adjudged, that tho' the Action was brought generally againſt the Defendants, without alledging, that they were Tenants *tempore Brevis*, and alſo without alledging, that he himſelf was then Tenant; yet being *ex gravi querela*, it ſhall be *intended*, that he was then Tenant. 3 *Bulſt.* 305. *Blackſtone* verſus *Martin.*

23. After a Statute was acknowledged, the Cogniſor made a Feoffment of his Lands liable to the Statute to two ſeveral Perſons, and the Cogniſee ſued out Execution againſt one of them alone, whereupon he brought an *Audita querela*, in which he ſet forth this Matter, and that his Lands were delivered to the Cogniſee by *Liberate*; it was objected in Arreſt of Judgment, that the Declaration was not good, for that the Plaintiff did not ſet forth all the Extent in Special; and alſo the Execution of the *Liberate*, for his ſaying, that the Lands were delivered to the Cogniſee by *Liberate*, was not an expreſs Allegation, that the Plaintiff was turned out of Poſſeſſion, or of any Manner of Grievance; but adjudged, that it was a ſufficient Averment, that he was turned out of Poſſeſſion. *Winch* 20. *Sir Edward Grubham* verſus *Sir Edw. Cook.*

24 Judgment againſt the Defendant, who was afterwards taken by Vertue of a *Ca. ſa.* and *eſcaped*; the Sheriff did not *return the Ca. Sa.* at the Day, *&c.* and thereupon an *Alias Ca. ſa.* iſſued againſt the Defendant, upon which he was retaken by the Sheriff, and thereupon the Defendant brought an *Audita querela*, and it was held good. *Moor* 57.

25. *Audita querela* was brought before Judgment entered; it was agreed by the Court, that it could not be done; but if 'tis brought before the *Day in Bank*, tho' the Judgment is not entered, the Court will compel, that the Judgment be entered as of that Term, ſo that they ſhall not plead *Nul tiel Record.* 1 *Mod.* 111. *Lampier* verſus *Mereday.*

26. Judgment againſt the *Principal*, and a *Scire facias* brought againſt the *Bail*, and Judgment thereon, then the *Bail* brought a *Writ of Error*, and the Judgment on the *Scire facias* was affirmed, then the *Principal* brought another Writ of Error upon the Judgment obtained againſt him, and it was reverſed, and thereupon the Bail brought an *Audita querela*; and it was objected, that it did not lie, becauſe the Judgment on the *Sci. fa.* was collateral to the Judgment in the *Principal* Action of Debt. *Sed per Curiam*, the Reverſal of that Judgment ſhall likewiſe reverſe the Judgment on the *Sci. fa.* and tho' the Judgment on the *Sci. fa.* was affirmed upon the Writ of Error brought, yet that Affirmance only removed the Errors aſſigned; ſo the *Audita querela* will lie, and the Bail were diſcharged. 2 *Roll. Rep.* 254. *Green* verſus *Legris.*

Cro. Car. 443. 27 The Caſe was, *ſſ.* Four Perſons made an Aſſault and Battery on the Plaintiff, who brought an Action againſt one of them in *C. B.* and had a Verdict and Judgment, and the Party was taken in Execution for the Damages; afterwards he brought another Action of Aſſault, *&c.* in *B. R.* againſt the other three, and had Judgment likewiſe againſt them; then the Party againſt whom the firſt Judgment was had in *C. B.* paid the Damages, and Satisfaction was acknowledged; and afterwards one of the three, againſt whom the laſt Judgment was had, was taken in Execution, and then all three brought an *Audita querela*, the Queſtion was, whether it would lie or not, becauſe the two who were not taken in Execution were not grieved? *Et per Curiam*, the *Audita querela* will lie by all three, for tho' the Plaintiff may have ſeveral Actions for the ſame Aſſault, he can have but one Satisfaction; as where two are bound in a Bond jointly and ſeverally, and the Obligee ſues one in *C. B.* and recovers, and afterwards ſues the other in *B. R.* and recovers againſt him, yet, if one of them make Satisfaction, the other ſhall have an *Audita querela* to avoid the Execution. *W. Jones* 377. *Corbett* verſus *Barnes.*

2 And. 170. 28. The Cogniſor of a *Recogniſance* in 2000 *l.* to one, acknowledged a *Statute* of 100 *l.* to another; the *Cogniſee of the Statute* extended the Lands of the Cogniſor in *D.* who had alſo other Lands not extended; afterwards the *Cogniſee of the Recogniſance* extended a Moiety of the ſame Lands which had been before extended and delivered in Execution to the Cogniſee of the *Statute*, who thereupon brought an *Audita querela*, upon which he was relieved, and had Judgment, which was affirmed in *Error*, becauſe he was in Poſſeſſion of the Lands by a lawful Title by Vertue of an Extent, and therefore thoſe Lands were only liable to the Execution of the Recogniſance *pro rata*; ſo that the Cogniſor of the Recogniſance ought to have included all the other Lands of the Cogniſor in his Execution, which were not extended by the Cogniſee of the Statute. *Yelv.* 12. *Hind* verſus *Dean.* *Poſtea* Execution. (H) 2. Sci fa. (A) 4. *S. C. Cro. Car. Blackſtone's* Caſe. *S. P.*

W. Jones 238. 29. The Judgment *Creditor* took out Execution by *Elegit*, and extended the Lands of the *Debtor*; afterwards he *aſſigned* thoſe Lands to others, and then he gave the *Debtor* a Releaſe of all Judgments and Executions, whereupon he brought an *Audita querela*; and upon Demurrer, it was objected, that this Writ being brought againſt the Judgment Creditor, was wrong, for it ought to be brought againſt the Aſſignees of the Extent; but adjudged good, for he being a Party to the Judgment, his Releaſe had diſcharged it. *Cro. Car.* 155, 214. *Flower* verſus *Elgar.*

30. The Debtor being taken in Execution, the Creditor conſented, that he might come to him at ſuch a *Tavern*, which was out of the Rules, and without a Keeper, or a Rule of Court; accordingly they met together at the Place, and not agreeing, the Creditor took him again in Execution, whereupon he brought an *Audita querela* and was relieved, becauſe the Execution was diſcharged by the Priſoner's going at large, and he could not be retaken by Law. *Style* 117. *Walker* verſus *Alden*, and 387. *Price* verſus *Goodrick*. *S. P.*

31. The Judgment Creditor extended the Lands of his Debtor *in one County* by *Elegit*, which were delivered to him in Execution, and enjoyed by him ſix Years; then he made his Wife Executrix, and died, and ſhe brought a *Sci. fa.* upon the Judgment directed to the Sheriff of another County, where the Debtor had other Lands; and upon two *Nihils* returned, ſhe had Judgment and Execution againſt the Debtor for the ſame Debt, who brought an *Audita querela*, and was relieved; for after an *Elegit* returned, and the Lands are extended, the Party cannot have another *Elegit*. *Style* 454. *Strowd* verſus *Keckwith*. See *Antea pl.* 14.

32. *Scire facias* againſt *Executors*, the Sheriff returned *nulla Bona*, &c. afterwards, upon a *Teſtatum*, that they had waſted the Goods of the Teſtator, a new *Sci. fa.* with a *Fi. fa.* iſſued againſt them, upon which there were *two Nihils* returned, and thereupon Judgment was given againſt them *de bonis propriis*, but becauſe they were never *ſummoned*, nor had any Manner of Notice of theſe Proceedings, they were relieved by an *Audita querela*. *Style* 372.

(C)

Where it will not lie to avoid Executions, &c. upon Writings and Records.

See *Attachment*. (A) 2. *Infant*. (G) 23. *Scire Facias*. (E) 2.

1. THE Coniſor entered into a Recognizance of 1000 *l.* to two Perſons, and afterwards he gave them the Manor of *Dale*, &c. one of the Coniſees ſued out Execution, and took the Coniſee in *London*, who, ſuppoſing that by the Gift of this Manor the Recognizance was diſcharged, brought an *Audita querela*; adjudged, that it will not lie, becauſe the Body, and not the Land of the Coniſor was the Debtor, for the Land was not liable to the Debt, but at the Election of the Coniſee; but if the Coniſor had made a *Feoffment to the Coniſee* of part of the Land, and to *a Stranger* of another Part, and had reſerved Part to himſelf, in ſuch Caſe the Coniſee ſhall not have Execution againſt the *Stranger*, becauſe he being one of the Feoffees, the Lands in the Poſſeſſion of the other Feoffee, who is the Stranger, are not chargeable with the Execution, for the Coniſee himſelf cannot be contributory for his Part with the Stranger, towards the Charge of the Execution, becauſe he cannot be contributory to himſelf. *Plow. Com.* 72. *Roſſe* verſus *Pope*.

2. The Father and Son were bound jointly in a Statute Merchant, and their Lands extended, they brought a joint *Audita querela*, and held not good, for it ought to be ſeveral, becauſe their Grievance by the Execution was ſeveral. *Worſley* verſus *Charnock*. *Owen* 106. *Moor* 570. *S. C.* *Curtis* verſus *Overſcot*. *Ibid.*

3. An *Infant* acknowledged a Recognizance in the Nature of a *Statute-Staple*, and afterwards, when he came of full Age, he brought an *Audita querela* to avoid it; but adjudged, that it did not lie, becauſe his Age is to be tried by Inſpection of the Court, which could not be after his full Age; the Law had been the ſame if he had died within Age, therefore he ought to bring the *Audita querela* before he is of full Age. 7 *Eliz. Dyer* 232.

4. The Coniſor of a Statute had Lands in *two Counties*, which were chargeable by the *Statute*, afterwards he made two Feoffments, by which he conveyed Part of theſe Lands to one of the Feoffees, and the Reſidue to the other Feoffee, and the Coniſee having taken out an *Extent* againſt the Lands of one of the Feoffees, that very Feoffee levied a Fine of the ſame Lands to the Uſe of *G. D.* the Purchaſer, who brought an *Audita querela* againſt the other Feoffee to have Contribution; it was inſiſted for him, that an *Audita querela* demands nothing, for 'tis only a *Commiſſion* to the Judges to hear the Complaint of the Party; and 'tis a Rule in Law, that a Purchaſer for a valuable Conſideration, ſhall not be charged, but only *pro rata*; but adjudged, that this *Audita querela* did not lie by the Purchaſer, becauſe the Land was clogged with the *Extent* before he bought it, *& tranſit terra cum onere*, ſo that he is not the Party grieved. 2 *Bulſt.* 15. *Earl* verſus *Mollineux*. See *Antea* (B) 4. 2 *Cro.* 227. *S. C.* reported by the Name of *Dutton* verſus *Mollineux*. 2 Cro. 227. S. C.

5. Judgment in an Action of Debt, the Defendant brought an *Audita querela*, and ſuggeſted, that he had a *Releaſe* after Judgment; the Defendant pleaded, that after the Judgment, and likewiſe after the ſuppoſed Releaſe, he ſued forth a *Scire facias* upon the ſaid Judgment, and *had Judgment therein by Default*; adjudged, that in ſuch Caſe the Plaintiff ſhall never have an *Audita querela*, but 'tis otherwiſe if *two Nihils* had been returned on the *Scire facias*. *Hob.* 283. *Hanmere* verſus *Mace*.

6. *Audita querela* by three Perſons to avoid ſeveral Executions at the Suit of ſeveral Perſons; adjudged, that three could not join in ſuch a Writ, and therefore a *Vacat* was entered on Record. *Moor* 354. *Collins*'s Caſe.

7. The Lands of the *Heir* were extended upon a Statute acknowledged by his Father, he brought an *Audita querela*, ſuggeſting, that all the Lands were *entailed*, and ſo not extendable; the

the Defendant pleaded, that they deſcended to the Heir in Fee, and traverſed the *Tail*, upon which they were at Iſſue, and it was found that all (except 500 Acres) were in Fee; adjudged, that the Iſſue ought to be found as pleaded (*viz.*) that *all were entailed*, but it being found, that 500 Acres only were entailed, the Plaintiff ſhall have no Relief by this *Audita querela*. 2 *Cro.* 85. *Aſhburnham Sir John* verſus *Lord St. John.*

(D)

Where it will lie by the Bail, and where not. See Antea (B) 26.

1. JUdgment againſt the *Principal*, and upon a *Scire facias* againſt the *Bail* there was a *Nihil* returned, and thereupon Judgment was againſt the Bail, who moved for an *Audita querela*, for that he was *within Age*; it was objected, that he ought in the firſt Place to bring a Writ of Error to reverſe the Judgment againſt the *Principal*; becauſe, whilſt that was in Force, the Bail muſt be chargeable; but it was anſwered, that it might be in vain to bring a Writ of Error, becauſe there might be no Error in that Judgment, therefore if the Bail could not have *Audita querela*, they were without Remedy, tho' he was ſtill an *Infant*, for they could not plead his Infancy to the *Scire facias*, and thereupon an *Audita querela* was granted. *Yel.* 155. *Markham* verſus *Turner*. *Poſtea* Infant. (B) 6. *S. C.* See *Antea* (B) 8. *contra.*

2. Judgment againſt the *Principal*, who died without paying the Money, or rendring himſelf to Priſon; afterwards a *Sci. fa.* was brought againſt the *Bail*, and the Plaintiff had Judgment againſt them, whereupon they brought an *Audita querela* and had Relief, becauſe they could not by Law be taken in Execution, till ſome Default be returned againſt the *Principal* upon a *Capias* awarded againſt him; and there being no ſuch Proceſs againſt him while he was living, 'tis now impoſſible for him to yield his Body to Priſon, being dead. *Goldsb.* 174. *Tedcaſtle* verſus *Hobbs*. *Poſtea* Execution. (F) 5. *S. C. Style* 281. *Barrock* verſus *Thompſon*. *S. P. Latch* 149. *Calfe* verſus *Bingly*. *S. P.*

3. *Feme Covert* acknowledged a Statute, and after the Death of her Husband ſhe was taken in Execution, whereupon ſhe brought an *Audita querela*, upon her Suggeſtion, that ſhe was *Covert* when the Statute was acknowledged, and withal averred, that the Money was paid by her Huſband in his Life-time, upon which they were at Iſſue, but the Woman was bailed to proſecute her *Audita querela* with Effect; in this Caſe it was adjudged, that if the Iſſue was found againſt the Woman, then the Bail ſhall be taken in Execution, for it cannot again be ſued againſt her, however, her Recognizance by which ſhe became bound with Bail, ſhall be extended for the Debt, but if the Iſſue is found for her, then the Bail are diſcharged. *Paſch.* 10 *Jac. Sir Anthony Aſhley*'s Caſe, and 1 *Bulſt.* 117. *Dingley* verſus *Sir James Creighton.*

Palm. 187, 301. 4. There was Judgment againſt the Principal, and afterwards another Judgment upon a *Sci. fa.* againſt the Bail, and upon a Writ of Error brought, the laſt Judgment was affirmed; afterwards the principal Judgment was reverſed upon a Writ of Error, and thereupon an *Audita querela* was brought by the Bail; it was objected againſt it, for that the *Reverſal of the principal Judgment*, was not a *Reverſal of the Judgment upon the Sci. fa.* that being a collateral Jndgment and ſtanding by it ſelf; but adjudged, that it depended on the firſt Judgment, and 'tis that which brings the Charge on the Bail, which being now diſcharged, the Bail ought to be ſo in like Manner. 2 *Cro.* 645. *Appeſly* verſus *Ives.*

5. After an *Eſcape* made by the *Principal*, there was Judgment againſt the *Sureties*, and they were taken in Execution, upon which they brought an *Audita querela*, and ſuggeſted they would bring the Money into Court, or give ſufficient Security to pay it to the Obligee, and ſo prayed that they might be bailed; but adjudged, that if the *Audita querela* had been grounded on a Specialty, or other Matter in Writing, or on Record, the Court would grant a *Superſedeas* to diſcharge them, if they were not in Execution, and would Bail them if they were; but upon this Suggeſtion, which is only Matter of Fact, they would neither grant a *Superſedeas* in the one Caſe, nor Bail them in the other. 2 *Brownl.* 108.

(E)

Of Proceedings in Audita Querela.

1. UPON a Motion for an Allowance of an *Audita querela*, it was held, that *Bail* muſt be given in Court, and not elſewhere, unleſs in Caſes of Neceſſity, to be allowed by the Court, and then it may be put in before two Judges. *Palm.* 422.

2 Mod. 48. 2. *G. A.* and *M. A.* were jointly and ſeverally bound to one *Tatnell*, in a Bond of 700 *l.* the Obligee ſued both and obtained two Judgments, and both of them were outlawed, and one of them was taken upon the *Capias utlegatum*, and the Sheriff voluntarily ſuffered him to *Eſcape*; whereupon *Tatnell* the Obligee brought an *Action of Debt* againſt the Sheriff for this Eſcape, and recovered *and received Satisfaction*, and yet he proceeded againſt the other, who thereupon brought an *Audita querela*, in which he ſet forth all this Matter; but upon a Demurrer to the

Declaration there was Judgment againſt him, becauſe *the Time when and Place where* Satisfaction was made by the Sheriff was not ſpecially ſet forth: 1 *Mod.* 170. *Alford* verſus *Tatnell.*

3. Adjudged, that where the Plaintiff in *Audita querela* gets Judgment, he ſhall have Reſtitution of his Goods, tho' they were taken in Execution before the Writ brought, and tho' there is no ſuch Thing mentioned in the Judgment. *Sid.* 74. *Brown* verſus *Burnet.*

4. Judgment in Rep'evin for the Avowants, afterwards one of them *releaſed*, and thereupon an *Audita querela* was brought; and a Motion was made, that it might be allowed, in order that the Execution might be *ſuperſeded*, and the Releaſe being produced, but the Witneſſes to it being in the Country, it was offered to prove their Hands, but that was not allowed, ſince the Witneſſes themſelves were living and in health; and they would not allow the *Audita querela*, unleſs the Releaſe was proved, nor ſcarce then; becauſe it appeared by *Affidavits*, that the Perſon who executed this Releaſe was joined with the other Avowants by Practiſe, and without their Conſent. *Sid.* 351. *Nuby* verſus *Jenkins.*

5. In *Audita querela* the Party appeared upon the *Scire facias* and demurred, for that the *Scire facias* bore date the 23*d Day of October*, and the *Audita querela* the 3*d Day of November* following; but adjudged, that this *Scire facias* is in Nature of a *Meſne Proceſs*, 'tis only to bring in the Defendant to anſwer, and the Judgment muſt be given upon the *Audita querela*, therefore this being only a Fault in *Meſne Proceſs*, 'tis cured by the Defendant's Appearance; 'tis true, ſuch a Fault would not be cured by an Appearance of the Defendant, where the *Scire facias* is brought upon a Judgment, becauſe in ſuch Caſe 'tis *quaſi* an Original, and the Judgment is given on the *Sci. fa.* 1 *Vent.* 7. *Vaughan* verſus *Lloyd.* 1 *Sid.* 404. *S. C.* 2 *Cro.* 424. *S. P.*

6. Where an *Audita querela* is founded on a Record, or the Party is in Cuſtody, the Proceſs upon it is a *Sci. fa.* but if founded on a Matter of Fact, or the Party is at large, then the Proceſs is a *Venire.* 1 *Salk.* 92. *Moor* 811. *S. P.*

7. Judgment in Debt againſt two Defendants, one of them was taken in Execution, and afterwards diſcharged out of Cuſtody by the Plaintiff himſelf, the other brought an *Audita querela* againſt the Plaintiff, praying, that he might likewiſe be diſcharged from the Judgment *quia timet*; and after two *Scire facias*'s and two *Nihils* returned, he moved for a *Superſedeas* (which ſhews, that an *Audita querela* is no *Superſedeas* of it ſelf) but it was denied; becauſe a *Scire facias* is improper where the Suit is *quia timet*, and the Party at large; he ſhould bring a *Venire*, and have a Diſtreſs infinite; but if he had been in Execution, he might either have a *Scire facias* or *Venire.* 1 *Salk.* 92. *Clerke* verſus *Moor.* See *Moor* 811, and *Moor pl.* 447. 3 *Cro.* 634. 2 *Cro.* 29. *Co. Ent.* 88. 2 *Saund.* 144. 1 *Lev.* 140.

8. Adjudged, that where the Party hath ſome Matter which he might have pleaded to the *Sci. fa.* in his Diſcharge, and *two Nichils* are returned, and Judgment againſt him, the Court will relieve him upon Motion, without putting him to bring an *Audita querela.* 1 *Salk.* 93.

Average. See **Merchants.**

Averment.

Where 'tis neceſſary, and what is a good Averment. (A)

Where 'tis not neceſſary, nor good, but ſuperfluous. (B)

To ſupply Defects in Wills. (C)

(A)

Where 'tis neceſſary, and what is a good Averment.

1. IN an Appeal of the Death of his Brother brought againſt *G. D.* of *H.* in the County of *W.* as Principal, and *R. H.* as Acceſſary, whereas the Name of the Principal was *W. D.* the Acceſſary pleaded, that there was no ſuch Perſon *in rerum natura* as *G. D.* at the Day of the Writ brought, or after; adjudged, that if there was a Man of that Name in another County, yet if he was not of the ſame Town mentioned in the Writ, in ſuch Caſe the Appellee may aver in Favour of Life, that he is not the ſame Perſon, and may traverſe the *Return of the Sheriff.* 18 *Eliz. Dyer* 348.

2. *The Reverſioner in Fee* expectant upon an *Eſtate for Life*, deviſed a Rent to another, and died, and ſeveral Years afterwards the *Deviſee made his Executor*, and died, the *Executor* diſtrained for the Rent, but in his Avowry he *did not aver*, that the Land remained in the Seiſin of

the Tenant, who ought to pay it, or in ſome other Perſon, who claimed under him by Purchaſe or Deſcent; neither did he aver, that the Rent incurred *after the Death of the Tenant for Life*, both which were adjudged good Exceptions, upon a Demurrer to the Avowry, eſpecially the laſt; for if a Reverſioner grants a Rent-charge, it ſhall not begin till after the Death of him who has the particular Eſtate. *Cro. Eliz.* 547. *Miles* verſus *Willoughby.*

3. Error of a Judgment obtained in a Court of *Piepowder*, for that the Plaintiff in his Replication, had not concluded with *hoc paratus eſt verificare*, nor demanded his Debt and Damages as he ought to have done; and for theſe Cauſes it was reverſed. *Cro. Eliz.* 256. *Penred* v. *Chambers.*

4. Lands ſowed with Woad were ſold, and the Vendor promiſed, that if the Vendee ſhould be prohibited by Proclamation, or otherwiſe, to ſow Woad, then he would return ſo much of the Purchaſe-Money; afterwards the Vendee brought an Action on the Caſe againſt the Vendor, and ſet forth this Matter, and that Proclamation was made, that no Man ſhould ſow Woad within four Miles of *any Market and clothing Town*, and that his Land was within four Miles of a *Market-Town*, but did not aver that it was a *clothing Town* likewiſe; and upon Demurrer it was adjudged, that he ought to have made ſuch an Averment. *Goldsb.* 7. *Cogan* verſus *Cogan.*

5. Debt againſt Husband and Wife, as Executrix of *G. D. &c. of London, Taylor*; the Defendant pleaded in Bar a Judgment which was obtained againſt her in the King's Bench, as Executrix of *G. D. of London*, Barber-Surgeon; and upon Demurrer to this Plea it was objected againſt the Defendant, that ſhe did not aver that *G. D. Taylor, and G. D. Surgeon, was one and the ſame Perſon*, and tho' it was ſaid that the Plea might be good to a common Intent, for they ſhall be intended the ſame Perſon, yet it was adjudged, that it ſhall not be ſo intended; for where a Thing is indifferent, there a common Intent may prevail, but not where 'tis more ſtrong on the one Side than the other; and here 'tis ſo ſtrong, that a Taylor and Surgeon being different Occupations, they can never be intended the ſame Perſon. *Goldſ.* 111. *Hooker* verſus *Gomerſall.*

Poſtea (C) 2. S.C.

6. By the Opinion of *Anderſon* Ch. Juſt. where the Teſtator intended to deviſe Lands *to the Heirs of G. D.* and the Writer by *Miſtake* wrote *to G. D. and his Heirs*, this may be helped by an Averment, becauſe what the Teſtator intended is written, *and more*, therefore the Deviſe ſhall be good *to the Heirs of G. D.* but he himſelf ſhall take nothing by the Will; but if the Deviſe had been intended *to G. D. and his Heirs*, and by Miſtake it had been written *to the Heirs of G. D.* there an Averment ſhall not help *G. D.* firſt; becauſe 'tis not the Will of the Teſtator in Writing, and then 'tis to encreaſe that which is defective in the Will, and in ſuch Caſe Averments are never allowed, tho' they are uſually allowed to take away any Surpluſage. *Hill.* 29 *Eliz. Godbolt* 131.

7. Where the Plaintiff libels in the Spiritual Court out of the proper Dioceſe, for a Legacy, if it doth not appear in the Libel it ſelf, that the Suit is out of the proper Dioceſe, the Defendant may aver that it was ſo; in like Manner where a Suit is in the Court of Admiralty for a Thing done upon the Land, the Defendant may aver, that it was done *infra Corpus Comitatus. Godb.* 214. *Hughes*'s Caſe.

8. The Father having two Sons, both of one Name, levied a Fine of Lands to the Uſe of *W.* his Son and his Heirs; in this Caſe the Judges cannot take Notice to which of his Sons the Land doth belong, but if the Party averreth, that the Cogniſor had two Sons named *W.* the Elder and *W.* the Younger, and that his Intent was to levy the Fine to *W.* the Younger, this Averment is good, it being of Matter of Fact not apparent in the Fine, but out of it, and therefore it ſhall be tried by a Jury: But if a Man, by Deed executed under his Hand and Seal, giveth Goods to one of the Sons of *G. D.* who hath ſeveral Sons at that Time, there an Averment ſhall not be allowed which Son he meant; becauſe the Deed it ſelf being void for Incertainty, it cannot be made good by an Averment. 5 *Rep.* 155. in *Edw. Altham*'s Caſe.

9. *Jointenants in Fee* of a Manor intermarried, and afterwards levied a Fine thereof to *G. D.* who rendered it back again to them in general Tail; they had Iſſue three Daughters, then the Husband died, and the Widow married a ſecond Husband, and he and his Wife levied another Fine, and took back the Manor in ſpecial Tail, then the ſecond Husband made a Leaſe for Years of the Manor, and the Leſſee diſtrained a Copyholder for Rent, who brought a Replevin, and the Defendant avowed the Taking, *&c.* but did not *aver the Life of the Leſſor*, and for that Reaſon the Avowry was adjudged void. *Cro. Eliz.* 524. *Laughter* verſus *Humfries.*

10. The Father being ſeiſed in Fee, and having Iſſue three Daughters, *covenanted to ſtand ſeiſed* to the Uſe of himſelf for Life, and after his Deceaſe, then, as to Part of the Land, to the Uſe of his Wife for a Jointure, and after their Deceaſes to the Uſe of the Heirs Males of his Body, and of the other Part to the Uſe of himſelf for Life, and afterwards to the Uſe of his Daughters, and to the Heirs of their ſeveral Bodies, and that if any of his ſaid Daughters die without *Iſſue Male*, then, that he may limit the Land by Will for the Advancement of any Perſon for Life, *&c.* one of the Daughters died without Iſſue Male, then the Father aſſigned great Part of the Land to his youngeſt Daughter, *for her Advancement*, without reſerving any Rent, and this was for a Thouſand Years; adjudged, that an *Uſe* cannot be raiſed by a Covenant, or by a Proviſo, or by a Bargain and Sale upon a *general Conſideration*; but yet the Bargainee may *aver* it was for a valuable Conſideration of Money, or for the Advancement of his Blood, if the Perſon is *certain* who ſhall take the Uſe; adjudged likewiſe, that where an *Uſe* is raiſed by a *Covenant in Conſideration of natural Love*, and by the ſame Deed there is a Proviſo, that the Covenantor, for a *good Conſideration*, may make Leaſes for Years, yet he cannot make ſuch a Leaſe, becauſe a *Covenant* upon ſuch a *general Conſideration cannot raiſe an Uſe*, and no particular Averment can be made,

made, that the Covenantor did intend at the Time of the Delivery of the Deed to demiſe it to any certain Perſon, and therefore his Power to make Leaſes was void *ab initio*; but if the Uſe had been raiſed upon a Fine, or upon a Feoffment, or Recovery, in ſuch Caſe there needs not any Conſideration. 1 *Rep.* 176. *Mildmay's* Caſe.

11. Feoffment by the Husband to the Uſe of himſelf for Life, and afterwards to the Uſe of his Wife *for a Jointure*, upon Condition, that ſhe ſhould perform his Will; the Husband died, the Wife entered and agreed to the Eſtate, and afterwards *brought Dower*; adjudged, that the Eſtate made to the Wife, upon Condition to perform the Will, might be *averred to be for her Jointure*, and that ſuch Averment is given by the expreſs Words of the Statute 27 *H.* 8. *cap.* 15. 4 *Rep.* 4. *Vernon's* Caſe. *Poſtea* Jointure. (A) 3. *S. C.*

12. Debt upon this Bill, (*viz.*) *Memorandum, that I* W. R. *do bind my ſelf to* M. M. *to pay him all ſuch Monies as my Brother oweth him.* In Witneſs, *&c.* and afterwards it was thus written, *The Brother oweth M. M.* 40 *l.* and it being ſo averred in the Declaration, the Plaintiff had Judgment; for tho' the Sum was incertain in the Body of the Bill, yet by the Averment the Debt is made certain. *Cro. Eliz.* 563, 758. *Morgan* verſus *Johnſon.* See *Saunders* verſus *Marke. S. P. pl.* 24.

13. Adjudged, that where a Man by Indenture covenants to levy a Fine to *T. S.* to the Uſe of *W. R.* and his Heirs, and afterwards covenants to levy a Fine to the Uſe of *R. C.* and his Heirs, of the ſame Lands, in this Caſe it may be averred to which of the Uſes in the ſaid Indentures the Fine was levied; becauſe as to the Indentures it ſtands indifferently to which of the Uſes the Fine is levied, for no Uſe is recited till the Fine levied. 1 *And.* 46.

14. In an Action on the Caſe for theſe Words, (*viz.*) *thy Son hath robbed me*, the Plaintiff cannot maintain the Action, without averring, that the Defendant had no more Sons; but if the Words had been ſpoken to the *Son* inſtead of the *Father*, or *to the Wife*, viz. *Thy Father hath robbed me*, there needs no Averment, becauſe a Son can have but one Father, and a Husband but on Wife. 2 *Cro.* 443. *Brown* verſus *Laws.*

15. *Caſe, &c.* wherein the Plaintiff declared upon a Promiſe made by the Defendant to pay to the Plaintiff 84 *l. out of the Money due for the Freight of a Ship*: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had not averred, that *there was Money due for the Freight of the Ship*; adjudged, that this was Parcel of the Promiſe, and that it ought to have been averred; and likewiſe the Plaintiff ought to have laid a Demand made of the Money. *Style* 220. *Chace* verſus *Levering.*

16. Debt in the *Debet & Detinet* brought for 107 *l.* 10 *s.* being the Value of 100 Guineas upon a Wager, ſetting forth the Wager, and that the Plaintiff had won it, of which the Defendant had Notice, but had not paid the 107 *l.* 10 *s.* the Defendant pleaded the Statute of *Gaming*; and upon a Demurrer the Plaintiff had Judgment, but upon a Writ of Error in *B. R.* it was objected, that the Plaintiff had averred the 107 *l.* 10 *s.* was not paid, but did not ſay, that the the 100 Guineas in Specie were not paid, as he ought to do; as where in Debt for 303 *l.* 12 *s.* upon a Bill of 1518 *Florence Poliſt*, which amounted to that Sum in *Engliſh* Coin, the Averment was, that the Defendant had not paid the one or the other. 1 *Lutw.* 484. *St. Leger* verſus *Pope. Yelv.* 155. *S. P. Poph.* 28 *S. P. Cro. Car.* 515. *S. P.*

17. Caſe, in which the Plaintiff declared, that *T. S.* was ſeiſed in Fee of the Manor of *H.* and granted to him 30 Acres by Copy of Court-Roll, Parcel of the ſaid Manor, and that he granted *four Acres*, other Parcel thereof, to the Defendant, and alledged, that the Copyholders of the 30 Acres, Time out of Mind, had *Common in the four Acres* for certain Cattle, from the *firſt of Auguſt* to the the Feaſt of *All-Saints*, and that the Defendant, 1*ſt May* in ſuch a Year, had *encloſed the ſaid four Acres* with Hedges and Ditches, *per quod* he could not have Common there: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Plaintiff had ſet forth, that the Incloſure was made 1 *Maii*, but did not *aver, that it continued till the firſt of Auguſt*, for he was not to have Common but from that Time. *Sed per Curiam*, if there is any Thing in the Declaration which implies an Averment, 'tis ſufficient; now here the *per quod* he could not have Common is a ſufficient Averment, that the Incloſure continued till the *firſt of Auguſt*, and after, for otherwiſe he could not looſe his Common; beſides the Jury have found him guilty, which he could not be unleſs the Incloſure had continued. But *per Dodderidge* Juſtice, the *per quod* is not an Averment, but an Illation from the Premiſſes. 2 *Roll. Rep.* 397. *Colſon* verſus *Perry.*

18. *Error* of a Judgment in *Aſſumpſit*, in which the Plaintiff declared, that in Conſideration he would renounce an Adminiſtration *at the Requeſt of G. D.* and permit the Defendant to adminiſter, that then the ſaid Defendant would diſcharge the Plaintiff of two Bonds, and alledged, that he did renounce the Adminiſtration, and ſuffer the Defendant to adminiſter, but that he had not diſcharged him of his Bonds; but becauſe he did not aver, that he renounced the Adminiſtration *at the Requeſt of G. D.* the Judgment was reverſed, for perhaps he might be compelled to renounce by a Sentence in the Spiritual Court. *March* 56.

19. In an Action for ſlanderous Words brought by a Journeyman Shoe-maker, (*viz.*) *It is no Matter who hath him, for he will cut him out of Doors*; the Plaintiff averred, that the Common Acceptation of theſe Words, amongſt Shoe-makers, was, *That he would Beggar his Maſter*; adjudged actionable, with this particular Averment of the Damage; but where

Words are ſpoken which are *malum in ſe*, as to call a Man Thief, Traitor, or the like, there needs no Averment. *Paſch.* 15 *Car. March.* 81.

20. Caſe, *&c.* in which the Plaintiff declared, that *G. D.* entered into a Recogniſance to him, and that he took out an *Elegit*, and that the Defendant being *Sheriff* took an Inquiſition upon it, upon which the Land was extended, which he refuſed to deliver to the Plaintiff, but made a Return that he had delivered it, and the Plaintiff averred, that he had not: Upon Not guilty pleaded, the Plaintiff had a Verdict; but upon a Motion in Arreſt of Judgment, it was objected, that the Declaration was not good, becauſe *an Averment could not be made againſt the Return of the Sheriff*; adjudged, that it may in another, tho' not in the ſame Action. *Winch* 100. *Sheis* verſus *Sir Fra. Glover.*

21. Leaſe for Years, rendring Rent half-yearly; afterwards the Leſſor *bargain'd and ſold* the Reverſion by a Deed, bearing Date before the Day of Payment of the Rent, but the Rent became due before the Deed was inrolled, and in an Action of Debt for Rent brought by the Bargainee, he declared upon this Deed, and averred, that it was enrolled within the ſix Months, according to the Statute: After a Verdict for the Plaintiff, it was moved, that the Declaration was not good, becauſe the Plaintiff did not ſhew whether the Deed was *enrolled before or after the Rent became due*; but adjudged, that his Averment, that it was enrolled within ſix Months, is good, becauſe 'tis purſuant to the Statute; and if it was not enrolled before the Rent was due, that ought to be ſhewn by the Defendant; but the Law is, that the Bargainee ſhall be entituled to the Rent before the Inrollment. *Latch.* 151. *Hall* verſus *Dewes.* *Hill.* 1 *Car. Alſop's* Caſe. *S. P.* Bargain and Sale. (C) 2. *S. C.*

22. In Debt upon a *Leaſe at Will*, reſerving Rent, there muſt be an Averment, that the Defendant occupied the Lands; but 'tis not ſo upon a *Leaſe for Years.* 1 *Vent.* 41. *Sid.* 423. *S. P.* 1 *Mod.* 3. *S. P.*

23. An Agreement was made, that the Defendant ſhould pay ſo much Money within ſix Months, *the Plaintiff tranferring his Stock, &c.* and the Plaintiff agreed to transfer the Stock, the *Defendant paying the Money*; adjudged, that if either Party ſue upon this Agreement, the one muſt aver and prove a Transfer or a Tender, and the other a Payment of the Money or Tender; becauſe *the Transferring in* the firſt Part of this Agreement is a *Condition precedent*; and tho' they are mutual Promiſes, yet where one Thing is the Conſideration of the other, there Performance muſt be averred, unleſs there is a certain Day appointed for it. 1 *Salk.* 112. *Collonell* verſus *Briggs.* See 1 *Saund.* 319.

24. In Replevin, the Defendant made Cogniſance as Bailiff to Husband and Wife, who was ſeiſed in Right of his Wife for Rent *in aretro exiſten'*; and upon a Special Demurrer, for that he did not aver the Life of the Wife; 'tis true, after Verdict, or upon a general Demurrer, the Plea had been good; and ſo 'tis upon a ſpecial Demurrer, becauſe *in aretro exiſten'*, is *quaſi* an Averment, that the Wife is living. 2 *Lev.* 88. *Harlow* verſus *Bradnox.*

25. In Debt for 15 *l.* 8 *s.* 8 *d.* the Plaintiff declared on a *Deed*, reciting, that ſeveral Suits were likely to ariſe beteen the *Vicar of Shittlehampton* and the Plaintiff, concerning a *Modus* in the ſaid Pariſh, and that the Vicar had already ſued the Plaintiff in the Spiritual Court concerning the ſame, which *Modus* likewiſe concerned all the Pariſhioners, and that the Defendant being a Pariſhioner, agreed to pay to the Plaintiff and bear his *proportionable Part of all the Charges of the Suit*, and of all other Suits by the Vicar touching that Matter; then he ſets forth, that between ſuch a Time, *&c.* he had expended 350 *l.* in Defence of Suits by the Vicar concerning that *Modus*, and that the Defendant had Lands in the Pariſh of the yearly Value of 53 *l.* and averred, that his Share of the ſaid Charge amounted to 15 *l.* 8 *s.* 8 *d.* of which he had Notice, *& licet ſæpius requiſit'*, *&c.* had not paid it, *&c.* The Defendant pleaded *non eſt factum*, and the Plaintiff had a Verdict; it was objected, that an *Action of Debt* would not lie on this Agreement, but *Covenant*, becauſe the Sum to be paid was incertain; but the Plaintiff had Judgment, for tho' a Sum at firſt is incertain, yet when 'tis reduced to a Certainty by an *Averment*, an Action of Debt will lie for it, as well as Covenant. 3 *Lev.* 429. *Sanders* verſus *Marks.* See *pl.* 12. *S. P.*

26. Debt upon Bond againſt *W. M.* in which *W. M.* the Elder, and *W. M.* the Younger, were jointly and ſeverally bound, conditioned, that if *W. M.* (omitting the Word *Younger*) ſhould knowingly come or write any Letter to *I.* the Wife of *I. L.* then the Bond to be in Force, *&c.* The Defendant pleaded, that he did not come or write any Letter to the ſaid *I.* knowingly; the Plaintiff replied, that he exhibited an Information againſt *W. M.* the Younger, *&c.* and that it was agreed then between them, that in Conſideration he would forſear to proſecute the ſame, the ſaid *W. M.* the Elder, and *W. M.* the Younger, ſhould become bound to the Plaintiff in a Bond of 1000 *l.* conditioned, that *W. M.* the Younger ſhould not knowingly come into the Company, *&c.* then he ſets forth the Bond and Condition *in hæc verba*, and avers, that *W. M.* in the Condition mentioned, is *W. M.* the Younger, and farther, that he did knowingly come into the Company of *I. &c.* The Defendant rejoined, that the Plaintiff ought not to aver, that *W. M.* is the Perſon mentioned in the Condition of the Bond; and upon a Demurrer, the Queſtion was, whether the Plaintiff was eſtopped by the Words of this Condition to make ſuch an Averment; the better Opinion ſeemed to be, that he was not, becauſe ſuch an Averment conſiſts with the Condition it ſelf. 3 *Mod.* 216. *Lawknor* verſus *Mountague.*

(B)

Where 'tis not neceſſary, nor good, but ſuperfluous. See *Action on the Caſe.* (M) 54. *Deeds.* (A) 10.

1. IN an Action upon the Statute 32 *H.* 8. againſt buying pretended Titles, if the Plaintiff declares, that the Defendant, or any of his Anceſtors, or any other Perſon under whom he claims, were not in Poſſeſſion of the Land, nor received the Rents, *&c.* by the Space of a Year, *&c.* he need not aver, that the Title is pretended, becauſe the Statute makes it ſo; and therefore 'tis impertinent to aver a Thing which clearly appears both by the Statute and the Declaration. *Plow. Com.* 87. *In Partridge* and *Strange*'s Caſe.

2. In Replevin, the Defendant made Conuſance, as Bailiff to *Thomas Lord Howard*, and ſet forth, that the Prioreſs of the late diſſolved Priory of *Holliwell*, by Deed, bearing Date 4 *Nov.* 29 *H.* 8. and then enrolled, granted the Manor of *P.* of which ſhe was ſeiſed, *&c.* to *G. D.* and his Heirs, who entered, and ſo derives a Title to the Defendant under that Grant; the Plaintiff in Bar to the Avowry ſhewed, that after the Making and Enrolling the ſaid Deed the ſaid Prioreſs leaſed the ſaid Lands to *R. H.* for 99 Years, and ſo conveyed a Title to himſelf under the Leaſe, and *averred*, that the Deed mentioned by the Defendant, was *primo deliberat' on the fourth of Novemb.* 31 *H.* 8. and traverſed, that the Prioreſs granted it to *G. D.* on the *fourth of Novemb.* 29 *H.* 8. and upon Demurrer, it was adjudged, that ſuch an Averment could not be made againſt a Deed inrolled. 2 *Leon.* 121. *Holland* verſus *Boins.*

3. *Ejectment*, *&c.* of a Rectory, it was objected againſt the Declaration, that it was inſufficient, becauſe the Plaintiff had not *averred*, that the Parſon was *living*, only by Implication; but becauſe it was, *quod præd' W. R. Rector Eccleſiæ præd' fuit & adhuc eſt ſeiſitus de & in Rectoria præd' in Dominico ſuo ut de feodo in jure Eccleſiæ*, the Declaration was adjudged good. 14 *Eliz. Dyer* 304.

4. Where a Man is to take a Benefit by an *Act of Parliament*, there in pleading he muſt *aver, that he is not a Perſon excepted*; but where he claims no Benefit by it, but only to keep that which he had before, in ſuch Caſe 'tis not neceſſary to make ſuch Averment. *Plow. Com.* 488. *in Nicholl's* Caſe. *Hob.* 67. **Cuddington* verſus *Wilkins. S. P.* *Pardons general. (B) 4. S.C.

5. *Aſſumpſit*, *&c.* wherein the Plaintiff declared, that in Conſideration he had paid to the Defendant 40 *l.* for the Debt of *G. D.* the Defendant promiſed to deliver him *all the Bonds*, *&c.* wherein *G. D.* ſtood bound to the Defendant: Upon *Non Aſſumpſit* pleaded, the Plaintiff had Judgment; but it was inſiſted for the Defendant in Arreſt of Judgment, that the Plaintiff ſhould have averred, that the Defendant had Bonds in which *G. D.* was bound to him; but adjudged, that he need not make any ſuch Averment; becauſe he is not to recover the Bonds, but Damages for detaining them. *Cro. Eliz.* 133. *Muſcot* verſus *Cole.*

6. *Falſe Impriſonment in London*, the Defendant pleaded a Judgment had againſt the Plaintiff in the Court at *Sandwich in Kent*, and that by Vertue of a *Ca. ſa.* he impriſoned the Plaintiff at *Sandwich*, and traverſed, that he is guilty in *London*; the Plaintiff replied, that the Defendant impriſoned him in *London*, and traverſed, that there was any ſuch Record, *&c. Et hoc paratus eſt verificare per Recordum:* Now 'tis abſurd to offer a Proof by Record, when he alledged that there was no Record; but yet the Replication might be good without any ſuch Averment, it being in the *Negative*, which needs no Averment; for if upon the Traverſe of the Record the Plaintiff had concluded to the Countrey, (*viz. Ex hoc petit quod inquiratur per patriam*) then the Defendant might have rejoined *quod habetur tale Recordum & hoc paratus eſt verificare per Recordum*, *&c. Cro. Eliz.* 418. *Paramour* verſus *Verrold. Poſtea* Cuſtom. (A) 8. *S. C.* Poph. 101. Moor 350, 603.

7. Error of a Judgment in Replevin, wherein the Avowant ſet forth, that the Tenant in Tail made a Leaſe of the Lands for three Lives, *rendring Rent*, and that the Reverſion deſcended to him as Heir in Tail, and the Rent being in Arrear he diſtrained, *&c.* and avowed the Taking, *&c.* and averred, that at the Time of the Demiſe the Lands had been formerly demiſed, and that the Rent reſerved was, *verus & antiquus redditus:* Upon Demurrer to this Avowry, it was adjudged, that the Averment, that the Lands were formerly demiſed, was not ſufficient, for he ought to have averred, that they had been let for eleven Years next before the Leaſe made; becauſe the Statute 32 *H.* 8. limits the Leaſes to be made by Tenant in Tail, that they ſhould be made only of ſuch Lands which had been commonly let by the *greater Part of twenty Years next before the Leaſe made*; alſo the Averment, that the Rent was *verus & antiquus redditus*, is not ſufficient, for it may be ſo, and yet the Circumſtances of the Statute may not be obſerved; for that requires, that the uſual Rent, or more, muſt be reſerved, which hath been paid for the greater Part of twenty Years preceding: Now the Rent which hath been paid for ſeven Years, may be *verus & antiquus redditus*; but that is not the Rent intended by the Statute for the Reaſon before mentioned. *Cro. Eliz.* 707. *Mallet* verſus *Mallet.*

8. In a *Præcipe quod reddat*, the Sheriff returned the Defendant ſummoned at the Church-door, purſuant to the Statute 31 *Eliz.* when in Truth he was not ſummoned; and he not appearing, a *Grand Cape* was awarded againſt him, and Judgment given by Default, upon which he brought a Writ of Error, and aſſigned for Error, and averred, that he was never ſummoned; but the Court Goldſ. 129.

Court would not allow this Averment; for ſince the Sheriff had returned him ſummoned, there could be no Error in awarding the *Grand Cape* upon that Summons, and the Default recorded; but if in Truth he was not ſummoned, he may either have an Action againſt the Sheriff for his Falſe Return, or a Writ of Deceit *Cro. Eliz.* 371, 397. *Collet* verſus *Marſh. Poſtea* Summons. (C) 3. *S. C. 6 Edw. 6. Dier S. P.* 1 *Inſtitut.* 171. *S. P. Trin.* 31 *Eliz.* 1 *Leon.* 205. *S. P.*

9. *Aſſumpſit, &c.* brought againſt an *Adminiſtrator* in an Inferior Court, the Plaintiff had a Verdict, and it was objected againſt him, that he did not aver, that the Defendant had *Aſſets* after the Debts paid: adjudged, that he need not make any ſuch Averment, for that ought to come on the other Side. *Plow. Com. Woodward's* Caſe, and *Trin.* 30 *Eliz. Goldſ.* 97.

10. Leaſe for Years of ſeveral Meſſuages *dated in November, and to commence at Michaelmas next* following, in which the Leſſee covenanted to repair all the ſaid Meſſuages, *except ſuch which the Leſſor ſhould appoint to be pulled down during the Term*; in an Action of Debt on a Bond brought by the Leſſor againſt the Defendant, for Non-performance of Covenants, he pleaded Performance, *&c.* the Plaintiff replied, and ſhewed the Breach in not repairing one Meſſuage, Parcel of the demiſed Premiſſes, and *averred, that the ſaid Meſſuage was not appointed to be pulled down during the Term*, and upon this they were at Iſſue, *(viz.)* whether the Defendant had repaired it or not; and it being found for the Plaintiff, it was moved in Arreſt of Judgment, that the *Averment* was inſufficient; for the Leaſe being *dated in November*, and the Term being to commence not before *Michaelmas following*, the Houſe might be appointed to be pulled down before the Commence of the Term, and if ſo, the Defendant is not bound to repair it; therefore this Averment doth not come up to the Exception; but adjudged, that this Averment was ſuperfluous, for it had been ſufficient to have aſſigned the Breach in not repairing, *&c.* without averring, that it was not appointed to be pulled down; for if it had been ſo appointed, it ought to be ſhewed on the Defendant's Part, becauſe it tends to his Advantage; for if any ſuch Appointment had been made, it would diſcharge him of his Covenant, as to that Houſe appointed to be pulled down. *Paſch.* 26 *Eliz. Sir John Smith* verſus *Peaze.* 1 *Leon.* 17.

11. A Man purchaſed Lands with his proper Money, which were held *in Capite*, and it was to himſelf and an Infant, and *to their Heirs*; adjudged, that this Purchaſe could not be averred to be by *Colluſion* to take away Wardſhip, which might accrue after his Death, becauſe he was never ſole Tenant, and no Feoffment that he can make, can be averred to be by Colluſion; becauſe if he make none, yet no Benefit can accrue to the King by his Death; adjudged likewiſe, that where the Father makes a Feoffment, for the Advancement of his Wife and Children, or for Payment of his Debts, it cannot be averred to be *Covin*, ſo as to give the King Cauſe to ſeiſe the Lands; adjudged likewiſe, that where the King's Tenant conveys his Lands, either for Life, for Years, or in Tail to his Children, or where a Stranger is joined to the Heir in Tail, or where a Remainder is limited in Fee, or where an Eſtate is declared *by Will*; that in all ſuch Caſes *Covin* may be averred for the King, but only for a *third Part*; becauſe the Teſtator is enabled by the Statutes 32 & 34 *H.* 8. to convey two Parts at his Pleaſure. 8 *Rep.* 164. *Might's* Caſe.

12. In a *Quare Impedit*, the Plaintiff declared, that *W. R.* was ſeiſed of the Advowſon in Groſs, and granted it to the Plaintiff and others, to the Uſe of the Grantor for Life, and afterwards to the Uſe of *R. R.* his Son in Tail: Proviſo, that if the Grantor died, his Son being within the Age of twenty-three Years, that then the Grantees and their Heirs, ſhould be ſeiſed, *&c.* to them and their Heirs, until the Son of the Grantor ſhould arrive to that Age; the Grantor died, his Son being then 14 Years old, and no more, ſo that the Grantees were poſſeſſed of the ſaid Advowſon *qui quidem* (the Plaintiffs) *ſic poſſeſſionati exiſten'*, the Church became void, and ſo it belonged to them to preſent: It was objected againſt this Declaration, that it was ill, becauſe the Plaintiff had not *averred the Life of R. R.* upon whoſe Life their Intereſt did depend; but adjudged, that the Declaration was good, for tho' *the Life of R. R.* is not expreſly averred, yet an Averment is ſtrongly implied; for the Plaintiffs ſet forth, that the Father died, his Son being of the Age of fourteen Years, and no more, by Force whereof they *were poſſeſſed of the Advowſon*, and being ſo *poſſeſſed*, the Church became void; now they could not have been ſo *poſſeſſed* if *R. R.* had not been then alive; ſo that where the Life is implied, it need not be averred. *Mich.* 29 *Eliz.* 2 *Leon.* 50. *Baskervile* verſus *Biſhop of Hereford.*

13. There was a Grant of an Office for Life, with an Authority to nominate Under-Officers, and by the ſame Deed an Annuity was granted to him who had the Office for the Support of the Under-Officers; the Grantor died, and becauſe his Son did not pay the Annuity, a Writ of Annuity was brought againſt him, in which the Plaintiff declared upon this Grant; and upon a Demurrer to the Declaration, the Plaintiff had Judgment, whereupon the Defendant brought a Writ of Error, and aſſigned for Error, that the Plaintiff had not averred in his Declaration, that he had exerciſed this Office; adjudged, that in all Caſes, where an Intereſt or Eſtate doth Commence upon a *Condition precedent*, which is to be performed by the Plaintiff, or any other, there the Performance muſt be averred, becauſe he hath no Intereſt till ſuch Condition is performed; but when the Intereſt paſſes immediately, as in this Caſe it did to the Grantee of the Office, which Intereſt may be defeated by Matter done afterwards; there the Plaintiff may declare generally, without averring any Performance; but the Defendant, who is to take Advantage of the Non-performance, ought to ſhew it; but if the Matter by which ſuch Intereſt may be defeated, appears to the Court to be Matter of Law, and that the Action cannot be ſupported without Averring the Performance of the Conſideration or Condition, there the Plaintiff muſt aver the Performance. 7 *Rep.* 10. *Ugthred's* Caſe.

14. Tenant in Fee, in Conſideration of natural Love and Affection, covenanted to ſtand ſeiſed, *&c.* of Lands to the Uſe of himſelf for Life, and after his Deceaſe to the Uſe of his *Wife for Life*, and afterwards to other Uſes, *&c.* The Queſtion was, if any Uſe did ariſe to the Wife; adjudged, that a *Conſideration may be averred* if it ſtands, and is not repugnant to the Deed it ſelf; but admitting a Conſideration, other than that which is expreſſed in the Deed, cannot be averred, yet here is an expreſs Conſideration in it ſelf; for when he limits the Lands to the Uſe of his *Wife for Life*, that implies a ſufficient Conſideration in it ſelf, and needs not any Averment; ſo where the Father, who was Tenant by Knights-Service, made a Feoffment to an Infant, who was then his Son and Heir apparent, it need not be averred, that it was done by Colluſion, becauſe 'tis apparent that it was ſo. 7 *Rep.* 40. *Bedell*'s Caſe.

15. Tenant for Life, Remainder in Tail, Reverſion in Fee, *&c.* he in Remainder levied a Fine to Two, and to the Heirs of one of them, and had Iſſue, and died before all the Proclamations were paſt, the Iſſue in Tail being then beyond Sea; afterwards the Proclamations were all made, and then the Iſſue in Tail returned and claimed the Eſtate; but adjudged, that he was barred by the Fine, and that he cannot aver againſt it, that *Partes finis nihil habuerunt.* 3 *Rep.* 84. the Caſe of Fines. See *Godbolt* 138.

16. Leaſe for twenty-two Years, rendring Rent to the Leſſor *during his Life*, and to his Aſſigns, the Defendant, as *Aſſignee* of the Leſſor diſtrained for the Rent, but in Pleading did not aver the *Life of the Leſſor*; beſides, he entituled himſelf to the Reverſion by a Fine levied by the Leſſor, but in his Avowry he did not aver, that the Fine was levied to his Uſe; adjudged, as to the firſt Point, that he need not aver the *Life of the Leſſor*, for if he was dead it ought to be ſhewn on the other Side; and as to the ſecond Point he need not aver, that the Fine was levied to his Uſe, becauſe the Law will *intend* it to be ſo till the contrary is ſhewn. *Latch* 265. *Cole* verſus *Surey*. *Poph.* 201. *Ditcher* verſus *Morland*. *S. P.*

17. A *Dedimus* was directed to *Roger Manwood Eſq*; to take the Caption of a Fine, and before it was taken he was made a *Knight*, *&c.* and then it was returned as taken *per Rogerum Manwood Militem*; upon a Writ of Error brought to reverſe this Fine, the Plaintiff aſſigned for Error, and averred, that the *Dedimus* was not returned by the ſame Perſon to whom it was directed, but adjudged to be no Error, becauſe 'tis directly againſt the Record, and Averments ſhall not be allowed in ſuch Caſes. *Arundell* verſus *Arundell*. *Yel.* 33.

18. The Plaintiff, at the Requeſt of the Defendant, bought ſeveral Wares for him, which were tranſported to *Ireland*, and the Defendant (at whoſe Requeſt the Money was laid out by the Plaintiff) promiſed to repay him, which not being done, he brought an *Aſſumpſit*, and declared, as aforeſaid, and had a Verdict; it was moved in Arreſt of Judgment, that the Declaration was not good, becauſe the Plaintiff did not aver that the Wares ſo bought came to the Uſe of the Defendant, neither did he aver, that when they were delivered to the Defendant, he promiſed then to pay the Money; but adjudged, that neither of the Averments were neceſſary. 1 *Bulſt.* 169. *Moor* verſus *Moor*.

19. The Statute 23 *H.* 6. for returning Members to Parliament, requires, that the Sheriff ſhall ſend his Precept to the *Mayor*, *&c.* and if there is no Mayor, then to the *Bailiff*, *&c.* in an Action of Debt brought upon this Statute againſt the *Bailiff*, for not returning the Plaintiff being duly elected a Burgeſs, *&c.* he declared, that the Sheriff had made his Precept directed to the Defendant as Bailiff, *&c.* upon *Nil debet* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Plaintiff had brought his Action againſt the *Bailiff*, without avering that there was *no Mayor*; but adjudged, it ſhall be *intended* there is no Mayor till the contrary is ſhewn. *Hob.* 78. *St. John* verſus *St. John*.

20. Debt againſt an *Adminiſtrator durante minore ætate* of an Infant-Executor, and the Plaintiff did not aver that the Infant was within the Age of *ſeventeen Years*; adjudged, that he need not make ſuch Averment; but if ſuch an Adminiſtrator had been *Plaintiff*, he muſt have averred the Infant Executor to be within the Age of ſeventeen Years, for 'tis that which entitles him to the Action. *Hob.* 251. *Carver* verſus *Haſterigg*.

21. In Treſpaſs for Taking two Steers, the Defendant juſtified under a Grant from the King to the Defendant and his Heirs, that he ſhould take at *Mary-Bridge* and *Willow-Bridge*, within his Manor of *Doncaſter* in *Yorkſhire*, ſuch *Toll* for the Paſſage of Cattle as is uſed to be taken *ibi & alibi* within the Kingdom of *England*; then he averred, that at *Burrow-Bridge* in the County of *York*, there was uſually taken 6*d.* for every Score of Beaſts, *&c.* and ſo juſtifies the Taking a Shilling for the Paſſage of forty Beaſts; adjudged, that this Grant was void for the *Incertainty*, it being to take ſuch Toll which had been uſually paid *there* and *elſewhere*, and the Averment, that ſo much was paid for Toll at another Place, and not there, is not good. 2 *Cro.* 421. *Lightfoot* verſus *Lennet*.

22. *In Replevin*, the Defendant juſtified the Taking in Right of his Wife; the Plaintiff replied and confeſſed that the Wife was ſeiſed of the Lands, but that the Husband and Wife had conveyed the ſame to the Defendant in Fee; the Defendant rejoined and craved *Oyer* of the Deed of Conveyance, by which it appeared, that it was upon Condition, and then he pleaded the Statute of Uſury, and alledged, that he borrowed 200 *l.* of the Plaintiff; and it was agreed between them, that they ſhould pay the 200 *l.* at ſuch a Day, and 20 *l.* for the Intereſt for one Year, and thereupon the Lands were conveyed, upon Condition, that if the Money was paid at the Day, then the Deed ſhould be void, and averred, that the Land was worth 12 *l. per Annum*, and ſo he had double Uſe; the Plaintiff ſurrejoined, that upon borrowing the 200 *l.* it was agreed, that the

Defendants

Defendants ſhould have the Profits of the Land until Breach of the Condition, and traverſed, that there was any Agreement, that he ſhould have the Profits, and *alſo* 20 *l. for Intereſt*; and upon a Demurrer to this Surrejoinder it was objected, that it was ill; becauſe it appearing that the Lands were conveyed to the Plaintiff, and by Conſequence the Profits thereof, he could not *aver* by a verbal Agreement againſt the Deed, that he had not the Profits; but the Plaintiff had Judgment. 1 *Roll. Rep.* 41. *Dodd* verſus *Ellington.*

23. In Replevin the Defendant made Conuſance for a Rent due to him in *Remainder in Tail*, and did not alledge the preciſe *Time* when the Tenant for Life died, but only that he died; yet adjudged good, becauſe an Avowry is a real Action, and in ſuch Actions the preciſe Day need not be alledged; beſides, the Defendant made Conuſance for the Arrears of Rent due to the Tenant in Tail in *Remainder*, which implies, that the Tenant for Life was dead; and if ſo, the Defendant need not aver that he was dead. *Poph.* 201. *Ditcher* verſus *Morland.*

Releaſe. (D) 24. S. C. 24. Debt upon Bond for 200 *l.* conditioned to pay 104 *l.* on a Day certain; the Defendant pleaded, that the Plaintiff did releaſe *præd. ſcriptum obligatorium, per nomen* of a Bond of 200 *l.* for the *Payment of* 100 *l.* and averred, that he made no other Bond to the Plaintiff beſides that Bond; and upon Demurrer the Plaintiff had Judgment, becauſe the Releaſe of a Bond for Payment of 100 *l.* doth not diſcharge the Payment of 104 *l.* and the Averment in this Caſe is foreign and idle and cannot make an inſufficient Releaſe good. *Allen* 71. *Chace* verſus *Gold.*

2 Cro. 622. 25. In Ejectment the Plaintiff declared, that the Lady *Morley* being Tenant for Life, made a Leaſe to him for three Years, if ſhe ſhould ſo long live, by Vertue of which he entered and was poſſeſſed, until the Defendant ejected him *Termino ſuo nondum finito*; upon Not guilty pleaded, the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff having derived his Title from the particular Eſtate of the *Lady Morley*, who was *Tenant for Life*, he ought to have averred that ſhe *is living*; but adjudged, that an Averment is not neceſſary but where a material Thing is doubtfully alledged, which this is not; becauſe *Termino ſuo nondum finito* implies, that the Tenant for Life was living; beſides, the Jury found, that the Defendant *ejecit* the Plaintiff, which likewiſe proves that the Term continues, and this Judgment was afterwards affirmed in the Exchequer-Chamber. *Palm.* 267, 327. *Arundell* verſus *Mead.*

26. Caſe, *&c.* againſt an Executor, upon a Promiſe of his Teſtator, to pay 20 *l. at his Death*; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not aver, that the Money was not paid by the Teſtator in his Life-time; but adjudged, that it was not neceſſary, becauſe the Money was not payable whilſt he was living; beſides, this is helped by a Verdict; for if two Perſons are to pay Money, and one of them dies, and then an Action is brought againſt the Survivor, 'tis ſufficient for the Plaintiff to alledge, that he had not paid, without averring that the other had not, for after a Verdict it ſhall not be intended that he had paid it. *Hardres* 221. *Greenway* verſus *Horneblow.*

27. *Scire facias* againſt *Cage* to repeal a ſpecial Livery granted to him upon his coming of Age; the Attorney general demurred to it, and the Queſtion was, whether he could aver againſt an Inquiſition returned into the *Petit Bag*, tho' it was not taken before the *Eſcheator*, but put in by another; and adjudged he could not, for this cannot be tried by a Jury, but upon an Examination in Court, and there to be redreſſed; thereupon Mr. Attorney waived the Demurrer, and took Iſſue upon the Age, (*viz.*) whether of Age, or not. *W. Jones* 389. *The King* verſus *Cage.*

28. Caſe againſt *W. R.* and another upon a joint Contract, *W. R.* was outlawed, and before the Declaration againſt the other it was entered on the Roll *& ſciendum eſt quod W. R.* is outlawed, and Judgment was had againſt the other; but it was arreſted, for that this was not a ſufficient Averment, that *W. R.* was outlawed. *Sid.* 173. *Gye* verſus *Goddard.*

29. *Aſſumpſit, &c.* for that the Defendant, in Conſideration the Plaintiff would deliver ſuch Goods into the Shop of *T. S.* as he ſhould require, that then he (the Defendant) *would ſee him paid*; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that the Plaintiff had not averred, that *T. S.* did not pay for the Goods; for the Promiſe which the Defendant made, to ſee that the Plaintiff ſhould be paid, is no more than that he would pay him if *T. S.* did not; but adjudged, that a Promiſe to pay, and to ſee him paid, is all one, and that an Averment is not neceſſary. 1 *Vent.* 43. *Robinſon* verſus *Pulford.*

30. *Aſſumpſit, &c.* in which the Plaintiff declared, that whereas *he had undertaken* not to put a Bond in Suit, by which the Defendant was obliged to the Coroner in the Penalty of 1600 *l.* for the Appearance of a certain Perſon, and which the Plaintiff had Authority to put in Suit; and whereas the Plaintiff had an Outlary againſt *W. R.* for 400 *l.* that if he (the Plaintiff) would permit the Defendant to take the Benefit of that Outlary, he would pay to the Plaintiff 400 *l.* and averred, that he permitted the Defendant to take the Benefit of that *Outlary, &c.* after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that here were two Conſiderations, the one was forbearing to put the Bond in Suit, and the other was to permit the Defendant to have the Benefit of the *Outlary*, and the Plaintiff had averred the Performance only of one; but adjudged, that *the Undertaking not to ſue*, amounted to a Promiſe not to ſue, and ſo not neceſſary to aver the Performance, it being only * one Promiſe againſt another, (*viz.*) In Conſideration of a Promiſe not to ſue, the Defendant promiſed to pay ſo much Money. 1 *Lev.* 20. *Bennet* verſus *Aſtell.* See *Nicholas* verſus *Raindbeard. S. P.*

* 1 Lev. 293. Beany v. Turner. S. P.

31. Error in *B. R.* of a Judgment in *C. B.* where the Plaintiff declared, that in Conſideration he, at the Inſtance of the Defendant, would buy for him *tanta pruna quanta in ea parte poſſet*, and

and would bring them to *Billingſgate*-Wharf, he (the Defendant) promiſed to pay 8*s. per Buſhel*, *&c.* that he bought ſuch a Quantity, *&c.* that he brought them to the Wharf, *&c.* ready to be delivered to the Defendant, and tendered them, *&c.* and that the Defendant did not receive them; after a Judgment for the Plaintiff, the Error aſſigned was, that the Plaintiff did not aver, that the Quantity bought, *was all he had or could buy*; but adjudged, that he need not, for Prunes are *Bona peritura*, and to be ſold immediately, and it was not their Intention, that the Plaintiff ſhould ſtay till he got together all he might have bought; beſides, this is proper to be inſiſted on at the Trial. *Mod. Caſes* 202. *Scrimſhaw* verſus *Weſtby*.

(C)

To ſupply Defects in Wills. See Antea (A) 6. *Intention.* (B) 5.

1. THE Teſtator deviſed all his Lands to *T. S.* but his (the Teſtator's) Name was not mentioned in any Part of his Will, yet adjudged, that by an Averment of his Name and Proof that it was his Will, it was good. 2 *Leon.* 85. 3 Leon. 79. 4 Leon. 104.

2. The Teſtator had Iſſue *two Sons and one Daughter then living*, and he deviſed his Lands to his youngeſt Son, and the Heirs of his Body, Remainder to the *Heirs of the Body of the eldeſt* Son, Remainder in Fee to the Daughter, afterwards the youngeſt Son died without Iſſue, living both his Father and elder Brother, then the elder Brother died leaving Iſſue; adjudged, that the Iſſue of the elder Brother cannot take by this Deviſe, becauſe he himſelf could not take by the Name of *Heir* in the Life-time of his Father, who being now dead, the eldeſt Son produced Witneſſes on Oath, to prove that his Father had declared his Meaning concerning his Will, (viz.) *That as long as his eldeſt Son had any Children, his Daughter ſhould not have the Land*; but there being nothing like it to be collected out of the Words of the Will, this Proof was rejected. 2 *Leon.* 70. *Chaloner* verſus *Bowyer*. *See* Heir. (A) 5.

3. So where Sir *Tho. Cheyney* deviſed ſeveral Lands to his Sons *Henry* and *John* in Tail, upon Condition *that he*, or they, or any of them, ſhall not *alien*, Remainder to the next Heir Male of *Sir Thomas* the Teſtator in Tail Male; afterwards, *Henry* his eldeſt Son ſuffered a common Recovery to the Uſe of himſelf and his Heirs, and then ſold the Lands; adjudged, that no Proof or any collateral Averment ſhall be allowed, which cannot be collected out of the Words of the Will, whether the Teſtator intended to reſtrain *Henry*, and the Heirs of his Body, as well as *John* and the Heirs of his Body, not to alien. 5 *Rep.* 68. *Lord Cheyney's* Caſe. Moor 727. 2 Cro. 145. Mollineux's *Caſe*.

4. The Husband deviſed Lands to his Wife *for Life* generally; adjudged, this cannot be averred to be for her Jointure, and in Bar of her Dower, becauſe a Deviſe imports a Conſideration in it ſelf, and an Averment ſhall not be allowed, where the Intent of the Teſtator cannot be collected out of the Words of his Will. 4 *Rep.* 44. *Leake* verſus *Randall*, cited in *Vernon's* Caſe. *Poſtea* Jointure. (A) 5. *S. C.* 1 *Lutw.* 734. *Lawrence* verſus *Dodwell. S. P. Poſtea* 7. *S. C.*

5. The Teſtator deviſed his Lands *to the Heirs of T. S.* this was his Intention, but the Clerk, in penning the Will, wrote *to T. S. and his Heirs*, this may be helped by an Averment, becauſe what he intended was written by the Clerk, *and more than he intended*, but if he had directed him to write his Will *to T. S. and his Heirs*, and inſtead thereof he had written *to the Heir of T. S.* in ſuch Caſe an Averment would not help *T. S.* becauſe there was no Eſtate deviſed to him by any Words in the Will, and the Statute requires all Wills to be in Writing. *Godb.* 131. *per Anderſon*. Antea (A) 6. S. C.

6. The Teſtator had a Son and a Grandſon both named *Robert*, and *Anno* 29 *Car.* 2. he deviſed his Lands to his *Son Robert and his Heirs*, and a Legacy to his *Grandſon Robert*, afterwards *Robert* the Son died in the Life-time of his Father, who then republiſhed his Will and declared his Intention to be, that *Robert, his Grandſon*, ſhould take by his Will inſtead of *Robert* his Son; adjudged by three Judges, that a new Publication is equivalent to a new Writing the Will, and tho' the *Grandſon* is not within the Words of the *written Will*, yet he may be averred to be a *Son*, for ſo he is with a Diſtinction by the adjective *Grand*, but this Judgment was reverſed in *B. R.* becauſe no parol Averment ſhall carry the Lands to one when by the Words of the Will they *are* expreſly deviſed to another; 'tis true, a new *Publication* may be equivalent to a new Writing the Will, but that muſt be where the Words in the written Will are apt and proper, and do not diſagree with the Words in the new Publication, which they do in this Caſe, for the *Word Son* in the written Will can never be conſtrued to be *Grandſon* in the new Publication, becauſe they are different Names of Appellation. 1 *Mod.* 267. *Steed* verſus *Berrier*. Raym. 408. 2 Mod. 313. 1 Vent. 341. Jones 132. 2 Lev. 243.

7. The Father deviſed Lands to his Son *John*, when he had two Sons of that Name; adjudged, that it may be averred, which he intended, for this conſiſts with the Words of the Will, becauſe one *John* was written in it.

8. So where the Husband deviſed Lands to his Wife for her *Proviſion and Maintenance*, this may be averred to be for her *Jointure* tho' that Word is not in the Will, becauſe 'tis conſiſtent with the other Words in it; but where a Widow brought a Writ of Dower, and the Tenant pleaded, that her late Husband made a Will and deviſed the Lands to her during her Widowhood, and averred this was in Recompence of her Dower; this Averment was rejected, becauſe there was nothing to be collected out of the Words of the Will to that Purpoſe. 1 *Lutw.* 734. *Lawrence* verſus *Dodwell*.

Avoidance.

What Acts make an Avoidance. (A) | In what Cases the Patron must have Notice. (B)

(A)

What Acts make an Avoidance.

Moor 434.

1. IF a Clerk is *inſtituted* to a Benefice of the yearly Value of 8*l.* and before Induction accepts another Benefice with Cure, and is inſtituted, the firſt Benefice is void by the Statute 21 *H.* 8. for he who is *inſtituted* only, is properly ſaid to have accepted a Benefice within the Words of the Act. 4 *Rep.* 78. *Digby's* Caſe. *Moor* 434. *S. C.* by the Name of *Robbins* verſus *Gerrard.*

2. The Patron granted the *next Avoidance to two jointly* and ſeverally; adjudged, that this Grant is not good, becauſe an *Intereſt cannot be divided*; ſo, where there was a Grant of the next Avoidance to three, *Habendum* to them and to each of them jointly and ſeverally, the Firſt preſented the Third, and adjudged good; but if the *Biſhop* had refuſed to admit the Preſentee, he might have failed in a *Quare Impedit*, becauſe the Severance in the *Habendum* is void in Law, but 'tis otherwiſe in Caſe of an *Authority*, for that may be divided. *Langford's* Caſe. *Poſtea* Preſentation. (C) 2. 13 *Eliz. Dyer* 304. *S. P. Antea Berry* verſus *Berry.* Arbitrament. (B) 12. *S. C.*

3. But if he is *inducted* into a ſecond Benefice the firſt is void in *facto & jure*, and not voidable only, *quoad* the Patron and until he preſents another, and in ſuch Caſe the Patron ought to take Notice of the Avoidance at his Peril, and preſent within the ſix Months. *Cro. Car.* 258.

4. *Deprivation* by a declaratory Sentence in the Eccleſiſtical Court is an Avoidance of a Benefice, and by the Common Law there are ſeveral Cauſes of *Deprivation*, as *Conſcientia Criminis, Debilitas Corporis, defectus ſcientiæ, malitia plebis, grave ſcandalum, irregularitas perſonæ. Dodderidge's* Parſons Law.

T. Jones 18.

5. In a ſpecial Verdict in Ejectment the Caſe was, one *Highden* was incumbent of *Wringleton* in the County of *Somerſet*, being a Benefice of Cure, *&c.* and *accepted the Rectory of Elme* in the ſaid County, being a Benefice with Cure, *&c.* and was inducted, *&c.* and thereupon the Patron of *Wringleton*, within two Months, preſented the Plaintiff to that Church; *Higden*, upon his Acceptance of *Elme*, did *ſubſcribe the thirty-nine Articles* according to the Statute * *Eliz.* but did not *read them in the Church within two Months* after his Induction, purſuant to the ſaid Statute; the Queſtion was, whether his not Reading the Articles, as aforeſaid, had excluded him not only from *Elme* but from *Wringleton*, for it was inſiſted, that if he was *ipſo facto* deprived of *Elme*, *by not Reading the Articles*, then his Induction into *Elme* was void, and as if it had never been, and by Conſequence he never accepted a ſecond Living, and if ſo, then the firſt is not void, but he ſtill muſt continue Incumbent thereof; but adjudged, that by *his ſubſcribing the Articles*, upon his Admiſſion and Inſtitution into *Elme*, he was perfect Incumbent thereof *pro tempore*, (*viz.*) to the Time allowed him to *read the Articles*, which is two Months, *&c.* and if ſo, then he accepted *Elme*, and by that Means he loſt *Wringleton*, and by *not Reading the Articles* within two Months after his Induction into *Elme*, he loſt that likewiſe. *Vaugh.* 129. *Shute* verſus *Higden.*

* 13 Eliz. cap. 12.

(B)

In what Caſes the Patron muſt have Notice of it.

1. TWO *Patrons* had a Right to preſent *by Turns*, one of them preſented, and his Clerk was inſtituted and inducted, and died, then the other preſented, and his Clerk being inſtituted and inducted, was afterwards *deprived* by the Biſhop (without giving Notice to him who had the next Turn) who collated his Clerk, and afterwards he who had the next Turn ſold his Moiety; the Court inclined, that by the *Collation* the next Turn was loſt, but clearly if it had been by *Uſurpation*, but yet it was adjudged, that upon the *Deprivation* the Patron ought to have Notice of it. *Goldſ.* 142. *Langford's* Caſe.

2. So in Caſes of *Refuſal by the Biſhop to inſtitute* a *Clerk* for any Cauſe of Diſability, he muſt give *Notice* to the Patron of ſuch *Refuſal*, and for what Cauſe, that the Patron may preſent another; for if he hath Notice of it, he ſhall not be prejudiced by any Lapſe. 5 *Rep.* 58. *Specott's* Caſe. *Goldſ.* 52. *S. C.*

3. But if he *refuſes to inſtitute a Lay-man* preſented to him by the Patron, in ſuch Caſe he need not give Notice to the Patron, becauſe it is notorious to the Patron himſelf when he preſent-

ed him, that he was incapable to take the Benefice; but if ſuch *Lay-man* had been inducted, this makes a *Plenarty de facto*, and he muſt be *deprived* by a Declaratory Sentence before the Patron can preſent another; and of ſuch Deprivation the Biſhop muſt give Notice to the Patron. *Mich.* 13 *Eliz. Dyer* 293.

4. Where the *Avoidance* is by the *Death of the Incumbent*, or by his being made *a Biſhop*, in ſuch Caſes the Patron is to take *Notice* of it at his Peril, and the ſix Months, in which he is to Preſent another, ſhall be accounted from the *Death of the one* and the *Creation* of *the other*; but if the Avoidance be by *Reſignation*, which is the Act of the Party himſelf, or by *Deprivation*, which is the Act of the Law, in both thoſe Caſes, the Patron muſt have Notice, and the ſix Months ſhall be accompted from the *Time of the Notice*, and not from the *Reſignation* or *Deprivation*. *Mich.* 16 *Eliz. Dyer* 327.

5. Where the *Avoidance* is by an *Act of Parliament*; as for Inſtance, if a Man hath one Benefice, with Cure, *&c.* and take another with Cure, *&c.* without any Diſpenſation to hold two, in ſuch Caſe the firſt is * void by the Act 21 *H.* 8. *cap.* 13. if it was above the Value of 8 *l.* and the Patron is now bound to take Notice of ſuch Avoidance, becauſe he is virtually a Party to the *Act*; but it was not ſo before that Act of Parliament was made, for then ſuch Avoidance of the firſt Benefice was by the Eccleſiaſtical Law, of which the Patron was not bound to take Notice; but yet he might take Notice of it, and Preſent, if he would. 4 *Rep.* 75. *Holland's* Caſe. Moor 726. Digbye's Caſe.

6. Where the Patron himſelf took *Notice* of a *Deprivation*, which was obtained at his own Proſecution, for not *Reading the thirty-nine Articles*; yet in ſuch Caſe, *Lapſe* ſhall not incur, without an actual Notice of the Deprivation given to him by the Biſhop; for 'tis he, and no other Perſon, who is required by the Law to give Notice, and it muſt not be a general Notice, but it muſt be Particular, and the Cauſe be expreſſed for which he was *deprived*. 6 *Rep.* 29. *Green's* Caſe.

7. Where the Biſhop *refuſeth* to Inſtitute a Clerk, he muſt give Notice of ſuch Refuſal to the Patron himſelf, if he is within that County where the Church is become void; but if he is not in that County, then Notice muſt be given at the Door of that Church; but where 'tis Doubtful who is Patron, and upon a *Jus Patronatus* awarded, 'tis found, that ſuch a one is Patron, tho' it may happen he is not the true Patron, yet if he gives him Notice, and no Preſentation is made within ſix Months after ſuch Notice, the Biſhop may collate to the Church; and tho' that Collation ſhall not bind the true Patron, yet the Biſhop ſhall be excuſed from being a Diſturber. 1 *Leon.* 32. *Albany* verſus *Biſhop of St. Aſaph.* *Hob.* 315. *Sir William Ellwis* verſus *Archbiſhop of York.*

Avowry.

For what a Man may diſtrain and avow, or make Conuſance; and of Pleadings in Avowry. (A)

For Rent, good. (B)

For Rent, not good. (C)

(A)

For what a Man may diſtrain and avow, or make Conuſance; and of Pleadings in Avowry.

1. A Man may diſtrain and avow, *&c.* for *Rent* due from a Copyholder to a Lord of a Manor. *Cro. Eliz.* 524. *Laughter* verſus *Humfries.*

2. So he may for an *Amerciament* for Breaking a *By-Law* made in a *Court-Leet.* 6 *Rep. Ruddock's* Caſe. 11 *Rep.* 44. *Godfrey's* Caſe. *Brownl.* 170.

3. So he may for an *Amerciament* of an Inhabitant impoſed in a *Court-Leet*, for refuſing to take upon him the Office of a *Conſtable.* 8 *Rep.* 38 *and* 41. *Greiſley's* Caſe.

4. So he may for an *Amerciament*, for not doing *Suit to the Lord's Court.* 11 *Rep.* 44. *Godfrey's* Caſe.

5. So he may for a certain Sum; as for Inſtance, 10 *s. pro certo Leto.* 6 *Rep.* 77. *Bullen's* Caſe.

6. So he may for *Homage*, *Fealty*, *Eſcuage*, *Relief*, or other like *Services.* 4 *Rep. In Bevill's* Caſe.

7. So he may for an *Heriot.* 8 *Rep.* 105. *Talbot's* Caſe. But where the Defendant avowed for an *Heriot-Service*, and the Plaintiff pleaded in Bar to the Avowry, that the Tenant at the Time

of his Death *nulla habuit animalia*, and thereupon the Defendant demurred; it was adjudged for the Plaintiff, becauſe the Defendant in his Avowry, did not alledge what the *Heriot* ſhould be, whether a Beaſt or other Thing. *Hob.* 176.

2 Roll Rep. 392. 8. In Replevin, *&c.* the Defendant made Conuſance, for that *Sir Fra. Barrington* was ſeiſed of the Manor of *Curles*, and the Plaintiff was ſeiſed of the *Locus in quo*, *&c.* and held the ſame of the ſaid *Sir Francis*, as of his Manor of *Curles*, by *Homage*, *Fealty*, *Eſcuage*, and by the *Rent of* 10 *s.* payable half-yearly, of which *Rent he was ſeiſed*, *&c.* in his Demeſne, as of Fee, and ſo made *Conuſance* for *Homage* not done; and upon Demurrer to this *Conuſance* it was inſiſted for the Plaintiff, that the Defendant did not ſhew any Manner of Title to this *Homage*, for that he did not alledge any ſufficient *Seiſin* to theſe *Services*; but adjudged, that * *Seiſin of the Rent*, which the Defendant had particularly alledged, was *ſufficient Seiſin of the other Services*; and inſtead of the Demurrer the Plaintiff might have traverſed the *Tenure*, and then the Defendant ought to ſhew, whether the Plaintiff had done *Homage* before. *Hutt.* 50. *Whitgift* verſus *Elderſham.*

* Poſtea 14.

9. Adjudged, that in an Aſſiſe *actual Seiſin* is requiſite; but in an Avowry, *Seiſin in Law is* ſufficient by the expreſs Words of the Statute 32 *H.* 8. *cap.* 2. which are *actual Poſſeſſion* or *Seiſin* in the Disjunctive; and therefore where the Tenant hath done either Homage or Fealty, that is a ſufficient Seiſin of all other Services, as to make an Avowry good, altho' the Lord, nor any under whom he claimeth, had Seiſin of thoſe Services within ſixty Years. 4 *Rep.* 9. *Bevill's* Caſe.

10. *Seiſin* in an Avowry is not *traverſable* generally Speaking; as to ſay, that the Avowant was *never ſeiſed of the Services*; becauſe by that Means the Plaintiff leaveth no Remedy to the Avowant by his Avowry; but in ſuch Caſe the Plaintiff may *diſclaim*, or reply, that 'tis *out of* the Fee of the Avowant, and ſo traverſe the *Tenure*; ſo likewiſe where the Lord avows for *other Services*, there the *Tenure* is traverſable; but if for *more Services* of the ſame Nature, there the *Seiſin is* traverſable; becauſe he may encroach more Services, and ſuch and Incroachment cannot be avoided in an Avowry, unleſs he takes an outragious Diſtreſs for them; and it was adjudged, that he who denieth Seiſin, muſt firſt acknowledge a Tenure, that the Lord may have his *Writ of Cuſtoms and Services.* 9 *Rep.* 33. *Bucknall's* Caſe. 4 *Rep. Bevill's* Caſe.

1 Brownl. 175. Moor. 870. 11. In Replevin, the Defendant made Conuſance as *Bailiff* to the *Dean and Chapter of Windſor*, ſetting forth, that *G. D.* held the *locus in quo*, *&c.* of them, as of their Manor of *H.* by Rent and *Suit of Court*, and that he was ſummoned, but did not appear at the Court, *&c.* and thereupon the Defendant diſtrained and made Conuſance for *Suit of Court*; the Plaintiff in his Replication confeſſed the Seiſin of the *Dean and Chapter*, and the Tenure, but ſaid, that they made a Leaſe of their ſaid Manor to *W. R.* for fifty-one Years, and that the Leſſee entered, and was poſſeſſed, *&c.* the Defendant in his Rejoinder confeſſed the Leaſe, but ſaid, that *Leets*, *Law-days*, *Fines*, *Amerciaments*, and *Perquiſites of Courts were excepted*, and that the Leſſee afterwards aſſigned all his Eſtate, *&c.* and that the Reverſion being in the *Dean and Chapter*, and *Perquiſites of Courts* excepted, they held a Court ſuch a Day, *&c.* and that the Plaintiff not appearing there after a Summons, the Defendant diſtrained for not doing Suit, *&c.* and upon Demurrer, it was inſiſted for the Plaintiff, that the Defendant's Plea was naught, becauſe he made Conuſance for a *Suit-Service* due from *G. D.* the *very Tenant*, and that for Default of Suit of that Tenant he did diſtrain, but conveyed no Intereſt in himſelf to the Tenancy, but meerly as a Stranger did entitle another to the *Service*, which he could not do, but only plead *Hors de ſon fee*; and this was adjudged a good Exception at Common Law; but not now; for tho' 'tis in the Choice of the Lord ſtill to avow at the Common Law, yet he may leave that, and by Vertue of the Statute 21 *H.* 8. *cap.* 19. he may avow upon the Land charged with the Diſtreſs, as he hath done in this Caſe; and likewiſe the Plaintiff may now alledge any Thing in Diſcharge of the Lands. *Hob.* 150. *Brown* verſus *Goldſmith.*

12. *Lord* and *Tenant* by *Fealty* and *Rent*; the Tenant made a Leaſe for Years, and the Leſſee had done *Fealty* to the *Lord*, and paid his Rent, yet if he will diſtrain the Cattle of the Leſſee for Rent, and avow *upon a Stranger* as his *very Tenant*; in ſuch a Caſe the Leſſee may alledge, that his Leſſor is ſeiſed of the Tenancy, and the Lord ſhall be compelled to avow upon his very Tenant, and his falſe Avowry upon a Stranger, ſhall not hurt the Leſſee. 9 *Rep.* 20. *Caſe of Avowries.*

13. In Replevin, *&c.* the Defendant avowed, for that the Place where, *&c.* was Parcel of the Manor of *M.* being *waſte Ground*, and that there are a Hundred Coppyholders of the ſaid Manor, who had Right of Common in that Place; and then he ſets forth a Cuſtom for them every Year to chooſe a *Surveyor* of their Fields, who uſed to *diſtrain* Cattle *Damage-feaſant*; that he was choſen *Surveyor* there, according to the Cuſtom, and found the Cattle Damage feaſant, and ſo *avowed the Taking them:* Upon Demurrer to this Plea, it was adjudged ill; for tho' they have a Cuſtom to chooſe a Surveyor, who may diſtrain Damage-feaſant, yet he cannot diſtrain and avow *in his own Name*, but in the Name of him *who hath the Freehold*; for which Reaſon the Juſtification was held ill. 2 *Cro.* 436. *Keblethorpe* verſus *Stephens.*

14. In Replevin, *&c.* the Defendant made *Conuſance*, as Bailiff to *Tho. March.* ſetting forth, that he ſeiſed of the Manor of *M. &c.* long before the Taking the Cattle, of which Manor the *locus in quo*, *&c.* was Parcel; and that one *Anthony Gage* was ſeiſed of Lands in Right of his Wife, (in which Lands the Diſtreſs was taken) which he held of the ſaid Manor by *Fealty*,

ty, and Payment of a certain Rent, and that the ſaid *Tho. March* was ſeiſed of the ſaid Services by the Hands of the ſaid *Anthony Gage, &c.* as his very Tenant, and ſo derived the *Tenancy to Sir Anthony Gage*, and the *Seignoiry* to *Tho. March* the Plaintiff, by the Death of his Father; and becauſe *Fealty* was not done by *Sir Anthony Gage*, the Defendant diſtrained as Bailiff, *&c.* and made Conuſance for Taking *infra feodum, &c.* The Plaintiff in his Replication took it by *Proteſtation*, that *non tenet* the ſaid Lands of *Tho. March*, as of his Manor of *M.* by *Fealty and Rent*, and *traverſed, that the ſaid Thomas March was ſeiſed of the ſaid Services*, by the Hands of the ſaid *Anthony Gage*, as his very Tenant; upon which the Defendant did demur, and it was objected againſt the Plaintiff, that his Replication was ill; becauſe by the Common Law he could plead nothing in Bar to the *Conuſance*, but that the Defendant took the Cattle *Hors de ſon fee*, or what did amount to it; but as to that it was adjudged, that by Vertue of the Statute 21 *H.* 8 *cap.* 19. the Plaintiff, tho' a *Stranger*, might plead any Thing in Diſcharge of the Lands; for ſince the Statute enables the Lord to avow upon the Land charged with the Diſtreſs, without naming any Perſon, 'tis but equitable, that the Plaintiff ſhould plead any Thing which goes to diſcharge it, tho' he himſelf claims no Intereſt in the Lands; but it was adjudged, that the Traverſe taken in this Caſe *by the Plaintiff*, was ill, for where the *Seiſin* is not material, as the *Seiſin of the Services* was not in this Caſe, for 'tis not within the Statute of Limitations, therefore 'tis not traverſable; beſides the *Seigniory* was not in Queſtion, and for that Reaſon the *Seiſin of the Services* was not traverſable; and it appears by the Pleading, that the Lord and Tenant gid not *agree* in the Services; and in ſuch Caſe 'tis not the *Services*, but the *Tenure* which muſt be traverſed; 'tis likewiſe very plain, that a Man ſhall never *traverſe the Seiſin of Services*, without firſt admitting a *Tenure*, which the Plaintiff had not done, for he took the *Tenure* by *Proteſtation:* And laſtly, the Plaintiff hath traverſed the *Rent*, which was never in Demand; he ſhould only have traverſed the *Fealty* for which the Diſtreſs was taken; but that he could not do in this Caſe, without traverſing the *Rent*, becauſe * *Seiſin of the Rent is Seiſin of the Fealty*, therefore he ſhould have traverſed the *Tenure*. *H.* 17 *Car. Layton* verſus *Grange*. * Antea 8.

(B)

For Rent, where good.

1. IN Replevin, *&c.* the Defendant made Conuſance, as Bailiff of *G. D.* ſetting forth, that one *W. R. was ſeiſed of the Land* in Fee, in which the Diſtreſs was taken, and that he held the ſame of the aforeſaid *G. D.* as of his Manor of *C.* by *Fealty* and other Services, and for the *Rent arrear* the Defendant made Cogniſance, *&c.* Upon a Demurrer, it was objected, that the Cogniſance was not good; becauſe the Defendant having alledged, that *W. R. held the Lands of another*, he afterwards made Cogniſance on the * *Statute*, which he ought not to do; for when he takes Notice of the Name he ought to make Cogniſance upon him at the *Common Law*, and not upon the Land, by Vertue of the *Statute*, as he had done in this Caſe: But it was adjudged, that the Cogniſance was good. *Cro. Eliz.* 146. *Lucy* verſus *Fiſher*. * 21 H. 8. cap. 19.

2. The Leſſor made a Leaſe *for Life* to one, and afterwards a Leaſe for Years to another of the ſame Lands, rendring Rent, the *Leſſee for Life* ſurrendered to the Leſſor, who ſuffered a Common Recovery to the Uſe of *G. D.* it was a Queſtion, whether he could diſtrain, and avow for the Rent within the Statute of *H.* 8. the Leſſor himſelf, who ſuffered the Recovery, could not; becauſe the Tenant for Life was ſtill living, and the Leaſe for Years was not commenced. 29 *H.* 9, *Dyer* 31.

3. In Replevin, *&c.* the Defendant avowed, ſetting forth, that his Anceſtor was ſeiſed of the Lands, and made a Leaſe thereof for Years, rendring Rent, and for Rent Arrear due to *him and his Wife*, and in the *Right of his Wife*, he * avowed, *&c.* and averred, that his Wife was living; upon a Demurrer, exception was taken to the Avowry; becauſe the Husband alone avowed, when it appeared, that the *Rent was due to him and his Wife*; but adjudged, that ſince he had diſcloſed the Truth of the Matter in his Avowry, and had averred the Life of his Wife, it was for that Reaſon good. 2 *Cro.* 442. *Wiſe* verſus *Ballot*. See *the Caſe of Bowles* verſus *Poor*. * 1 Mod. 273. S. P.

4. In Replevin, *&c.* the Defendant avowed, ſetting forth, that *G. D.* was ſeiſed in Fee of the Manor of *C.* whereof the *Locus in quo, &c.* was Parcel, and being ſo ſeiſed, he gave the ſaid Manor to Husband and Wife, to the *Heirs of the Husband*, who by his laſt Will deviſed a Rent to the Avowant of 4 *l.* out of the ſaid Manor, with a Clauſe of Diſtreſs, *for his Livelihood and Child's Part to be paid yearly*; the Husband died, and about nineteen Years after his Death the Wife died, and the Avowant diſtrained for the Arrears of this Rent-Charge incurred between the Deaths of the Husband and Wife, and avowed for the ſame; thereupon the Plaintiff demurred, and it was inſiſted for him, that this Rent did not commence till after the Death of the Wife of the Teſtator; and therefore the Avowant could have no Title, but to what incurred after her Death; but adjudged, that if he in Reverſion, after the Determination of an Eſtate for Life, grant a Rent-Charge to another, in ſuch Caſe the Grantee may diſtrain for all the Arrears after the Grant, and which incurred in the Life time of the Grantor, *a fortiori* in this Caſe; becauſe it appears by the Words of the Will, that the Rent was deviſed to the Avowant, *for his Livelyhood and Child's Part*, which Words imply a *preſent Advancement*;

ment; and then the ſubſequent Words, (*viz.*) *To be paid yearly*, are a ſtrong Proof that the Teſtator *intended* it as ſuch. 1 *Leon.* 13. *Rearsby* verſus *Rearsby.*

5. A *Rent-Charge* was granted to the Father and his Heirs, during his own Life, and the Lives of his Wife and of his two Daughters; one of them married, who in Replevin avowed for the *Rent arrear* before his Marriage, *due to him and his Wife*, which could not be, for nothing was due to him before Marriage; but this being aſſigned for Error, it was held only Matter of Form and *Surpluſage*, and that the Avowry was good in Subſtance; becauſe it was *for Rent Arrear*, which is good without ſaying any more. 2 *Cro.* 151. *Wilſon* verſus *Billent.*

6. *In Replevin*, the Defendant avowed in the Right of the Father, and ſet forth, that he held of him by *Eſcuage*, and that he was dead, and that the *Seigniory* deſcended to his Son, the now Defendant, and ſo avowed the Taking for 10 *l.* Rent for twenty Years, *quæ eidem* the Defendant *aretro fuerunt*; after Judgment for the Avowant, it was moved in Arreſt of Judgment, that the Avowry was ill, becauſe it did not ſet forth, that all the Rent was due to the Son, for ſome of it might be due to the *Father*; 'tis true, this had been a good Exception, if it had not appeared that *all was due to the Son*, which it did in this Avowry, becauſe it ſet forth, that all *aretro fuerunt* to him; the Judgment was affirmed. 1 *Roll. Rep.* 50. *Harwood* verſus *Paramore.*

7. In Replevin, *&c.* the Defendant avowed the Taking in the Place where, *&c. for Rent, &c.* for that the Plaintiff being ſeiſed, granted the Rent *out of the Tenements*, where the aforeſaid Taking was ſuppoſed, *&c. per nomina* of all his Lands *which were not then in Leaſe*: After the Plaintiff was Nonſuit, it was moved in Arreſt of Judgment, that the Avowry was ill, becauſe the Defendant did not *aver*, that the Place where the Taking was, *&c. was not in Leaſe at that Time: Sed per Curiam*, ſince the Grant of the Rent, *was out of the Tenements*, *&c.* that is a ſufficient Averment, that they were not in Leaſe; and Judgment was given for the Avowant. 1 *Roll. Rep.* 422. *Fawkner* verſus *Fawkner.*

Raym. 21. 1 Lev. 43. 8. In Replevin, the Caſe was, the Defendant avowed for a *Rent-Charge* due in *the Year* 1660. and afterwards he diſtrained and avowed for other Part of the *Rent-Charge*, due a Year before, (*viz.*) *Anno* 1659. and this Diſtreſs was taken of the Cattle of another Perſon, who was then Tenant of the Lands; and upon Demurrer the Queſtion was, whether he was eſtopped to avow for the Arrears of the Rent-Charge, before the Year 1660. and adjudged, that he was not; but that if he had given an Acquittance he could not claim the Rent due before, becauſe that was his voluntary Act; but in an Avowry for Rent, he may avow for all or Part at his Pleaſure, and the firſt Avowry ſhall not bar him from avowing for Rent before. *Sid.* 44. *Palmer* verſus *Stabick* See 1 *Lev.* 95.

9. Where an Avory is made for Rent, and it appears in Pleading by the Parties own Shewing, that Part of it is not due, yet the Avowry is good for what is due; but if it appears, that the Avowant had only a Title to two Parts of the Rent for which he avowed, the whole Avowry ſhall abate. 1 *Saund.* 285, 286.

(C)

For Rent, not good.

1. IN Replevin, *&c.* the Defendant avowed for a *Rent-Charge deviſed* to him out of certain Lands, but did not alledge that they were holden in *Socage*, and for that Reaſon the Avowry was adjudged not good. *Cro. Eliz.* 669. *Merriweather* verſus *Stanton.*

2. The Grantor was ſeiſed of three Parts of a Manor, and *G. D.* was ſeiſed of the fouth Part; and he who was ſeiſed of the three Parts granted a Rent of five Pounds to another, and afterwards made a Feoffment of his three Parts to *W. R.* then he who was ſeiſed of the fourth Part conveyed the ſame to the aforeſaid *W. R.* ſo that now he had the whole Manor, and then he deviſed the ſaid Manor to his Wife, and died; afterwards the Grantee of the Rent diſtrained the Cattle of the *Wife*, for Arrears of the Rent, and in Replevin he avowed the Taking, *&c.* but adjudged, that his Avowry was not good; becauſe the fourth Part of this Manor, which was in the Poſſeſſion of *G. D.* was not charged with this Rent; and tho' the *whole* Manor came to the Husband by Purchaſe, and to his Wife by Deviſe, yet it was not ſo conſolidated by *Unity of Poſſeſſion*, but that the Owner might ſingle out the *ſaid fourth Part*, and grant it, as he did in this Caſe; and then the Grantee ſhall hold it diſcharged of this Rent. 1 *Leon.* 85. *Gomerſtone* verſus *Hatcher.*

3. *In Replevin, &c.* againſt three Defendants, one of them *avowed*, and the other two made *Cogniſance* as Bailiffs to the Avowant for a Rent in Arrear to him, and due from the Plaintiff; the Jury gave a Verdict for the Defendants, and *two Pence Damages*, and the Judgment was entered, that *all the three Defendants ſhould recover the Damages aſſeſſed by the Jury*: Now becauſe *Cogniſance* in its ſelf is the Juſtification of the Right of another; therefore thoſe who make Cogniſance can have no Right to recover Damages, eſpecially in this Caſe, where two of the Defendants made *Cogniſance, not as Servants, but as Bailiffs* to the Avowant; therefore Damages being given to them, when by Law they could have none, the Judgment was reverſed. *Mich.* 5 *Jac. Yelv.* 108. See *Poſtea* 4. *S. P.*

Cro. Car. 358, 385. 4. The *Avowant* had Judgment in Replevin, for Taking a Diſtreſs for Breach of an Order, and *Damages and Coſts*; and upon a Writ of Error brought in *B. R.* the Queſtion was, whether *Damages and Coſts* ſhould be given for the Avowant, in this Caſe the Court was divided; but

the better Opinion ſeemed to be, that they ſhould not, for it was neither within the Letter or Equity of Statutes 7 *H.* 8. *cap.* 14. and 21 *H.* 8. which give Damages, not within the Letter, for the Words are, (viz.) *Where a Man diſtrains for Rents, Cuſtoms, and Services, or for Damage-feaſant*; and the Diſtreſs in this Caſe was for neither, for it was for *a Penalty for* the Breach of a *Steward's Order founded upon the Cuſtom of the Manor*; neither is it within the Equity of thoſe Statutes, for the Inconveniency, which was remedied by them, was, that Damages could not be recovered at *Common Law*, for ſuch Rents, Services, *&c.* but this *Penalty* was neither a *Rent or Service*, *&c.* and 'tis a Rule, that where at Common Law a Man cannot recover Damages, there he ſhall recover no Coſts, but if a Statute give Damages, there he ſhall have Coſts; becauſe 'tis an *Act of Creation*, which gives a Thing which ought not to be given before; ſo where there is an Act of *Addition* which encreaſeth the *Damages* at Law, there he ſhall recover *Coſts*. *Mich.* 44 *Eliz. Skipwith's* Caſe, in an Avowry for a *Relief*, the Judgment was reverſed, becauſe *Damages were given*; ſo in *Hill.* 14 *Jac. Rot.* 471. *Leader* verſus *Standwell.* In *Replevin*, the Avowry was for an *Amerciament in a Court-Leet*, and a Verdict for the Avowant and *Damages* aſſeſſed; but the Entry on Record was, *ſuper quo nullo habito reſpectu*, the Plaintiff was diſcharged of the *Damages*; becauſe in ſuch Caſe *nulla damna debent eſſe adjudicanda per legem terræ*. *Cro. Car.* 497, 532. *James* verſus *Tutney*. Copyhold. (G) 15. *S.C.* *Antea pl.* 3. *S. P.* 8 *Rep.* 38. *Greiſly's* Caſe. *S. P.*

5. In Replevin, the Defendant made Conuſance as *Bailiff* to the Archbiſhop of *York*, who had the Freehold in the Place where, *&c.* and becauſe the Cattle were there Damage-feaſant, he entered and took them as *Bailiff*, *&c.* the Plaintiff replied, and ſet forth a Title under a Leaſe made to him by the Predeceſſor of the Archbiſhop, which was confirmed by the *Dean and Chapter*; the Defendant confeſſed the Leaſe, and that it was made rendring Rent; Proviſo, that *ſede vacante*, it ſhould be paid to the *Chapter*; that the Archbiſhop died, and another was choſen, and for Rent arrear *ſede vacante*, and not paid to the Succeſſor, the Defendant, *as his Bailiff*, entered and took the Cattle Damage-feaſant, *&c.* and upon Demurrer to this Replication it was adjudged ill, becauſe a *Bailiff*, by Vertue of his Office, cannot enter for a Condition broken, without the ſpecial Command of his Maſter. *Moor* 52. In *Eyres's* Caſe. Proviſo. (A). 12. *S. C.* Entry. (B) 16. *S. C.*

6. *In Replevin, &c.* the Caſe was, Tenant for Life, Remainder in Tail, Remainder in Fee to the Tenant for Life, they both join in a Deed, by which the Tenant for Life granted, and the Remainder-man in Tail confirmed to the Avowant a *Rent-charge* of 10 *l. per Annum*, payable out of the Lands half-yearly, with a Clauſe of Diſtreſs, and a *Nomine pœnæ* of 20 *s. per* Month after the Rent became due and unpaid, and for 20 *s.* Parcel of 5 *l.* which was Part of 50 *l.* of the *Nomine Pœnæ* due on ſuch a Day, the Defendant diſtrained and avowed the Taking, *&c.* but becauſe he did not ſhew how the *Reſidue of the Penalty* was diſcharged, therefore it was adjudged, that his Avowry was not good. *Cro. Car.* 73. *Holt* verſus *Sambach.* *Poſtea* Rent-charge. (I) 15. *S. C.*

7. In Replevin, *&c.* the Defendant avowed for Rent arrear, upon a Leaſe for Years, *&c.* the Plaintiff replied *Non conceſſit*, upon which they were at Iſſue, and the Jury found for the Avowant, but *they did not find what Rent was in arrear*, as they might by the new Statute, and that the Avowant ſhall have Judgment for as much as they find; therefore he moved, that this Defect might be ſupplied by a Writ of Inquiry, but it was not allowed, becauſe the Avowant had loſt the Benefit of it by not praying it, therefore he had only Judgment at Common Law, of *Retorn' Habend'*. 1 *Vent.* 40. *Ward* verſus *Culpeper*. See *Burton* verſus *Robinſon*. *S. P.* Sid. 380. 1 Lev. 255. Raym. 170.

Authority.

How it differs from an Intereſt, and the Difference, where 'tis given by the Law, and where by the Party. (A)

Where it muſt be ſtrictly purſued. (B)
Where not ſtrictly purſued. (C)
Where 'tis well purſued. (D)

(A)

How it differs from an Intereſt, and the Difference, where 'tis given by the Law, and where by the Party. See *Arbitrament.* (P) 7. *Sale.* (C) and (D) per totum. *Joint and Several.* (A) 5.

1. A Deviſe to another *to have the diſpoſing, ſelling, and letting his Land*; ſo a Deviſe to his Son, but *that his Wife ſhall take the Profits*; ſo a Deviſe, that his Executor ſhall have the *Overſight and Dealing of his Lands*; ſo a Deviſe to an Infant in Tail, but that *G. D.* ſhall have the *Overſight* of his Will, and the Education of his Son till

till of Age, and *to receive, ſet, and let for him*, theſe, and ſuch like Words give the Deviſee an *Authority*, but *no Intereſt*. *Dyer* 26. *b.* 2 *Leon.* 221. 3 *Leon.* 78, 216. *Moor* 635. *S. P.* *Cro. Eliz.* 678, 674, 734. *Pigott* verſus *Garniſh.* *See* Fee-ſimple in Wills. (B) 13.

2. Where *Goods* are deviſed to a *particular Purpoſe*, there the Deviſee hath no *Intereſt* in them, as for Inſtance, the Teſtator deviſed ſeveral Legacies, and after thoſe were paid, then he deviſed the Reſidue to his Wife *to diſpoſe for the Good of his Soul and Payment of his Debts*, and made her ſole Executrix; adjudged, that by this Deviſe ſhe had no *Intereſt* in the Reſidue, for it was deviſed for a *particular Purpoſe*, (*viz.*) to pay the Teſtator's Debts. *Dyer* 331. *Poſtea pl.* 9. *contra.*

3. The Law makes a Difference where *Lands are deviſed to Executors to ſell*, and where the Deviſe is, that *his Lands ſhall be ſold by his Executors*; for in the firſt Caſe an *Intereſt* paſſes to the Executors, becauſe the Lands are expreſly deviſed to them, but in the other Caſe they have only an * Authority to ſell. *Goldſ.* 2. *Dyer* 219. *Moor* 61. *Keilw.* 107. *b.* 1 *And.* 145. *Lock* verſus *Loggin.*

* *And if one dies, the other cannot ſell.* 1 And. 145. Poſtea 12.

4. The Teſtator deviſed, that his Executor ſhould receive the *Iſſues and Profits* of his Lands till his Son came of Age, *to pay his Debts and Legacies, and to breed up his younger Children*; the Teſtator died, and ſo did the Executor, during the Minority of the Son, having firſt made *T. S.* his Executor; adjudged, that this Executor of an Executor may diſpoſe of the *Iſſues and Profits* for the Purpoſes mentioned in the Will during the Infancy of the Son; becauſe the firſt Executor had not only a bare *Authority*, but an *Intereſt* veſted in him. *Dyer* 210. *Poſtea* 17. *S. P.*

5. Where the Teſtator gives another an Authority *to ſell his Lands*, he may ſell the *Inheritance*, becauſe he gave him the ſame Power he had himſelf, and in ſuch Caſe the Purchaſer ſhall be in by the Deviſe. 2 *Rep.* 53. *Iſabel Goodcheap*'s Caſe, reported in *Sir Hugh Cholmley*'s Caſe.

6. An *Authority* may be *apportioned* or *divided*, but an *Intereſt* is *inſeparable* from the Perſon, and where an Act which is in its Nature indifferent, will work *two Ways*, the one by an *Authority* and the other by an *Intereſt*, the Law will attribute it to the *Intereſt*, as for Inſtance, where a Man is ſeiſed of three Acres holden *in capite*, to the Uſe of ſuch Perſon, and of ſuch Eſtate as he ſhall deviſe, and afterwards he, by his Laſt Will, deviſed *all his Lands* to *G. D.* in Fee, this ſhall only paſs two Parts, (*viz.*) two Acres and no more; but where an *Intereſt and Authority* meet, if the Party declare, that the Thing ſhall take Effect by Vertue of his *Authority*, there it ſhall prevail againſt the *Intereſt*; therefore if the Teſtator had recited his Power, and relied upon it, the three Acres would have paſſed by his expreſs Declaration; nay, if he had not made ſuch a Declaration, yet if the Act it ſelf doth import, that it muſt neceſſarily work by his *Power*, or be void, the Law will adjudge it to take Effect according to the Meaning of the Party; therefore it was reſolved in *Sir Edw. Cleer*'s Caſe, that he being ſeiſed of three Acres of equal Value, ſettled two of them in Jointure upon his Wife, and afterwards made a *Feoffment* of the third Acre *to the Uſe of ſuch Perſon to whom he ſhould deviſe the ſame*, and then deviſed it to *G. D.* that this Deviſe was good by Vertue of his *Authority* to deviſe, or elſe the Whole had been void. 6 *Rep.* 17. *Sir Edw. Cleer*'s Caſe.

7. *Six Carpenters* came to a Tavern, and called for a Quart of Wine, which they drank, but refuſed to pay for it *upon Requeſt*, and in an Action of Treſpaſs brought againſt them, it was adjudged, that where an *Authority is given by Law*, as it was in this Caſe (it being lawful for the Defendants to enter into the Tavern) and if they abuſe that *Authority* (which they did in not paying for the Wine) they ſhall be Treſpaſſers *ab initio*; but where an *Authority* is given to one by the *Act of the Party*, and he abuſes it, he ſhall be puniſhed according to the Injury he hath done, but ſhall not be a Treſpaſſer *ab initio*. 8 *Rep.* 146. *Six Carpenters* Caſe. *Poſtea* Treſpaſs. (A) 16. *S. C.*

8. Deviſe of his *Land* to his Son, and that his Wife *ſhall take the Profits* till he come of Age; this is only an *Authority*, and no *Intereſt* in the Wife. 2 *Leon.* 221. *Moor* 635. *S. P.*

9. So where the Husband deviſed, that if his Wife *Elizabeth* ſhall think fit to bring up his Children, and find them Neceſſaries, that then ſhe ſhall have his Lands till his eldeſt Son comes of Age, and the Wife died before her Son came of Age; adjudged, that this was not only a bare Truſt or Confidence, but an Intereſt veſted in her, tied to a Condition to educate his Children. *Cro. Eliz.* 252. *Smith* verſus *Havers.*

Yelv. 73. 1 Brownl. 88. 10. Deviſe of Land to his Son, *when he ſhould be of Age*, and that his Executor ſhould *have the Overſight and Dealing* of his Lands and Goods till that Time; the Executor made a Leaſe at Will, rendring Rent at *Lady-Day*, *&c.* the Son died before that Day; adjudged, that the Executor had only an *Authority*, and that the Eſtate was in the Son by Deſcent. *Moor* 774. *Carpenter* verſus *Collins.* *Poſtea* Legatee. (B) 2. *S. C.* *See* Fee-ſimple in Wills. (B) 13.

11. The King by his Letters Patents gave Authority to the Surveyor, *&c.* to make Leaſes of certain Lands, reſerving the antient Rent, who made Leaſes in this Manner, (viz.) *This Indenture made between our Lord the King of one Part*, &c. *witneſſeth, that the King hath demiſed*, &c. and at the End of the Leaſe it was, *In Witneſs, whereof the Surveyor*, &c. *hath put his Hand and Seal*; this Leaſe was adjudged void; for tho' a Man may have a larger Authority by the Words in a Grant than he hath generally at Common Law, yet he muſt purſue that Authority which he hath. *Moor* 70.

3 Leon. 106. 12. Deviſe to *T. S.* in Tail, and if he die without Iſſue, that then his Lands ſhall be ſold *by his Sons in Law*, who were *Five* in Number at the Time of the Death of the Teſtator, after whoſe

Death the Deviſee in Tail entered and died without Iſſue, *one of the Sons in Law died*, and the other four ſurviving ſold the Lands; and adjudged, that this * Sale was good, for it ſhall be intended, that the Teſtator would have his Lands ſold by ſuch of his Sons in Law as ſhould be living at the Time of the Sale, and not by all Five abſolutely. *Cro. Eliz.* 26. *Rowland* verſus *Lee.* *Antea* 3. contra Poſtea (B) 3.

13. The Teſtator deviſed ſeveral Legacies, and made an Executor, to whom he gave the *Diſpoſal of the Reſidue of his Goods*; adjudged, that by theſe Words an *Intereſt* was veſted in the Executor, and that it was not a bare Authority to *diſpoſe*. *Jones* 161. *Tayler* verſus *Shore*.

14. So where a Deviſe was to his Wife to *diſpoſe at her Will and Pleaſure*; adjudged, that the Word *Diſpoſe* carries an *Intereſt* with it. *Latch* 9, 39, 134. *Daniell* verſus *Upley*. *Moor* 57. *S. P.* 1 *Leon.* 156. *Jenner* verſus *Hardy*. *S. P.* 1 *Mod.* 189. *Liefe* verſus *Saltingſtall*. *S. P.* 2 *Lev.* 104. *S. C.* *Poſtea* Fee-ſimple in Wills. (D) 6. *S. C.* W. Jones 137.

15. Deviſe of Lands to his Daughter and her Heirs, when ſhe comes to the Age of eighteen Years, and that his *Wife ſhall take the Profits in the mean Time, provided ſhe find the Daughter at School*; adjudged, that this was not a perſonal Limitation to the Wife, that ſhe ſhould not take the Profits any longer than ſhe found the Daughter at School, becauſe that was not ſuch a *particular Privity*, but yet it might be performed by any other Perſon, but it was a plain Term for Years deviſed to her till the Daughter ſhould come to the Age of eighteen Years, and therefore ſuch an *Intereſt* was veſted in her, that ſhe having married a ſecond Husband, and afterwards dying, that Intereſt ſhall accrue to him. *Hutton* 36. *Balder* verſus *Blackburne*. Hob. 285. 1 Brownl. 79.

16. The Husband being poſſeſſed of Lands for the Term of ninety-nine Years, deviſed it to his Wife *for Life, to ſet, let, or make any Eſtates out of it, in as ample Manner as he himſelf might if living, during the Term of her Life*, Remainder in Tail to his *Daughter*; the Widow made a Leaſe of a Tenement, Parcel of the Lands deviſed to her *for ninety-nine Years, if three Lives ſhould ſo long live*; it was inſiſted for the Daughter, that this was not a good Leaſe to bind her, becauſe her Mother had no Authority by the Will to diſpoſe any Part of the Eſtate, but *only during her own Life*; but adjudged, that if ſhe had only that Authority, and no more, then the Words, *to ſet and let, and make any Eſtates, &c. in as ample Manner as he might himſelf*, had been altogether in vain, therefore it ſhall be intended, that he gave her Authority to make Leaſes for Years, determinable upon Lives, where it was Cuſtomary ſo to do, and that by ſuch Leaſes ſhe did not deſtroy the Remainder to the Daughter, contrary to the Intention of the Teſtator, becauſe by Poſſibility ſhe might ſurvive. *Style* 315. *Heal* verſus *Green*. 2 *Roll. Abr.* 261. *S. C.*

17. Deviſe, that his Executor ſhould receive the *Iſſues and Profits* of his Lands till his Children ſhould attain their reſpective Ages of twenty-one Years, the Reſidue to his Son when he ſhould be of that Age; the Executor made his Wife Executrix, and died before the Son came of Age, having firſt deviſed, that ſhe ſhould diſpoſe the Iſſues and Profits, according to the Will of the firſt Teſtator; adjudged good, becauſe an Intereſt was veſted in the Executor. *Carter* 35. *Courthope* verſus *Heyman*. *Antea* 4. *S. P.*

18. So a Deviſe of *the Rents and Profits, &c.* to his Wife for Life, *to be paid by his Executors* into her own Hands; by the Opinion of *Holt* Ch. Juſt. againſt two Judges, the Executors had no *Intereſt*, but only an Authority to receive, for nothing was deviſed to them. 5 *Mod.* 63. *South* verſus *Allen*, and *Buſh* verſus *Allen*. 5 Mod. 101. 1 Salk. 228.

19. There are ſeveral Caſes where the Deviſee hath both an *Authority* and *Intereſt*, as for Inſtance, the Teſtator deviſed to *G. D.* the *Rents and Profits* of his Eſtate for fifteen Years in Truſt, to pay his Debts, and the Reſidue to the ſaid *G. D.* whom he made Executor; it was inſiſted for the *Heir*, that this Term of fifteen Years being raiſed out of the Inheritance, ſhall return to it again after the Truſt is performed; but decreed, that the Executor had an *Intereſt* by the Words of this Deviſe, and therefore he ſhall have the Reſidue of the Term after the Debts are paid. *Ch. Rep.* 98. *Gore* verſus *Blake*.

20. So a Deviſe of all his real and perſonal Eſtate to *G. D. to diſpoſe for the Payment of his Debts*; it was decreed, that this made an Eſtate *in Fee-ſimple*. 1 *Ch. Rep.* 262. *North* verſus *Crompton*. *Antea pl.* 9. *contra*.

(B)

Where it muſt be ſtrictly purſued. See *Error*. (G) 37. *Repairs*. (A) 13. *Revocation*. (G) 5. *Statutes*. (A) 4.

1. A Commiſſion was directed to *eight Perſons* by Name, and *ſeven of them* only made the Return, it was inſiſted, that it was good, and the *Earl of Leiceſter's* Caſe in *Plow. Com.* 393. was cited to prove it, where a Commiſſion was granted to *fifteen Perſons*, to take an Indictment, and Authority was given to them, or four of them, or more, whereof *Two to be of the Quorum*, and the Indictment was taken by *eight of them*, whereof *Two were of the Quorum*, and it was held good; but in the principal Caſe it was adjudged, that the *Authority* given to theſe eight Perſons was *joint*, and not ſeveral, and ought ſtrictly to be purſued. *Paſch.* 8 *Jac.* 1 *Bulſt.* 107.

2. The Husband was attainted, and the King granted a Commiſſion under the Seal of the *Court of Augmentations*, to certain Perſons to aſſign to the Wife the *third Part of the Lands* of the Huſband, by Vertue of which the Commiſſioners aſſigned her the *third Part of the Rent of an Houſe*, which the King confirmed, and ſhe accepted; adjudged, that this Aſſignment of Dower was not good,

good, becauſe the Commiſſioners had not purſued their Authority; for that was to *aſſign Lands*, and they had aſſigned *Rents iſſuing out of Lands*, and if ſo, then the Confirmation made by the King is void. *Trin. 9 Eliz. Dyer* 263.

3. The *Lord Bray* declared the Uſes of his Lands to ſuch a Woman with whom his Son ſhould marry at the Nomination and Appointment of *four of the Privy Council*; *one of them* * *died* before the Son was married; adjudged, that the Authority of the other *Three is determined*. *Dyer* 190. *Lord Bray*'s Caſe.

* Antea (A) 3. 12.

4. The Defendant being a *Recuſant Convict*, departed above five Miles from his Habitation againſt the Statute 1 *Jac. cap.* 1. He pleaded, that two Juſtices gave him *Licence under their Seals*, to come to *London* for ſix Months; it was objected, that he had not purſued the Statute, becauſe that directs the Licenſe to be under the Hands and Seals, and with the Conſent of the Biſhop, *&c.* Judgment againſt the Defendant. 1 *Roll. Rep.* 108. *The King* verſus *Muccleſield.*

5. Conveyance, *&c.* was made to the Uſe of *T. P.* for Life of ſeveral Manors, Lands, *&c.* with a Power to make Leaſes *of the Premiſſes, or any Part thereof*, ſo that ſuch Rent be reſerved, or more, upon every Leaſe which had been before reſerved *within the Space of two Years*; afterwards he made a Leaſe of Part of the Lands, which had not been leaſed *within two Years before*; adjudged a good Leaſe, and that any Rent might be reſerved upon it, becauſe he had a general Power to make Leaſes *of all the Premiſſes*; and this reſtrictive Clauſe ſhall not be applied to ſuch Lands which were not in Leaſe for two Years laſt paſt, but to ſuch Lands which were in Leaſe within two Years before. 2 *Roll. Rep.* 263. *Cumberford*'s Caſe.

Sid. 260. 1 Lev. 167.

6. In a Special Verdict in Ejectment, the Caſe was, the Leſſor being ſeiſed in Fee, made a Leaſe *for ninety-nine Years, if three Lives ſo long lived*, the Reverſion he ſettled upon himſelf in Tail, with a *Power* to make Leaſes for one, two, or three Lives, or *for twenty-one Years in Poſſeſſion*; afterwards he made a Leaſe for twenty-one Years, *to commence after the Determination of the Leaſe for three Lives*, and then conveyed the Reverſion by a Fine levied to *T. P.* the firſt Leaſe determined; and the Queſtion was, whether this ſecond Leaſe for twenty-one Years was made purſuant to the Power; it was inſiſted, that it was, for the Word *Poſſeſſion* in this Conveyance may be applied to the Time *when the Eſtate is to take Effect in Poſſeſſion*; but the better Opinion ſeemed to be, that *Powers* are to be expounded according to the *Intent of the Parties*, and ſo is *Hawkins*'s Caſe. 2 *Cro.* 318. *Yelv.* 222. and that the Power in this Caſe is not purſued. *Raym.* 132. *Opey* verſus *Thomaſius*. See * *Lepur* verſus *Wroth.*

Statutes. (A) 4.

7. In a Special Verdict in Ejectment, the Caſe was, the Father, in Conſideration of the Marriage of his Son, and of a Portion paid, covenanted *to ſtand ſeiſed* of the Lands in Queſtion to the Uſe of himſelf for Life, Remainder *to B. W. and his Heirs, during the Life of the Son*, Remainder to the Son in Tail Male, and to every Son of the Son in Tail Male, Remainder to *Edw. Belſon* (the Defendant) in Tail Male, Remainder over with *Power to the Father to make Leaſes for one, two, or three Lives, or for one and twenty Years*, reſerving the antient Rent, who afterwards made a Leaſe to the ſaid *Edward Belſon* for twenty-one Years, *to commence after the Death of Jacobs and Meeks*, who were Tenants for Life in *Poſſeſſion*, and lived many Years after; the Queſtions were, whether the Power to make Leaſes for twenty-one Years being General without Reſtraint to Leaſes in *Poſſeſſion* was good, and if good, whether the Father had purſued this Power in making a Leaſe to commence *in futuro*; and adjudged, that this Power being created by a *Covenant to ſtand ſeiſed* is void; and ſo is *Mildmay*'s Caſe. 1 *Rep.* but if it had been good, 'tis not well executed, the Leaſe being made to commence *in futuro*; and ſo is *Yelv.* 221. * *Stockham* verſus *Hawkins*, and *6 Rep. Fitzwilliams*, and *Lepur* and *Wroth*'s Caſe. *Raym.* 248. *Baines* verſus *Belſon.*

* 2 Cro. 319. Poph. 9.

8. In a Special Verdict in Ejectment, the Caſe was, a Feoffment was made *to Three*, *Habendum* to *Two for their Lives*, Remainder to the *Third for his Life*, and a Letter of Attorney to make *Livery and Seiſin to Two*; but inſtead of that, it was made to *all Three ſecundum formam Chartæ*; it was objected, that this was no good Execution of the Authority, and therefore no *Livery* was made, becauſe the Authority was not purſued: *Sed per Curiam*, tho' the antient Opinions are, that *Authorities* muſt be purſued with great Exactneſs; yet endorſing *Livery* was always favourably expounded, eſpecially in later Times, unleſs it plainly appears, that the Authority was not purſued at all, therefore this Livery ſhall be good to Two for their Lives, Remainder to the Third. 2 *Mod.* 78. *Norris* verſus *Triſt.*

1 Sid. 428.

T. Jones 205.

9. In Treſpaſs, the Caſe was, *Martin* made a Leaſe to *Warren*, excepting the Trees, in which Leaſe *Warren* covenanted, that *Martin* and his Aſſigns ſhould have Power to ſell the Trees, and Root them up, he or *they repairing* the Hedges where they ſtood; *Martin* ſold ſome of the Trees to the Defendant, who, with his Servants, entered and cut them down, for which *Warren* the Plaintiff brought Treſpaſs; and upon Demurrer it was objected, that the Defendant did not ſhew, that he *repaired the Hedges* when he cut down the Trees, for this being a qualified Power, ought to be ſet forth at large, and that it was a Power annexed to the Reverſion, and not aſſignable to any other Perſon: *Sed per Curiam*, a bare Power is not aſſignable, but here is an *Intereſt* annexed to the Power, (*viz.*) that *Martin* might ſever the Trees from the Reverſion; and where a *Power is coupled with an Intereſt*, *'tis aſſignable*. 2 *Mod.* 317. *Warren* verſus *Arthur.*

10. Conveyance of Lands, and a Rectory to the Uſe of *T. P.* for Life, with a Power to *leaſe the Premiſſes, or any Part thereof*, ſo as ſuch a Rent was reſerved for every Acre *of Land*; the Tenant for Life made a Leaſe of the *Rectory*, reſerving a Rent; now this being not *Land*, but conſiſting *in Tithes*, the Queſtion was, whether the Leaſe thereof was warranted by this Power, and

and adjudged, that it was; becauſe the reſtrictive Clauſe is in the Affirmative, and ſhall not reſtrain the Generality in the preceeding Clauſe. 1 *Vent.* 294 *Walker* verſus *Wakeman.*

11. *In Replevin, &c.* the Caſe upon the Pleadings was, a Fine was levied to the Uſe of *T. P.* for Life, Remainder to his Executors, *&c.* for eighty Years, with Power to him and his Aſſigns, to make Leaſes in Poſſeſſion or Reverſion for twenty-one Years, reſerving the antient Rent, and determinable upon three Lives; *T. P.* deviſed this Term to *J. N.* and dled; afterwards *J. N* died, and ſo the Term came to his *Executor, who aſſigned it to W. R.* and that Aſſignee made a Leaſe of the Lands, *&c.* and *whether an Aſſignee of an Executor of an Executor of the Leſſee for Life, could execute this Power, or not,* was the Queſtion; it was objected, that he could not, becauſe this Power was collateral to the Eſtate, and therefore could not run with the Land; but adjudged, that this Power was coupled with an *Intereſt*, and annexed to the Eſtate, and that the Tenant for Life having deviſed the Term, his Deviſee was an Aſſignee, and the Power was in him, and conſequently it muſt be in his Executor, and by the ſame Reaſon in the Aſſignee of the Executor of that Executor. 1 *Vent.* 338, 339. *How* verſus *Whitfield.* T. Jones 116.

12. Adjudged, where a Man hath Power to charge Lands, with a Sum not exceeding 3000 *l.* he may charge it with that Sum, and the *Intereſt*, becauſe the Sum carries Intereſt of Courſe, for none will lend it without *Intereſt.* 2 *Salk.* 538. *Ld. Kilmurry* verſus *Geery.*

(C)

Where it need not be ſtrictly purſued.

1. TEnant for Life, Remainder in Tail, with Power for the Tenant for Life to make *Leaſes* for eighty Years in *Poſſeſſion or Reverſion, if A. B. and C. ſhould ſo long live*, reſerving the antient Rent; afterwards he granted the *Reverſion* for eighty Years; adjudged, that he had done leſs by this Grant than what he had Authority to do; becauſe the Grant of the Reverſion, without mentioning for the Lives of *A. B.* and C. muſt expire with the Life of the Grantor; but if he had made a *Leaſe* to commence after his Death, that had been more than he had Authority to do. *Godb.* 195. *Parrot* verſus *Keeble.*

(D)

Where 'tis well perſued, where not. See *Leaſes.* (G) per Totum. *Revocation.* (E) 7.

1. TEnant in Fee-ſimple made a Leaſe *for Life*, and afterwards covenanted to aſſure the Lands to the Uſe of himſelf for Life, Remainder in Tail to his Son, with a Power for him *to make Leaſes in Poſſeſſion or Reverſion, provided they did not exceed three Lives, or twenty-one Years*; afterwards he made a Leaſe to *G. D.* for 99 Years, if *he and another ſhould ſo long live* to commence after the Determination of the Eſtate of the *Tenant for Life*; adjudged, that the Leſſor had well purſued his Power, which was abſolute to make Leaſes in *Poſſeſſion or Reverſion*, but reſtrained by the Proviſo, *not to exceed three Lives or twenty-one Years*; ſo that here was a general Power reſtrained with a *Negative*, (*viz.*) not to exceed, *&c.* and in ſuch Caſe he may make Leaſes *for ninety-nine Years, if three Lives live ſo long*; but if his Power had been in the Affirmative to make Leaſes *for three Lives or twenty-one Years*, there he muſt do the one or the other; for in ſuch Caſe he cannot make a Leaſe *for ninety-nine Years, if three Lives ſo long Live.* 6 *Rep.* 69. *Whitlock's* Caſe.

2. In *Accompt* brought by a Merchant againſt his Factor, for certain Jewells delivered to him to merchandiſe for the beſt Profit he could get beyond Sea; the Defendant pleaded, that he had ſold them to the *King of Morocco* for ſo much, *&c.* and averred, it was the beſt Profit he could get, and that the King had promiſed to return the Money to *England*, which he had not done: Upon a Demurrer to this Plea, it was inſiſted for the Defendant, that as the Owner of the Jewels was to have the Profit, ſo he was by Law to ſtand to the Loſs; but adjudged, that where an *Authority is given to a Factor to ſell*, he ought to receive the Money upon the Sale and Delivery of the Goods, otherwiſe he doth not purſue his Authority; for a Power given *to ſell*, is not a Power to truſt the Buyer for the Goods. 1 *Bulſt.* 103. *Barton* verſus *Sadock.*

3. By the Statute 2 *&* 3 *Ph. & Mar.* an Authority was given to *Cardinal Pool* to diſpoſe and imploy *Appropriations* to augment the Livings of the Incumbents; and afterwards the *Cardinal made a Leaſe for Years of one of thoſe appropriated Benefices*; adjudged, that the Leaſe was void, becauſe he had only a *Special Authority* by the Statute, and to a particular Purpoſe. *Moor* 42.

4. The Plaintiff having obtained a Decree in Chancery for 1000 *l.* the Defendant procured the Plaintiff's Son to give him (the Defendant) a Releaſe, upon Payment of one Hundred Marks in ready Money, and upon giving Security to pay one Hundred more in a little Time; all this was done, and the Son gave the Releaſe in his own Name, when he had only a Letter of Attorney from his Father to compound and agree the Suit with the Defentdant; and this Releaſe was adjudged to be void. *Moor* 818. *Dabridgcourt* verſus *Aſhley.*

5. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration, that he would procure *T. S.* then in Priſon, *to be diſcharged*, the Defendant promiſed to repay all ſuch Sums of Money, as he (the Plaintiff) ſhould diſburſe in that Behalf, *&c.* The Defendant confeſſed the Promiſe, but pleaded, that before the Plaintiff had laid out any Money, he (the Defendant) revoked his Promiſe, and countermanded the Plaintiff, that he ſhould not do any Thing towards the Diſcharge of the Perſon; the Plaintiff replied *Proteſtando*, that the Defendant did not countermand, and *pro placito*, he demurred; it was inſiſted for the Defendant, that he might countermand the Authority given by him to the Plaintiff; for he who gave the Authority is the ſole Actor, and the other is at no Prejudice, for he is no more than a Servant to him who gave him the Authority; but in a *Contract* 'tis otherwiſe, for there *both Parties are Actors. Sed per Curiam*, he cannot countermand it, for probably the Plaintiff might have agreed with the Gaoler, and made himſelf Debtor by Promiſe to him. 2 *Roll. Rep.* 21, 39. *Winter* verſus *Foweracres.*

6. Upon a Special Verdict in Ejectment, the Caſe was, *W. S.* levied a Fine of his Lands, and declared the Uſes to *himſelf for Life*, Remainder in Tail to *T. S.* with ſeveral Remainders over, Reverſion in Fee to his own Right Heirs; Proviſo, that *if he* ſhould make a Jointure to his Wife, *and make a Leaſe for thirty-one Years, to commence after his Death*, for the raiſing 3000 *l. for his Daughters Portions*, then the Cogniſees ſhould ſtand ſeiſed to thoſe Uſes; afterwards he made a Jointure to his Wife, purſuant to this Power; and after that, by *Bargain and Sale enrolled*, he conveyed the Lands to other Perſons in Truſt to raiſe Portions, *&c.* and after that, the *Bargainees* by a Feoffment *reconveyed the Lands to him in Fee*; then he made a Leaſe for thirty-one Years, to commence after his Death, for raiſing 3000 *l.* for *two of his Daughters*, and he and his Wife levied a Fine, *&c.* and died; the Queſtion was, *whether this Power to make a Leaſe for thirty-one Years was diſtroyed?* it was inſiſted, that it was not; becauſe by the *Bargain and Sale*, the Bargainor departed with his whole Eſtate, ſo that afterwards he had no Power to make ſuch Leaſe; beſides, by the Conneyance of the Eſtate to him by the Bargainee, he is now in of a new and other Eſtate, and by Conſequence the Power reſerved by the firſt Settlement is gone, for he hath no Manner of Privity of his former Eſtate; and laſtly, if this Power was well executed, yet 'tis not well created; becauſe 'tis unreaſonable and inconſiſtent, that *Tenant for Life* ſhould have both thoſe Powers to make a Jointure, and a Leaſe for thirty-one Years *to commence in Intereſt at one and the ſame Time*; for in ſuch Caſe 'tis againſt Law, becauſe the Jointure would deſtroy the Leaſe; but adjudged, that it doth not, becauſe both the Jointure and the Leaſe ariſe out of the firſt Eſtate, and not out of the *Eſtate of the Tenant for Life*, and the Power to make both is conſiſtent; becauſe during the Continuance of the *Jointure*, the Leaſe ſhall not take Effect *in Point of Intereſt*, but ſhall go on *in Time*, and ſhall take effect *in Intereſt* for ſo much thereof as ſhall be to come after the Death of the *Jointreſs*; ſo that the ſingle Queſtion is, *whether the Power to make this Leaſe for thirty-one Years was deſtrained*; and adjudged, that it *was not*; becauſe it was not incident, or annexed to his Eſtate, but *collateral* to it, for it was not to commence till after his Death; ſo that it not falling in with his *Eſtate for Life*, becauſe it was not to begin till that was determined, it muſt therefore be a collateral Power in Groſs; and in ſuch Caſe a Conveyance of all *his Eſtate*, or any other Alteration of his Eſtate for Life, will not affect that Power; 'tis true, by the *Bargain* and *Sale* he had parted both with his *Eſtate for Life, and the Reverſion in Fee* in the Lands; but this Power was not annexed to the Lands, but *collateral* to it, and a *Power in Groſs*, and therefore ſtill ſubſiſting, notwithſtanding the *Bargain and Sale*, which affected only his own Eſtate, but none of the *Remainders in Tail*, for they were ſtill in Being by the firſt Settlement; and therefore, tho' the *Fee-ſimple* was reconveyed to him by the Feoffment of the Bargainee, yet he is not in of a new Eſtate; becauſe ſo long as there were any Remainders in Tail in Being, he had only a *Poſſibility*, that the Fee-ſimple may come in Poſſeſſion; and 'tis very clear, that ſuch a *Poſſibility* of a Remainder in Fee coming into Poſſeſſion will not deſtroy this Power. *Hardr.* 410. *Edwards* verſus *Slater.*

Hardr. 395. 7. Upon a Trial at Bar in Ejectment, the Caſe was thus; On a Special Verdict, (*viz.*) The Father was Tenant for Life, Remainder to his Son *Charles* in Tail-general, they on the Marriage of the Son, and in Conſideration of the Portion, levy a Fine, and ſuffer a Recovery to the Uſe of the Father for Life, Remainder to *Charles* the Son, and the Heirs of his Body on the Wife to be begotten, *&c.* with Power to the Father, *by Deed in Writing*, to charge all or any of the Lands, *with the Payment of* 2000 *l.* afterwards the Father and Son, without reciting this Power *by Leaſe and Releaſe*, in Conſideration of 200 *l.* paid by *David Jenkins*, convey Part of the Lands *to him in Fee*, on Condition to be void upon Payment of 160 *l.* at the End of one Year, and 160 *l.* more every Year, for nine Years, *being the Intereſt of the* 2000 *l.* and then to repay the 2000 *l.* the Father died; then the Son's Wife died, and he married again, and had Iſſue the Defendant, and then the Son died, and the Money not being paid, the Son and Heir of *David Jenkins* brought the Ejectment; but Judgment was given for the Defendant, upon theſe Points, that the Power being to charge the Land with 2000 *l. by one Deed* in Writing, tho' it was well executed in Form by *two Deeds*, (*viz.*) By the Leaſe and Releaſe, yet that was not a good Execution of it in Law; beſides, the Power was to charge the Lands with 2000 *l.* and here they are charged with the 2000 *l.* and the *Intereſt thereof for nine Years*; 'tis true, here is a full Performance of the Power, and more, but yet it ſhall not be good for that which was in his

Power, and void for the Reſidue; becauſe as the Power is intire, ſo muſt be the Execution thereof, and it cannot be made for Part, and void for the Reſidue at Law: Afterwards, upon a Bill in Equity, to have the Defect of this Execution of the Power ſupplied, it was decreed, that he could have no Relief, but that the Marriage and Portion of the firſt Wife, extended to the Iſſue of the ſecond; and that tho' the Father and the Son joined in the Leaſe and Releaſe to *Jenkyns*, yet they not reciting the Power, it cannot be intended to be done in Execution of it, but rather as Owners of the Land; and tho' in the Releaſe there was a Covenant for farther Aſſurance, yet the Iſſue in Tail is not bound to make that Aſſurance good, which his Father might have made good by a Fine; but the Covenant for farther Aſſurance by the Father and Son cannot be taken to be an Execution of the Power at all. 1 *Lev.* 150. *Jenkyns* verſus *Keymith*, 238. *S. C.*

8. Deviſe to *Bernard for Life*, and after his Deceaſe to *the Iſſue of his Body*, by a ſecond Wife, and for Default of ſuch Iſſue, Remainder over, *provided, that Bernard may make a Jointure upon ſuch ſecond Wife for Life*; *Bernard*, during the Life of his firſt Wife, ſuffered a Recovery to the Uſe of himſelf and his Heirs; then the Wife died, and he married again, and covenanted to ſtand ſeiſed to the Uſe of himſelf and his ſecond Wife for their Lives, Remainder to the Heirs of their Bodies, *&c.* one Queſtion was, that admitting *Bernard* had only an *Eſtate for Life*, (but he had an *Eſtate-tail*) then it being forfeited by the Recovery, whether his Power to make a Jointure did ſtill remain, and if it did, whether it was well executed? they who argued for the Affirmative, did admit, that a *Power coupled with an Intereſt* in the the ſame Perſon, would be deſtroyed by a *Fine*, *Feoffment*, or *Recovery*; becauſe ſuch Power is to be executed upon his own Eſtate, and with that he had parted, by *levying a Fine*, *&c.* but in the Principal Caſe, the Power was not to be executed out of the Eſtate of *Bernard*; for it was to charge the Reverſion by making a *Jointure*, which is not to take Place till after his *Eſtate for Life* is determined, and ſo 'tis collateral to his Eſtate, and ſuch collateral Powers are not deſtroyed by *Feoffments*, *Fines*, *&c.* But adjudged, that the Power was deſtroyed by the *Recovery*; otherwiſe the Execution of it was well enough. 2 *Lev.* 58. *King* verſus *Melling*.

Bailiff. See **Sheriff.** (A) 16.

Bail.

Of Common and Special Bail, and of Exceptions to the Bail, and of the Aſſignment of the Bail-Bond. (A)
Where the Bail are diſcharged by the Death of the Principal, where not, and how they are to be charged where a greater Sum is recovered, than laid in the Declaration. (B)
Where they are diſcharged by the Render or Taking the Principal, where not. (C)
Of Bail in Inferior Courts, and upon *Habeas Corpus*. (D)
Of Bail on Writs of Error. (E)
Where their Lands are liable, where not, and where they are liable to Coſts. (F)
Of Bail by a wrong Name, or in the Name of another Perſon. (G)
Of Bail by Husband and Wife, and for the Wife. (H)
Where Bail is allowed in Criminal Caſes. (I)
Where 'tis not allowed in Criminal Caſes. (K)

(A)

Of Common and Special Bail, who ſhall give it, and who not, and of Exceptions to it; and of Aſſignment of the Bail-Bond. Sci. fa. (C) per Totum.

1. IN Treſpaſs againſt two Defendants, they had a Verdict, and it was moved in Arreſt of Judgment, that no *Bail* was entered for one of the Defendants; for every Defendant is ſuppoſed to be *in cuſtodia Mareſchalli*, and in this Caſe the *Venire facias* being to try the Iſſue between the Plaintiff and the Defendants, and one of them being * no Party in Court, he cannot have Judgment, and it appearing that there was no Fraud in the Plaintiff, * 1 Roll. Rep. 372. Defendant.

In Denham *and* Cumber's *Caſe, Common Bail was filed after the Death of the Attorney for the* the

the Judgment for this Reaſon was arreſted; but if the ſame Defendant had appeared at the Suit of any other Perſon in that Term, it had been ſufficient. *Trin.* 16 *Jac. Hob.* 145. *Dennis* verſus *Sir Arthur Manwaring.*

2. Adjudged, that *Executors* or *Adminiſtrators* ſhall not put in Special Bail in any Action brought againſt them for the Debt or Duty of the Teſtator, or Inteſtate, becauſe 'tis not their proper Debt; neither ſhall their Bodies be liable to an Execution for it. *Hill.* 7. *Jac.* 2 *Brownl.* 293.

3. In all Actions brought upon *Penal Statutes*, the Defendant ſhall only put in *Common Bail*; and ſo it was adjudged in *St. George's* Caſe, in an Action brought upon the Statute 13 *Eliz. of fraudulent Conveyances*; ſo likewiſe Executors and Adminiſtrators ſhall put in Common Bail, becauſe they are to be charged only with the Goods of the Teſtator. 7 *Jac.* 2 *Brownl.* 293. *Yelv.* 53. *St. George's* Caſe.

4. *Thomas Aſhfield* the Elder, and *Tho. Aſhfield* were jointly and ſeverally bound in a Bond, the Obligee arreſted *Thomas the Elder in London*, who removed the Cauſe by *Habeas Corpus*, into *B. R.* and put in Bail; the Obligee did not declare againſt him, but againſt *Thomas Aſhfield the Younger*, and had Judgment; now Bail being filed, and upon a Writ of Error brought, that was aſſigned for Error; then the Obligee moved, that the ſame Bail might be filed for *Thomas the Younger*, which was denied by the Court; and now there being three Terms paſſed ſince the Bail was put in for *Thomas the Elder*, the Obligee moved, that he might be at Liberty to declare againſt him; but that was likewiſe denied, becauſe every Plaintiff ought to proceed by the Rules of the Court, within three Terms after *Special Bail* filed; therefore it was adjudged, that the Bail ſhould be taken off the File and diſcharged. 2 *Cro.* 620. *Aſhfield* verſus *King. March Rep.* 157. *S. P. Style* 125. *Coot* verſus *Plunket. S. P.*

* Poſtea 28. 5. An Executor of an Executor brought Debt upon Bond for 2000 *l.* and upon Motion, that the Plaintiff might accept *Common Bail*; becauſe the Condition of this Bond was for * *Performance of* Covenants; the Court ordered, that Bail ſhould be accepted according as the Breach was aſſigned; it was held in this Caſe, that where Executors are Defendants, the Plaintiff ſhall accept Common Bail. *Yelv.* 53. unleſs in Caſes of a * *Devaſtavit.* 3 *Bulſt.* 317. For if they commit Waſte, they ſhall give Special Bail. *Sid.* 63. *Boothby* verſus *Buller.* *Antea 1.

6. The Bail being perſonated by another, the Court was moved, and it appearing upon *Affidavits*, that he was not the Man, but perſonated by another, the Bail was diſcharged. 2 *Cro.* 256. *Cotton's* Caſe.

7. The Action of *Conſpiracy* being againſt two Defendants, one of them put in *Special Bail* in *Michaelmas Term*, and the other in the *Term following*; a Motion was made, that the Bial in *Michaelmas Term* might be taken off the File, and put on the File of the other Term; becauſe otherwiſe it would be Error, if the Plaintiff ſhould proceed in an Action where two were joined, and made Defendants, who had put in Special Bail in ſeveral Terms, and it was ruled accordingly. *Mich.* 2 *Car. Latch* 183.

8. In Battery for putting an Arm out of Joint, it was moved for Special Bail; but denied. 1 *Mod.* 2.

9. An Attorney was ſued, and being going into *Ireland*, it was moved, that he might put in Special Bail; but it was denied. 1 *Mod.* 10. *Redman's* Caſe.

*Antea 5. Poſtea 15. 10. Where an *Executor* is charged with a * *Devaſtavit*, he ſhall put in *Special Bail*; as for Inſtance, a *Scire facias* was brought againſt an Adminiſtrator, upon a Judgment in a *Devaſtavit de bonis propriis*; he brought a Writ of Error, and was obliged to put in Bail before he could have any *Superſedeas*; becauſe the *Devaſtavit* was his own Act, and by Conſequence the Judgment was not *de bonis Teſtatoris*, but *de bonis propriis*; ſo that it was become a Suit againſt the Executor himſelf. *Sid.* 368. *Fitzwilliams* verſus *Moor.* 1 *Lev.* 245. *S. C.*

1 Lev. 268. 11. Where an Action is brought againſt an *Executor de ſon tort*, he muſt give Bail; and ſo muſt a Rightful Executor formerly, if he was ſued in an *Inferior Court*, and afterwards removed the Cauſe by *Habeas Corpus*; but the Law is now altered as to this laſt Point; becauſe if an Executor ſhould be compelled to give Bail in ſuch Caſes, it would encourage the Plaintiffs to bring Actions againſt them in Inferior Courts, on purpoſe to hold them to Bail upon the Removal. *Litt. Rep.* 5. and 81. *Sid.* 418. *Caſtle* verſus *Willet.*

1 Vent. 105. 12. *In Accompt, &c.* the Defendant is not obliged to put in *Special Bail* till the firſt Judgment is given *quod computet.* 1 *Lev.* 300. *Reeves* verſus *Gibſon.* See *Noy* 28.

13. Caſe againſt the Defendant, for that he had affirmed he was of full Age, and by that Means he borowed the Money on Mortgages made by him, when *in facto* he was under Age; it was moved, that he might put in Special Bail, but it was denied; for Special Bail ſhall not be given by Vertue of the Statute 13 *Car.* 2. *cap.* 2. but where it was required to be given by the Rules of the Court before that Statute; and the *Acetiam* will not make the Defendant put in ſuch Bail, unleſs the Cauſe expreſly appears to be valuable, as a *Debt*, *Trover*, *&c.* but where Special Damages may ariſe to the Party grieved on Special Declarations, as in the Principal Caſe, Special Bail ſhall not be given. *Sid.* 183. *Chetwin* verſus *Venner.*

14. The Defendant being arreſted, a Motion was made for *Special Bail*; upon *Affidavit* made, that the Cauſe of Action was for a great Battery and Wounding, and that the Plaintiff had ſeveral Wounds with a Sword, it was at firſt doubted upon the Statute 13 *Car.* 2. *cap.* 2. but afterwards granted. *Sid.* 306. *Roberts* verſus *Slingsby. Sid.* 276. See 1 *Lev.* 39. *S. P.*

15. The Defendant was taken in Execution, upon a Recogniſance of Bail, and he making it appear to the Court, that he was perſonated by another, moved, that he might be diſcharged; but it was ruled, that ſince the Statute 21 *Jac. cap*, 26. by which this is *Felony without Clergy*, the Court will not vacate the Bail till the Offender is convicted; therefore they ordered this Perſon to bring the Money into Court, and that he might proſecute the Offender; and ſo it was done, 22 *Car.* 2. in *Spicer*'s Caſe; and 'tis not Felony unleſs the *Bail be filed*, and ſo it was held in *Timberley*'s Caſe. 2 *Sid.* 90. 1 *Vent.* 301. *Beaſly*'s Caſe. *T. Jones* 64. *S. C.* The Man was hanged, but the Rope was immediately cut.

16. In * *Ent and Withers*'s Caſe; the Court would not allow, that an *Executor* ſhould be held to Special Bail in an Action in the *Debet & Detinet*, brought againſt him, upon the Suggeſtion of a *Devaſtavit*; but about four Years afterwards, it was held otherwiſe. 1 *Vent.* 355. * Devaſtavit. (C) 9.

17. Caſe, *&c.* in which the Plaintiff declared againſt a *Sheriff*, ſetting forth a Clauſe in the Statute 32 *H. 6. cap.* 10. by which amongſt other Things, 'tis enacted, That *if a Sheriff return a Cepi Corpus, or reddidit ſe, he ſhall be chargeable to have the Body at the Day of the Return*; then he ſets forth, that *M. D.* owed him 140 *l.* on Bond, and that to recover the ſame he ſued out a *Bill of Middleſex*, returnable *Tres Mich.* by Vertue whereof, and before the Return, the Defendants arreſted the ſaid *M. D.* and had him in their Cuſtody, and let him to Bail upon Security, *&c.* given to them (the Sheriffs) for his Appearance at the Return of the Writ, *ubi revera, the Bail had not ſufficient Eſtates in the County of Middleſex*; neither did the ſaid *M. D.* appear at the Return of the Writ, nor found any Bail to anſwer the Action, by Reaſon whereof the Plaintiff had loſt his Debt, *&c.* The Defendants in their Plea, ſet forth the whole Statute, and ſhew, that the *Bill of Middleſex* was ſued forth and delivered to them, and the Arreſt, and that they had *M. D.* in their Cuſtody, and that they diſcharged him upon Security given by the Bail for his Appearance, they having ſufficient Eſtates within the County at that Time; whereupon they returned *Cepi Corpus, &c.* And upon Demurrer to this Plea, it was adjudged good, and that the Action did not lie againſt the Sheriff, becauſe he is compellable by the Statute to diſcharge the Priſoner upon Bail; and if he return a *Cepi Corpus*, and have not the Body at the Return, he ſhall be amerced to the King, but not puniſhable at the Suit of the Party. 2 *Saund.* 59. *Poſterne* verſus *Hanſon, &c.*

18. Judgment againſt the *Principal*; and now an Action of Debt was brought againſt the *Bail*, upon their Recogniſance, it was objected, that this Action of Debt would not lie, becauſe it deprived the *Bail* of that Plea which they might have by Law, (*viz.*) that there was no *Capias againſt the Principal*; and it likewiſe abridged them of that Time which the Law gave them to bring in the Principal, which they are not obliged to do till the Return of the ſecond *Scire facias*; but if this Action ſhould be allowed, they are immediately chargeable with the Debt: It was anſwered, there were ſome Precedents where this Action hath been allowed, but the Court were of another Opinion; and that if there are ſuch Precedents, they paſſed *ſub ſilentio*, and are not to be regarded; 'tis true, an *Action of Debt* will lie upon a Judgment given upon a *Scire facias* againſt the Bail, but not upon the Recogniſance. *Raym.* 14. *Godlington* verſus *Lee*. See 1 *Brownl.* 65. *Booth* verſus *Davenant*. *Trin.* 8 *Jac. Rot.* 805. and *Winch* 61. * *Sparrow* verſus *Sowgate*. *Het.* 129. *S. C. contra.* * W. Jon. 29.

19. Judgment had againſt the *Principal*, and afterwards the Goods of the Bail were taken in Execution; but there being no *Ca. Sa.* taken out againſt the Principal, and the Matter being referred to be examined by the *Secondary*, upon his Report, the Execution againſt the Bail was *ſuperſeded*; thereupon he brought an Action of Treſpaſs, againſt the Plaintiff in the Original Action, for taking his Goods, and upon a Special Verdict found, the Bail had Judgment and Damages; afterwards he brought a *Scire facias* againſt the ſaid Plaintiff, to have Reſtitution of thoſe Goods which were taken from him upon an erronious Execution, and for which he had recovered Damages; but upon a Motion this *Scire facias* was ſuperſeded. *Raym.* 73. *Turner* verſus *Felgate*. *See* Relation. (A) 29. *S.C.* 2 Sid. 125. 1 Lev. 95.

20. In an Action of *Scandalum magnatum*, the Court upon Motion, ordered the Defendant to put in Special Bail. *Raym.* 74. *Earl of Stamford* verſus *Cordall.*

21. It was held, that the Sheriff cannot be amerced, after the Plaintiff hath accepted an Aſſignment of the Bail-Bond; but if they who were Bail to the Sheriff, are likewiſe Bail to the Action, and the Plaintiff excepts againſt them, and they do not juſtify themſelves, he may go on with Amerciaments againſt the Sheriff. *Mod. Ca.* 122. *Groverner* verſus *Soame.*

22. Debt upon Recogniſance entered into by the Bail; the Declaration ſet forth, that the Plaintiff in *Michaelmas* Term obtained Judgment againſt their Principal, and that in *Eaſter Term* the Defendants became Bail by Recogniſance conditioned, *&c.* in *placito præd'*; but did not ſet forth, that there was any Action depending in *Eaſter Term*; but adjudged, that the Common Form is ſo upon a *Sci. fa.* againſt the Bail, and the like may be in an Action of Debt upon the Recogniſance. *Mod. Ca.* 159. *Perkins* verſus *Chaterton.*

23. Adjudged, that if the Bail ſurrender the Principal at or before the Return of the *ſecond Scire facias*, 'tis good, tho' the Plaintiff hath not immediate Notice of it; but if he is at any Charge *for want of Notice*, the Principal ſhall not be diſcharged without paying it; where there is a *Capias* againſt the Principal, and *after the Return of it the Bail* ſurrender him at a Judge's Chamber, and thereupon he is committed to a Tipſtaff, and eſcapes, or is reſcued, this is not a good Surrender; becauſe 'tis an Indulgence to the Bail to accept it after the Return of a *Capias*, and upon ſuch a Surrender he ought to be two Days in the *Cuſtody of the Marſhal* to make it good; but

but 'tis otherwiſe if the Bail ſurrender him *before, or at the Return of the Capias*, becauſe that is Matter of Right. *Mod. Ca.* 238.

24. The Defendant was arreſted, and had given *Bail*, who had charged him in an Action of 4000 *l.* and had him taken up in *London* and committed to the *Compter*, in order to remove him by *Habeas Corpus*, and render him in the King's Bench, where the Original Action was brought in Diſcharge of themſelves; but the Judges being all in the Circuit, he was charged with the Queen's Debt before the Bail could get an *Habeas Corpus*, and render him; and now having obtained it, the Attorney General oppoſed his Removal from the Compter, becauſe the Queen might chooſe her own Priſon; which is true, if he had been arreſted at her Suit firſt; ſo he was turned over. *Mod. Ca.* 241. *French's* Caſe.

25. One *Villiers* was arreſted by the Name of *J. Villiers, Eſq*; who pretended himſelf to be *Earl of Buckingham*; and upon a Motion, it was held, that this being in a civil Action, 'tis not neceſſary for him to join in the Bail-Bond; and in criminal Actions the Court may diſpenſe with it, upon a Motion, as they did in the Caſe of the *Earl of Banbury* upon an Indictment, and ordered, that he ſhould find others to be Bail for him by the Name of *G. Knowles, Eſq*; for their Act could not conclude him. 1 *Salk.* 3. *Smith* verſus *Villiers*. *Far.* 39. *S. C.*

26. *T. S.* being in Execution, was charged in Cuſtody according to the Statute 4 & 5 *Will.* 3. *cap.* 21. and there being Proceedings againſt him for *two Terms* afterwards, he was diſcharged upon *Common Bail*, as if he had been in the Cuſtody of the Marſhal, (tho' he was in Cuſtody of the Sheriffs of *London*); for by this Act the Plaintiff hath the ſame Benefit as if the Defendant was in Cuſtody of the Marſhal; and therefore 'tis reaſonable the Defendant ſhould have the ſame Rule. 1 *Salk.* 98. *Holland* verſus *Serjeant*.

27. It was ruled, that in an Action upon a *Bond of Replevin*, that *Common* Bail ſhall be filed. 1 *Salk.* 99. *The Duke of Ormond* verſus *Brierly*.

*Antea 5. 28. In Debt upon a *Bond* * *for Performance of Covenants*, Bail muſt be given in Reſpect to the Damages occaſioned by the Breaches, the Meaſure whereof ſhall be taken from the Plaintiffs *Affidavit*. 1 *Salk.* 100.

29. Bail was put in one Term, and *additional Bail in another Term*; adjudged, this is only Bail of that Term wherein the additional Bail was given. 1 *Salk.* 100.

30. In an Action for *Money won at play*, if under 100 *l.* Special Bail ſhall be given. 1 *Salk.* 100.

31. Ruled, that the Plaintiff muſt *except within twenty Days* after Notice of the Bail put in, and of the Place of their Abode, otherwiſe the Bail ſhall be filed; upon a *Cepi Corpus he hath twenty Days*; upon a *Writ of Error*, where Bail is put in, *the Plaintiff hath twenty Days*, and he need not give Notice that he excepts; but he cannot take out Execution, without giving the Plaintiff a *four Days* Rule to put in better Bail; but in all other Caſes he muſt give Notice: Upon an *Habeas Corpus* he hath *twenty-eight Days* to except. 1 *Salk.* 98.

32. Ruled, if the Plaintiff take an Aſſignment of the Bail-Bond, tho' the Bail is inſufficient the Court will not amerce the Sheriff. 1 *Salk.* 99. *In the Caſe of Etherick* verſus *Cowper*. *Poſtea* Sheriff. (I) 3. *S. C.*

33. Motion to ſtay Proceedings on a Bail-Bond, upon bringing Principal, Intereſt and Coſts into Court; this was after Notice of Trial, and therefore denied, unleſs it be brought in ſuch Time as the Plaintiff may not be delayed of his Trial. *Mod. Ca.* 25. *Butler* verſus *Rolls*.

34. Ruled, that the antient Courſe was, that a Bail-Bond could not be put in Suit till a Rule was had to amerce the Sheriff for not having the Body ready; and now Proceedings were ſtayed on the Bail-Bond, becauſe there was no *Cepi Corpus* returned. *Mod. Ca.* 229.

35. A Priſoner for Debt *under* 100 *l.* was diſcharged by the Juſtices purſuant to the late Act, and afterwards was taken again for *above* 100 *l.* at the Suit of one Man; ruled, that he muſt put in Special Bail. *Mod. Ca.* 301. *Cragget* verſus *Glover*.

(B)

Where diſcharged by the Death of the Principal, where not, and where diſcharged by the Plaintiff recovering a greater Sum than laid. *Scire facias.* (C) per Totum.

1. IN a *Sci. fa.* the *Bail* may plead the *Death* of the Principal, *after the Judgment*, and before the *Scire facias* againſt them; becauſe in ſuch Caſe 'tis impoſſible for them to bring in the Body. *Cro. Eliz.* 199. *Warter* verſus *Perry*. *Poſtea* Scire facias. (C) 4. Execution. (F) 5. *S. P.*

2. The Bail ſtand engaged, that the Principal ſhall render himſelf, which muſt be intended upon Proceſs awarded againſt him in his Life-time; therefore if he ſhould die before the *Ca. ſa.* is awarded againſt him, the Bail is diſcharged. *Hill.* 40 *Eliz. Cro.* 597. *Hobbs* verſus *Tadcaſtle*. *Poſtea* Execution. (F) 5. *S. C. Golds.* 175. *S. C. Poph.* 185. *Calf* verſus *Nevill. S. P.* 2 *Cro.* 165. *Timberly* verſus *Calverly. S. P.* Sci. fa. (C) 2. *S. C. Hutt.* 47. *Suggs* verſus *Sparrow. S. P. Style* 360. *Wood* verſus *Mountney, contra.*

3. Judgment againſt the Principal in *B. R.* and immediately, upon the awarding a *Ca. ſa.* againſt him, he died; it was the better Opinion, that neither an Action of Debt, or a *Sci. fa.* did in ſuch Caſe lie againſt the Bail. *Trin.* 21 *Jac. Godb.* 354.

4. The Plaintiff ſued the Defendant in an Action of Treſpaſs, *&c.* by *Bill of Middleſex*, *Actiam a Bill for* 40 *l.* and recovered 100 *l.* Damages; it was held clearly, that the Bail ſhould not be liable for what exceeded *the* 40 *l.* becauſe that was the Meaſure of their Undertaking; and *Holt Ch. Juſt.* was of Opinion, that they are not liable at all; becauſe the Recogniſance is to anſwer the *Condemnation-Money*; and ſince that cannot be, they are bound to nothing. 1. *Salk.* 102. *Genbaldo* verſus *Coynoni*. *Lilly's Pract. Reg.* 188. *Edwards* verſus *Overton*. *S. P.* Mod. Ca. 90. *quite otherwiſe reported. But* Mod. Ca. 266. S. C. *reported as here.*

(C)

Where diſcharged by the Render or Taking the Principal, where not.

See *Execution.* (F) per Totum.

1. JUdgment againſt the *Principal*, who rendered himſelf in Court, and prayed, that his Bail might be diſcharged; the Courſe was in ſuch Caſe to demand, that the Plaintiff or his Attorney, might appear in order to elect, whether he will have either his Body or Goods in Execution; but by this Render the Bail are diſcharged. *Mich.* 25. *Eliz. Cro.* 22.

2. *Aſſumpſit*, *&c.* and Judgment againſt the Principal; and upon a *Ca. ſa.* awarded againſt him, and *non eſt inventus* returned, there was a *Sci. fa. againſt the Bail*; but before it was brought the Bail brought in the Principal, and prayed, that he might be committed, which was done accordingly, and the Bail diſcharged. *Cro. Eliz.* 618, *Walmſley* verſus *Holland*. *Poſtea* Sci. fa. (C) 5. *S. C.*

3. There muſt be *fifteen Days between the Teſte and Return* of the *Sci. fa.* and the Courſe of the King's Bench is to have *two*, but the Common Pleas allow but *one Sci. fa.* therefore in *B. R.* if the Bail bring in the Principal upon the firſt *Sci. fa.* againſt them, he ſhall be received, and they ſhall be diſcharged. *Cro. Eliz.* 739. *Aliſon* verſus *Diſton*. *Poſtea* Scire facias (C) 6. *S. C.*

4. Judgment againſt the Principal, who came into Court and *rendered himſelf*, and prayed, that the Court would record his *Render* in Diſcharge of his Bail, which was done; then the Court demanded of the Plaintiff, whether he would have Execution of the Body? who replied, he would not; thereupon a Rule was made for the Diſcharge of the Bail, which was thus entered, (*viz.*) That the Defendant offered himſelf in Diſcharge of his Bail; *& Attornatus quer' allocutus per Curiam, &c. dixit ſe nolle: Ideo conſideratum eſt per Curiam quod tam præd' defend' quam prædict' manucaptores de recognitione prædict' denariis in eadem exoneretur.* 1 *Leon.* 58. *Fullwood* verſus *Fullwood*. Sci. fa. (C) 5. *S. C.*

5. The Bail, before any Judgment given againſt the Principal, brought him into Court, and prayed, that they might be diſcharged, and the Principal taken into Cuſtody; adjudged, that if they bring him in at any Time before the Return of the *ſecond Sci. fa.* they ſhall be diſcharged. *Godb.* 338. *Sir Arthur Gorge* verſus *Sir Rob. Lane.* 1 Roll. Rep. 333. S. C.

6. Judgment againſt the Principal, and a *Sci. fa. againſt the Bail*, who pleaded, that after the Judgment had againſt the Principal, he came into Court, and rendered himſelf to Priſon in Diſcharge of his Bail, but that the Plaintiff *refuſed* to have him in Execution; adjudged, that this was ill pleaded, for the Bail being on Record, the Render of the Defendant to Priſon, muſt be likewiſe of Record, and therefore the Bail ſhould have concluded this Plea * *prout patet per Recordum*; and tho' the Plaintiff thus refuſed to have the Defendant in Execution upon the Render of his Body, yet this is not a Releaſe, or a Renouncing the Execution; for he may have a *Ca. Sa.* againſt him, notwithſtanding ſuch Refuſal, and tho' 'tis entered on Record. *Hob.* 210. *Welby* verſus *Comming*. 1 Lev. 211. Raym. 50.

7. If the Principal, after Judgment, renders himſelf in Diſcharge of his Bail, 'tis ſtill at the Election of the Plaintiff to take out Execution either againſt him or his Bail; but if he take the Principal, he ſhall never afterwards charge the Bail, and if he take the Bail, tho' he hath not full Satisfaction, he ſhall never afterwards charge the Principal. 2 *Cro. Higgen's* Caſe. *Poſtea* Execution. (F) 14. *S. C.* 2 Bulſt. 68.

8. Judgment againſt the Principal in *B. R.* and a Writ of Error brought in the Exchequer-Chamber, returnable 3 *Febr.* to which the Defendants became Bail; in the ſame Term, a *Sci. fa.* was brought againſt them, who pleaded, that before the Return of the Writ of Error, the Principal *reddidit ſe in Curia, & per mandatum Curiæ committitur Mareſcallo, & adhuc remanet in priſona Mareſcall', &c. in executione*; The Court held the Plea ill; for it ought to be *venit hic in Curia & in eadem Curia reddidit ſe, & per eandem Curiam Commiſſus fuit, &c.* for the Court muſt commit him in Execution. 3 *Bulſt.* 199. *Auſtin* verſus *Monke*. *Poſtea* Sci fa. (C) 13. *and* Bail. (E) 1. *S. C.* But they likewiſe held, that if the Principal renders himſelf *before the Return of the Writ of Error*, that the Bail are diſcharged. *S. C.* Poſtea (E) 1.

9. Where the Bail bring in the Principal upon the firſt *Sci. fa.* they ſhall be diſcharged; but if they do nothing till the *ſecond Sci. ſa.* and then bring in the Principal, 'tis too late, and they ſhall be charged. 3 *Bulſt.* 182. *Spaniſh Ambaſſador* verſus *Gifford*. *Poſtea* Execution. (F) 9. Sci. fa. (C) 14. *S. C. Moor* 850. *S. C.*

10. Judgment againſt the Principal, and a *Ca. ſa.* iſſued againſt him, and the ſame being returned, but before it was filed a *Sci. fa.* was brought againſt the Bail, one of them having brought an Action againſt the Principal, and he being taken upon the Proceſs, and brought into Court, the Bail prayed, that he might be delivered in Execution for the Debt upon the Judgment, which was done accordingly. 2 *Bulſt.* 260. *Duport* verſus *Wildgooſe.*

11. Judgment againſt the Principal, who abſconded by the Direction of the Plaintiff, on purpoſe that he might charge the Bail, who moved the Court, that the Sheriff might take the Principal, which was ordered accordingly, and the Plaintiff gave Notice to the Principal of the Rule of Court; but yet he was taken, and afterwards ſet at Liberty by the Direction and Conſent of the Plaintiff himſelf; all which appearing upon Oath, it was adjudged, that the Principal being once taken, and in Execution, the Bail ſhall be diſcharged. 1 *Bulſt.* 43. *Worſley* verſus *Brown.*

12. Execution was taken out againſt the Bail, then he paid *Part of the Money*, and afterwards the Plaintiff took out Execution againſt the *Principal* for the Reſidue, the Bail being let at Large before the Taking the Principal; and this was held to be the conſtant Courſe. *Sid.* 107. *Felgate* verſus *Moler.* *Poſtea* Execution. (F) *pl.* 14. *contra.* But in that Caſe it muſt be intended that the Bail was in Cuſtody.

13. The Plaintiff ſued *T. S.* in three Actions, and he gave Bail to each Action; the Plaintiff recovered in all, and then *T. S.* rendered himſelf, and they who were Bail to one of the Actions enter'd an *Exoneretur* on the Bail-Piece, but thoſe who were Bail to the other two Actions, did not; adjudged, that the Render is a Diſcharge *in Poſſe* as to all, but not compleat till an *Exoneretur* is entered upon each Bail-Piece. 1 *Salk.* 98. *Williams* verſus *Williams.*

14. Judgment againſt *T. S.* who rendered himſelf before the Return of the *Ca. ſa.* but did not give the Plaintiff Notice of it, nor get the Bail-Piece diſcharged; and the Plaintiff brought a *Scire facias* againſt the Bail, and had Judgment againſt them; but the Court would not relieve them upon a Motion, becauſe no *Exoneretur* was entered; ſo they muſt bring an *Audita querela.* 1 *Salk.* 101. *Lyell* verſus *Galletly.*

15. There was a *Capias ad ſatisfaciend'* againſt *T. S.* and *non eſt inventus* returned: Now in Strictneſs of Law the Recogniſance of the Bail is forfeited; but if the Defendant render himſelf before the Return of the *Alias Scire facias* againſt the Bail, the Court will ſtay Proceedings againſt the Bail; but inſtead of a *Scire facias*, the Plaintiff brought an Action of Debt againſt the Bail upon their Recogniſance, who pleaded, that the Principal rendered himſelf before the Return of the *Latitat*; now tho' this is not pleadable to an Action of Debt, upon the Recogniſance againſt the Bail, yet the Court will allow a Render as well on an Action of Debt, as on a *Scire facias*, and that at any Time before the Return of the *Latitat.* 1 *Salk.* 101. See *Raym.* 14.

16. The Defendant was indicted in *B. R.* and was likewiſe proſecuted in a civil Action in *C. B.* and gave Bail to both, and afterwards rendered himſelf to the *Fleet*, in Diſcharge of his Bail to the civil Action, and removed himſelf by *Habeas Corpus* to the King's Bench, from whence he eſcaped; and upon Motion of the Bail to the Indictment, that their Recogniſance might not be eſtreated, for that he was taken out of their Cuſtody by the Commitment to the *Marſhal*, it was denied; becauſe they ought to have him committed there in Diſcharge of themſelves. 1 *Salk.* 105.

17. Where the Defendant renders himſelf in Diſcharge of his Bail, the Plaintiff muſt make his Election, whether he will proceed to charge him in Execution, or take an *Elegit* againſt his Lands, for he muſt not do both; and the Court, upon Motion, will Rule, that he do the one or the other by a certain Day. *Lilly's Pract. Reg.* 183.

(D)

Of Bail in Inferior Courts, and upon Habeas Corpus. See the Act 31 *Car.* 2. *cap.* 2.

1. BAIL was given in an Inferior Court, and upon an *Habeas Corpus* brought, the *Lord Chief Juſtice Popham* took Bail, being then in his Circuit; afterwards a *Procedendo* was awarded, and Judgment againſt the Principal in the *Inferior Court*, which was affirmed on a Writ of Error; and upon a *Sci. fa.* againſt the Bail below, it was adjudged, that they were diſcharged, altho' the Bail taken by the Chief Juſtice was not filed, for that could not be till the Term following. *Yelv.* 120. *Fernly* verſus *Fawcet.* *Poſtea* Sci. fa. (C) 15. *S. C.*

1 Roll. Rep. 64. *By the Name of* Cheſton *v.* Buller. 2 Bulſt. 286. Moor 836. Poſtea 4. S. C.

2. Judgment againſt the Principal in an Inferior Court, and a *Sci. fa.* was brought againſt the Bail, who pleaded, that after the Action brought againſt the Principal, and Bail put in, the Cauſe was removed by *Habeas Corpus* into *B. R.* and Bail put in there and accepted, and afterwards the Cauſe was remanded by *Procedendo*, and then, and not before, Judgment was given againſt the Principal, *&c.* adjudged, that where a Cauſe is removed out of an Inferior Court, and Bail filed in that Court to which it is removed, and afterwards, in another Term, 'tis remanded by *Procedendo*, there the Bail in the Inferior Court are not chargeable; becauſe by the Filing the Bail above, the Court is poſſeſſed of the Cauſe; but if the Cauſe is remanded in the ſame Term in which 'tis removed, then 'tis as if it had never been removed; for there is no Record made of the Removal, and therefore in ſuch Caſe the Bail ſhall be charged. 2 *Cro.* 363. *Beeſton* verſus *Buller.*

3. Upon a *Capias* directed to the *Serjeant of the Mace* in an *Inferior Court*, he returned *Cepi Corpus*, and that he had taken Bail according to the Cuſtom; the Plaintiff proceeded in an Action of *Debt*, and there was Judgment againſt him, which was afterwards reverſed upon a Writ of Error; and upon a *Sci. fa.* againſt the Bail, it was adjudged, that ſpecial Bail being Matter of Record, could not be taken by a *Serjeant at Mace*, but before the Judge of the Court; and therefore the Bail were not chargeable. 2 *Cro.* 94. *Loffe* verſus *Keldridge.*

4. Debt in the Court at *Yarmouth*; the Cauſe was removed into *B. R.* by *Habeas Corpus, &c.* and new Bail was put in, and in the *ſame Term* a *Procedendo* was granted; adjudged, that the old Bail given at *Yarmouth* ſhall ſtand, and not be diſcharged by the Removal of the Record; becauſe the *Procedendo* was granted in the *ſame Term* the Record was removed; for in ſuch Caſe there is no Record made of the Removal. *Moor.* 836. *Jeſſon* verſus *Bun.* 2 Cro. 363. * Antea 2. S. C.

5. Debt in *London* againſt the Defendant as Heir; the Cauſe being removed into *B. R.* by *Habeas Corpus*, the Queſtion was, whether he ſhould put in ſpecial Bail, as he muſt have done in *London*, where they compel all Defendants, as well Executors as others, to do it; but adjudged, that upon this Removal the Heir ſhall not find ſpecial Bail, as he would have done below. 2 *Lev.* 204. *Sir John Lawrence* verſus *Blith.* T. Jones. 82.

6. An Action was removed into *B. R.* from *London*, by *Habeas Corpus*, and it was inſiſted, that in ſuch Caſe ſpecial Bail ſhould be put in of Courſe; but the Court held, they might examine into the Cauſe of Action, wherefore it came thither by *Habeas Corpus*, and if it was ſuch which required Bail, tho' under 10 *l.* they might make the Defendant put in ſpecial Bail; but if the Action was Vexatious, they would diſcharge him upon Common Bail. 1 *Salk.* 101. *Lumley* verſus *Quarry.*

7. An *Executor* being ſued in an *Inferior Court*, put in *ſpecial Bail*, and afterwards the Cauſe was removed into *C. B.* by *Habeas Corpus*; the Court held, he ſhall put in Bail only to appear to a new Original within two Terms, but not to pay the Condemnation-Money; and that in all Cauſes which are removed by *Habeas Corpus*, *ſpecial Bail* ſhall be given, except in the Caſe of an *Executor.* 1 *Salk.* 98. *Page* verſus *Price.*

8. Adjudged, that where a Cauſe is removed out of an Inferior Court by *Habeas Corpus*, if the Bail below offer themſelves to be Bail above, they ſhall be taken; becauſe, tho' the Plaintiff might except againſt them below, he did not, but let them ſtand, except the Cauſe comes out of *London.* 1 *Salk.* 97.

(E)

Of Bail on Writs of Error, and of a Writ of Error brought by the Bail.

Antea (A) 9. Poſtea *Error.* (Q) per Totum.

1. JUdgment againſt the Principal in *B. R.* who brought a *Writ of Error in the Exchequer-Chamber*, and *gave Bail* according to the Statute 3 *Jac.* to *proſecute his Writ of Error with Effect*; the Writ was returnable 3 *Febr.* and on the 12*th of Febr.* a *Sci. fa.* was brought againſt the *Bail* on the Writ of Error, who pleaded, that it was returnable 3 *Febr.* and that on the 2*d of Febr.* the Principal came into Court, and rendered himſelf there in Diſcharge of the Bail, and by the Order of the Court was committed to the Marſhall, and ſtill remains in the Priſon of the *Marſhalſea* in Execution; it was adjudged, that he rendring himſelf before the *Writ of Error was returnable*, and the Judgment not affirmed, the Bail cannot be charged; but yet the Plea in this Caſe is not good; becauſe he doth not ſay *reddidit ſe priſonæ*, but *venit hic in Curia ſecundo die Februarii*, which could not be, becauſe the *ſecond Day of February* is not *dies Juridicus*; he ought to have pleaded, that *in eadem Curiam reddidit ſe, & per eandem Curiam commiſſus fuit*, for the Court muſt commit him in Execution. 3 *Bulſt.* 199. *Auſtin* verſus *Monke.* *Moor* 852. *S. P.* *Poſtea* Sci. fa. (C) 13. *S. C.* Antea (C) 8.

2. The *Teſtator* had Judgment againſt the *Principal*, and the *Executors* brought a *Sci. fa. againſt the Bail*, who pleaded, that after the Judgment, and the *Sci. fa.* returned, the *Principal* brought a *Writ of Error in the Exchequer-Chamber*, pending which *Writ*, the ſaid Principal *reddidit ſe priſonæ in exoneratione manucaptorum*, and there he *died*; adjudged, that the Bail was not diſcharged by the bringing the *Writ*, becauſe it was incertain, whether the Judgment would be reverſed or affirmed; but in this Caſe a *Sci. fa.* will not lie againſt the Bail, becauſe by the bringing the Writ of Error, no *Capias* could be awarded againſt the Principal before his Death. *Poph.* 185. *Calfe* verſus *Nevill.*

3. In the Caſe of *Auſtin and Monke*, *antea pl.* 1. it was adjudged, that the Bail upon a Writ of Error cannot plead the *Render of the Principal* in *Execution*, *&c.* becauſe they do not ſtand engaged **to render his Body*, but to pay the Condemnation-Money, with Coſts, which ſhall be adjudged for the Delay of the Execution, upon the affirming the Judgment; and this is by Vertue of the Statute 3 *Jac.* therefore they ſtand bound for the Debt. *Antea* 1. *Auſtin* verſus *Monke.* *Poſtea 8.

4. Judgment againſt the *Principal*, who being in Court, both the Plaintiff and the Bail prayed he might be committed in Execution; but it appearing to the Court, that he had brought a *Writ of Error*, which was allowed, for that Reaſon they could not award Execution, and therefore the Bail could not be diſcharged; for the Entry muſt be, that the Defendant *reddidit ſe Curiæ*,

riæ, to be in Execution, if the Plaintiff will, which cannot be done now the *Writ of Error is depending*, and before the Return is paſt; but after 'tis paſt, the Court may award Execution. *Hob.* 116. *Wickſtead* verſus *Bradſhaw.*

5. *Error, &c.* brought by the *Bail*, upon a Judgment againſt the *Principal in an Inferior Court*, and the Writ was, *tam in redditione Judicii quam in redditione executionis*; and the Error aſſigned was, becauſe a *Capias* was awarded againſt them before any *Sci. fa.* and this was adjudged good Cauſe of *Error*; but then an Exception was taken to the *Writ of Error*, for that the Bail cannot have it upon the Principal Judgment; which is very true, but then the Queſtion may be, that ſince the Record is removed, whether they might not have a Writ of Error, *quod coram vobis reſidet. Mich.* 19 *Jac. Cro. Car.* 404.

6. The Principal and his Bail joined in a Writ of Error, and the Error aſſigned was, that there was no *Capias* againſt the Principal, and yet there was a *Sci' fa.* againſt the Bail, and Judgment given againſt them upon that *Sci. fa.* It was objected againſt the Plaintiffs, in this Writ of Error, that the Bail ought not to join therein with the Principal, becauſe they cannot ſet aſide the Judgment againſt him for any Error in the Proceedings; and ſo it was adjudged; and likewiſe, that the * Principal ought not to join in a Writ of Error to reverſe the Judgment given againſt the Bail in the *Sci. fa.* 1 *Cro.* 295. *Buſhell* verſus *Telles, and* 415. *Smith* verſus *James. S. P. Poſtea* Error. (B) 7. *S. C.*

* Poſtea 12.

7. Judgment againſt the Principal in *B. R.* who brought a Writ of Error in the Exchequer-Chamber, and the Record being removed, he prayed to be bailed; but adjudged, that he being in Execution, was not * bailable in either Court; not in *B. R.* becauſe there was no Record there; not in the Exchequer-Chamber, becauſe they have no Authority to bail, but only to reverſe or affirm the Judgment. 2 *Cro.* 108. *Sheppard* verſus *Allen.*

* Cro. El. 713. S. P.

8. By the Statute 3 *Jac. cap.* 8. 'tis enacted, *That Execution ſhall not be ſtaid upon any Writ of Error, for reverſing a Judgment in an Action of Debt, or upon any Contract, unleſs the Plaintiff in the Writ of Error enter into a Recogniſance, with two Sureties, to the Perſon who hath obtained the Judgment, and in double the Sum, to proſecute the Writ of Error, with Effect, and to pay the Debt, if the Judgment ſhould be affirmed*; about nine Years after this Statute, *an Action of Debt* was brought againſt an Executor, upon the Bond of his Teſtator, and upon *Plene Adminiſtravit*, there was a Verdict for the Plaintiff; afterwards the Defendant brought a Writ of Error; and adjudged, that becauſe he was Executor, he ſhould not give *Bail*; for tho' the Words of the Statute are general, (*viz.*) *That Execution ſhall not be ſtaid* on a Judgment in an *Action of Debt, &c.* yet that muſt be underſtood, in an Action of Debt brought againſt the Defendant upon his own Bond, or for his own Debt; but where the Judgment is Special, as 'tis in this Caſe, againſt an *Executor*, (viz.) *de Bonis Teſtatoris*, and Damages only *de Bonis propriis*, 'tis unreaſonable, that he ſhould find Sureties to pay the whole Condemnation-Money out of his own Eſtate. 2 *Cro.* 350. *Goldſmith* verſus *Plat. Poſtea* Error. (Q) 1. *S. C. Cro. Car.* 59. *Mildmay's* Caſe. *S. P. Litt. Rep.* 2. *S. C.*

9. An *Executor* upon a Writ of Error brought, ſhall not *find Bail* within the Statute 3 *Jac.* 1. *cap.* 8. to anſwer the Principal Debt; but he ſhall find Bail to anſwer the *Double Coſts* upon the *Statute* 13 *Car.* 2. *cap.* 2. if 'tis found againſt him. *Sid.* 183. 4 *Mod.* 246. *S. P.*

10. Adjudged, that if the Plaintiff in Error will not aſſign Errors, this is a Breach of his Recogniſance, upon the Statute 17 *Car.* 2. *cap.* 8. to proſecute his Writ of Error with Effect; but the Court may mitigate it, when the Plaintiff in the Original Action hath his Debt and Damages. *Sid.* 294. *Cooper* verſus *Price.*

11. Debt upon a Bond, conditioned to pay to one *Briggs ſo much Money as* W. *R. upon an Accompt by him ſtated between the Plaintiff and Defendant, ſhould declare to be due to the Plaintiff:* The Defendant pleaded, that *W. R.* had not declared any Thing to be due, upon which they were at Iſſue, and the Plaintiff had a Verdict; and upon a Writ of Error brought, the Queſtion was, whether the Plaintiff in Error ſhould find *Bail* upon the Statute * 3 *Jac.* which extends only to *Bonds, with Conditions to pay a certain Sum?* therefore where a Man recovers an *Inſimul computaſſet*, and the Defendant brings a Writ of Error, he ſhall not put in Bail upon this Statute; and ſo is * *Girling's* Caſe. *Yelv.* 227. nor in Debt upon an Award; but adjudged, that tho' Writs of Error are Writs of Right, yet they are often uſed for Delay; therefore that Statute ſhall be taken Beneficially, and not Strictly; 'tis true, *Girling's* Caſe, and Actions of Debt on an Award, are not Actions upon *Bills or Bonds for the Payment of Money*, which are only within the Words of the Statute; but the Action in the Principal Caſe is founded on a *Bond for Payment of Money*, which, tho' uncertain when the Bond was executed, yet was certain before the Action brought; ſo the Plaintiff was ordered to find Bail. 1 *Lev.* 117. *Dean and Chapter of St. Paul's* verſus *Capel.*

* Poſtea 13.

* Error. (Q.) 2.

12. Before any Judgment againſt the *Bail* in an *Inferior Court*, but after Judgment againſt the *Principal*, they brought a *Writ of Error* on the Judgment againſt the *Principal* and himſelf; but it was quaſhed, becauſe the Bail cannot bring a Writ of Error of the Principal Judgment, nor can he and the Principal * join in a Writ of Error. 1 *Lev.* 137. *Atherton* verſus *Hole.*

*Antea 6.

13. Debt on a Bond, for *Performance of Covenants*, and a Breach aſſigned, upon which they were at Iſſue, and a Verdict and Damages for the Plaintiff, and *an Action of Debt was brought on that Judgment*, and Judgment by Default; and now on a Writ of Error brought *on the Judgment by Default*, the Queſtion was, whether the Plaintiff in Error ſhould put in Bail according to the

Statute * 3 *Jac.* 1. for it was agreed not to be within the Statute 13 *Car.* 2. Now the Statute 3 *Jac.* mentions *Actions of Debt for Payment of Money only, or for Rent or Contracts for Money*; and the Principal Caſe is Debt for *Performance of Covenants*, and ſo not within that Statute; but by two Judges againſt *Twiſden*, the Action of Debt upon the Judgment, being for Money recovered on that Judgment, is within the Words, *Contracts for Money*, and ſo ruled the Plaintiff in Error to put in Bail. 1 *Lev.* 260. *Biddolph* verſus *Temple*. * Antea 11.

14. Where Bail is put in upon a Writ of Error, the Defendant hath *twenty Days to except* againſt *it*, which Exception muſt be entered in the Clerk of the Errors Book, and he ought to take out a Rule, and ſerve the Attorney on the other Side with it, to put in better Bail; but that Rule need not be ſerved out within twenty Days, but it muſt be before Execution ſued out for Want of a Writ of Error. *Mod. Caſes* 233. *Gibbon* verſus *Dove*.

(F)

Where their Lands are liable, where not, and where they are liable to Coſts.

1. ERror in the *Exchequer-Chamber*, upon a Judgment in *Aſſault* againſt the Defendant in *B. R.* and the Judgment was there affirmed, and *new Coſts* given; afterwards the Record being remanded into *B. R.* the Plaintiff moved for a *Sci. fa.* againſt the Bail, as well for the *Damages and Coſts* on the firſt Judgment, as for the *Coſts upon the Affirmance of that Judgment on the Writ of Error*, but adjudged, that the Bail was not chargeable with theſe *new Coſts*, for they are only liable to the Condemnation-Money in *B. R.* and not in any other Court. *Cro. Eliz.* 589. *Penruddock* verſus *Errington*. *Poſtea* Coſts. (E) 1. *S. C.*

2. The Bail, before Judgment was had againſt the *Principal*, made a Leaſe of his Lands for a valuable Conſideration, and afterwards the Plaintiff obtained a Judgment againſt the *Principal*, and the Queſtion was, whether theſe Lands were liable to the Judgment? the Caſe was not adjudged; but the better Opinion ſeemed to be, that they were liable; for otherwiſe many Judgments might be defeated, and the Bail might be diſcharged; and in this Caſe a Difference was taken between *Bail in the King's Bench* and *Common Pleas*, for upon a *Latitat* in *B. R.* there is no *Certainty of the Debt or Duty till Judgment is given, and then, but not before, the Land is bound; ſo that if it be in the Hands of another Man for a valuable Conſideration, before Judgment given, it ſeems that it ſhould not be liable to that Judgment; but it may be otherwiſe in the Common Pleas, for there the Suit is by Original, and the Certainty of the Debt appears in the Declaration, for which Reaſon 'tis known from the Beginning for what the Bail ſtand bound. *Poph.* 132. *Baskervill* verſus *Brooks*. 2 *Cro.* 149. *S. C.* 5 Rep. in Hoe's Caſe 70.

(G)

By a wrong Name, and of acknowledging Bail in the Name of another.

1. IN Ejectment againſt one *Parkhurſt*, he put in Bail by the Name of *Parkes*, but the Declaration, and all the Proceedings, were by the Name of *Parkhurſt*; after a Verdict for the Plaintiff the Judgment was arreſted; becauſe it did not appear, that the Defendant was *in Cuſtodia Mareſchalli*, for *Parkhurſt and Parkes* cannot be intended the ſame Perſon; and if the Bail be pulled of the File, the Plaintiff is without Remedy, for it cannot be amended. *Cro. Eliz.* 223. *Gore* verſus *Parkhurſt*.

2. The Defendant was arreſted by the Name of *William Gerrard*, and he put in Bail by the Name of *Wm. Gerrat*, and all the Proceedings againſt him were by the Name of *Gerrat*; it was moved in Arreſt of Judgment, after a Verdict for the Plaintiff, that here was no Bail entered, for they were Bail for *Gerrat*, when the Defendant's Name was *Gerrard*; but adjudged good, for otherwiſe every Defendant may give a wrong Name to his Attorney, by which he would be bailed, and then move it in Arreſt of Judgment. *Mich.* 43. *Goldſ.* 138. *Gerrard's* Caſe.

3. The Defendant was indicted at *Surrey Aſſiſes*, upon the Statute 21 *Jac. cap.* 26. for acknowledging Bail in the Name of another, and the Jury found a Special Verdict, that this Bail was taken before a Judge *de bene eſſe, but never filed*, and whether this was *Felony* or not, was the Queſtion? it was inſiſted that it was; becauſe the Filing or not Filing it was not material, for if it ſhould, then it would be in the Power of the Attorney to make it Felony or not; the Man had done all in his Power to do for perfecting the Bail, therefore he is within the Intent of the Statute, which was made to puniſh the Abuſe of Counterfeit Bail; but it was anſwered, and ſo adjudged, that 'tis not Bail till filed, and make a Record of the Court. 2 *Sid.* 90. *Timberley's* Caſe. See *Hall* verſus *Wingfield*. See *Dyer* 26, 221, 246.

(H)

By the Husband and Wife, and for the Wife.

1. WHere the Man and his Wife are Defendants, and the Man is taken upon Proceſs, and not the Wife, he ſhall give Bail for both, otherwiſe he ſhall be committed till he doth; and this is the conſtant Courſe of *B. R. Mich.* 43 *Eliz. Goldſ.* 127.

(I)

Where allowable in criminal Caſes.

1. THE Defendant was indicted for Murder, and the Trial coming on, the Proſecutor did not proceed, ſuſpecting a Partial Jury, but brought an Appeal, and tho' by the Appeal the Indictment ſtill continued, and was not gone, yet the Delay being occaſioned by the Proſecutor, the Party was bailed. 1 *Bulſt.* 85. *Morgan's* Caſe.

2. *Coll. Dorrington* was committed to the Tower for *High Treaſon*, from whence he eſcaped, and one *Fitzpatrick* was committed by the Privy Council to *Newgate*, for aſſiſting in this Eſcape, and being brought up by *Habeas Corpus*, was bailed; becauſe there was a Seſſions between this Time, and the Time of his Commitment, and no Proſecution. 1 *Salk.* 103. *Fitzpatrick's* Caſe.

* Poſtea (K) 1.

3. Where a Man is found guilty of *Murder* by the * *Coroner's Inqueſt*, *B. R.* may Bail him; becauſe the *Coroner proceeds on Depoſitions taken in Writing*, which the Court may look into. 1 *Salk.* 104. *In the Lord Mohun's* Caſe.

4. *Marriot* was committed for *forging Indorſements on Bank-Bills*, which is not Felony, tho' the *Forging* the Bills is; and therefore he was bailed, this being only a Miſdemeanor. 1 *Salk.* 104. *Marriot's* Caſe.

* Poſtea (K) 1. contra. See 1 Bulſt. 122.

5. The Cauſe returned upon an *Habeas Corpus* was a Writ of *Excommunicato capiendo*, which recited a *Significavit* of an *Excommunication* of one *Daviſon* a Quaker for teaching School without a Licenſe, and the Court deſiring to hear Counſel, whether this was an Offence or not, he was bailed, whilſt the * Return was under Conſideration; and the Entry was *Traditur in Ballivum & interim Curia vult adviſare*, and the Condition of the Recogniſance was to appear the firſt Day of the Term, and ſo from Day to Day, and to Render his Body to Priſon, if the Court ſhould adjudge the Return to be good. 1 *Salk.* 105. *The King* verſus *Daviſon*. See *Poſtea* (L) *pl.* 1. denied. See 1 *Cro.* 552, 557. *Latch* 174. *Vaugh.* 157.

6. An Indictment was found againſt a *Feme Covert* at the Quarter-Seſſions in *Norwich*, for Petty Treaſon, and Murder of her Husband, ſhe was brought to the Bar, and moved to be bailed; and it appearing upon *Affidavits* of the Fact, that the Proſecution was malitious, and nothing being done, either upon this Indictment, or the Coroner's Inqueſt, ſhe was bailed. 5 *Mod.* 323. *Barney's* Caſe.

7. The Defendant being indicted for Murder, moved *B. R.* to be bailed, and producing ſeveral *Affidavits*, by which the Court were ſatisfied, that the Proſecution was malitious, he was bailed by four Perſons, Body for Body. *T. Jones* 222. *Farrington's* Caſe.

(K)

Where not allowable in criminal Caſes.

1. THE Defendant was found guilty on the Coroner's Inqueſt, and moved to be bailed for Manſlaughter, but it was denied; The Statute *Weſtm.* 1. *cap.* 15. is, that no Bail ſhall be taken; but that muſt be intended no Ordinary Bail; for the Statute 1 & 2 *Ph. & Ma. cap.* 13. is, that Bail ſhall be taken where the Party is bailable by Law in Manſlaughter, by which it appears, that he is not bailable in all Caſes for Manſlaughter; as for Inſtance, if he confeſs the Fact, or if 'tis notorious. 2 *Roll. Rep.* 268. *Poynes's* Caſe. 3 *Bulſt.* 113. *S. C.*

2. *Dr. Watſon*, late *Biſhop of St. Davids* was taken on an *Excommunicato capiendo*, and brought into *B. R.* by *Habeas Corpus*, and pleaded to the Writ, that he was a *Lord of Parliament*, and prayed to be bailed, whilſt the Return was under Conſideration; 'tis true, this hath been done, (which ſee (I) *pl.* 5.) but 'tis Diſcretionary; but ſince the Court knew this Plea to be falſe, becauſe one of the Judges was a Commiſſioner of Delegates, by whom he was deprived, therefore he was not bailed. 1 *Salk.* 106. *Dr. Watſon's* Caſe. *Far.* 117. *S. C.*

3. The Defendant was convicted upon the View of the Lord Mayor for a *Forcible Deteiner* in *London*, and fined 100 *l.* and committed in Execution till he paid it; and the Record being removed by *Certiorari*, and a Writ of Error *coram nobis reſiden'* brought, he aſſigned Error in Perſon, and moved to be bailed; 'tis true, in a *Writ of Error to reverſe an Outlary the Court will Bail*, but not to reverſe a Judgment in an Indictment; and in this Caſe, the Defendant being in Execution for a Fine, they would not bail him. 1 *Salk.* 106. *The Queen* verſus *Layton*. See 1 *Cro.* 557. and *Sid.* 320. *S. P.*

4. The Defendant was indicted for * Murder, the Court would not Bail, upon *Affidavits* of the Evidence, becauſe that might diſcharge the Proſecution. 1 *Salk.* 104. * Antea (I) 3.

5. So where a Man is found guilty of a * Murder by the Grand Jury, the Court will not Bail him, becauſe they cannot have Notice what Evidence was before the Jury, which by their Oath they are bound to conceal. 1 *Salk.* 104. The *Lord Mohun*'s Caſe. * Antea (I) 2. Antea 3.

6. The Defendant was indicted for *Murder* and upon the Statute of Stabbing, and the Jury found him guilty of *Manſlaughter*, and a Special Verdict as to the Reſt; and now he moved to be bailed, which was denied, being found guilty of *Manſlaughter*, for in ſuch Caſe 'tis never allowed till Clergy had; 'tis true, it was allowed in *Liſle*'s Caſe, but he prayed his Clergy, which is as much as he could do, for the Court never asked him what he could ſay why Judgment ſhould not be againſt him. 1 *Salk.* 103. * *The King* verſus *Keat.* * Indictment. (M) 47.

Bankrupts.

What Acts make a Bankrupt, and who ſhall be a Bankrupt, and what Intereſt the Creditors have in his Eſtate. (A)

Of the Sale of his Eſtate, and Commitment of his Perſon by the Commiſſioners. (B)

Sale by Commiſſioners, not good. (C)

Pleadings in Caſes of Bankrupts. (D)

(A)

What Acts make a Bankrupt, and who ſhall be a Bankrupt, and who not, and who are Creditors, and of the Intereſt they have in his Eſtate. See *Outlary.* (C) 20. Poſtea (C) 5, 9, 10.

1. WHere a Man gets the Goods of others into his Poſſeſſion, and then abſents himſelf to defraud them, in ſuch Caſe the *Lord Chancellor, or three Judges of B. R. or the Common Pleas*, upon Complaint to them made in Writing by the Parties grieved, may commit the Offenders, and cauſe their real and perſonal Eſtate to be appraiſed, and then ſell the ſame, and divide the Money ariſing by ſuch Sale in Proportion amongſt the Creditors. See *Statute* 34 *H.* 8. *cap.* 4.

2. A Subject or *Denizen* uſing any Trade by Way of Bargain, *&c.* or ſeeking his Trade of Living, by Buying and Selling, departing the Realm, or Keeping within his Houſe, or abſenting himſelf from it, with an Intent to defraud his Creditors, or taking Sanctuary, or ſuffering himſelf to be willingly arreſted for any Debt or Duty before 'tis due, or ſuffering himſelf to be outlawed, *&c.* is a Bankrupt within the Statute 13 *Eliz. cap.* 7.

3. A *fraudulent Deed* made of a Man's Goods will not make him a *Bankrupt* within the Statute 1 *Jac.* if it was made before he committed any Act of Bankruptcy, but if made afterwards, it ſhall not be good againſt the Creditors. *Hutt.* 42. *Cartwright* verſus *Underhill.*

4. A *Tradeſman*, in Conſideration of Marriage made a *Conveyance of his Lands to himſelf*, and his Wife, and afterwards became a Bankrupt; adjudged, that the Law intends a Bankrupt, who is ſo by *Fraud* as well as by *Accident*, and that the Providing for his Wife is a Providing for himſelf. *Style* 288. *Tucker* verſus *Coſh.*

5. Two became bound with *W. R.* for Payment of Money, and had *Counterbonds* from him to ſave them harmleſs; the Money was not paid at the Day, but the Sureties afterwards paid it, and *W. R.* became a Bankrupt; adjudged, that theſe Sureties were *Creditors* within the Statutes of Bankrupts. *Trin.* 4 *Jac.* 2 *Cro.* 127. *Osborne* verſus *Churchman.* Noy 142.

6. The Purchaſer of a Copyhold, about two Years after the Purchaſe, became an *Inn-keeper*, and about twelve Years afterwards he became a Bankrupt, and his Copyhold was ſold by the Commiſſioners to the Defendant, then the Bankrupt died, and his Son entered and made a Leaſe, *&c.* to the Plaintiff, who brought an Ejectment; adjudged, that an * *Inn-keeper*, *quatenus* ſuch is not within the Statutes, *&c.* becauſe he doth not live by *Buying and Selling*, but by *Uttering* his Goods without any Contract, and if he utters them at an unreaſonable Rate, he might be indicted for *Extortion*, which a Seller cannot; likewiſe, if a Gentleman *buy and ſell Lands* he is not within the Statutes, for the Buying and Selling mentioned in the Statute muſt be of *perſonal Things* and not of *Lands*; and tho' a *Copyhold Eſtate* is liable to the Statutes, yet this Copyhold is not, becauſe it was bought two Years before the Purchaſer was an *Inn-keeper*; ſo that he was not an Offender when he bought the Eſtate; therefore the Purchaſe ſhall not be avoided. *March* 34. *Criſp* verſus *Pratt.* Cro. Car. 395, 549. W. Jones 437. * Poſtea 16.

7. A

7. A *Shoe-maker* may be a Bankrupt, for he doth not live by his manual Occupation as a Labourer doth, but by *buying and ſelling Leather and Shoes.* *Cro. Car.* 2. See *Cro. Eliz.* 268. 3 *Mod.* 330. So a *Drover* is within the Statutes, for an Action on the Caſe will lie for calling him Bankrupt. *W. Jones* 304. *Collis* verſus *Malin.*

Cro. Car. 282.

8. One who had a *Stock in the* * *Eaſt-India Company*, and who ſate in their *Committees* as a Merchant in the Management of their Trade, and did receive the Profits of his Stock upon the Return of † Ships, tho' he had a great Eſtate in Lands, and did not get the moſt Part of his Living by Buying and Selling, yet he may be a *Bankrupt*, for 'tis not the Quality of his Perſon, or the Greatneſs of his Eſtate which protects him from thoſe Laws, but his Buying, Selling, and Trading, makes him liable to be a Bankrupt; and this was the Caſe of *Sir John Wolſtenholme.* *Paſch.* 1653.

* *See Statute* 13 & 14 Car. 2. cap. 24. *Stock in that Company doth not make a Trader.*

† *One having a Share in the Ship is not within the Statute.* 1 Sid. 411. 1 Vent. 29.

9. One had formerly been a *Turkey Merchant*, (but not of late Years importing or exporting any Thing) had Goods which were the Effects of his former Trading, to a very great Value, which he ſhewed to ſeveral Perſons, and borrowed Money upon the Credit of them; adjudged, that this brought him within the Statute. 1 *Vent.* 166. *Sir Anth. Bateman's* Caſe. 1 *Mod.* 76. *S. C.* *Sid.* 411. *S. C.*

10. In Trover, *&c.* upon Not guilty pleaded, the Queſtion of Fact was, whether the Defendant was a Bankrupt, he being the Owner of the Goods; the Plaintiff proved, that he had Silk and other Goods to a great Value in his Warehouſe, and that upon the Credit of them he took up Money, but could not prove that the Goods were brought in after the Defendant had contracted Debts, or that he had exported any for a long Time before; therefore the Court held, that if thoſe Goods were the Effects of his former Trading, which he could not put off ſo ſoon as he ceaſed to trade, he ſhall not be a Bankrupt; but about two Years afterwards it was adjudged otherwiſe. 1 *Vent.* 29. *Sir Rob. Cotton* verſus *Daintry.* *Sid.* 411. *S. C.* 1 *Vent.* 166. *Sir Anth. Bateman's* Caſe *contra.* See *pl.* 9. *S. C.*

11. In Debt, the Caſe upon the Pleadings was, *T. S.* owed Money to a Bankrupt, and he, together with the Bankrupt, became bound in a Bond to *G. D.* conditioned to pay the Money, but in Truſt for the Bankrupt, a Commiſſion of Bankruptcy iſſued, and this Debt was aſſigned to a Creditor; *G. D.* died, and his Executor *releaſed* this Debt, but yet the Creditor brought an Action of Debt, and adjudged that it was well brought; becauſe the Intereſt of this Debt was transferred to him by the Statute 21 *Jac. cap.* 19. the Bond being made to the Uſe of the Bankrupt, and therefore the Releaſe afterwards was no Bar. *Palm.* 505. *Gerrard* verſus *Aylmer.*

12. *Indebitatus* for Money, *&c.* on a Special Verdict the Caſe was, *T. S.* being a *Tradeſman*, owed 100 *l.* to *B. B.* and 50 *l.* to *C. W.* he was arreſted for this 100 *l.* and put in Bail, and about a Month afterwards he paid the 50 *l.* and then rendered himſelf to Priſon in Diſcharge of the Bail; the Queſtion was, from what Time *T. S.* ſhall be a Bankrupt; the *Statute* 21 *Jac. cap.* 19. *ſays, He ſhall be a Bankrupt from the firſt Arreſt*; but adjudged, that muſt be from the *firſt Arreſt upon which he lies in Priſon*, and not *from the Arreſt to which he gave Bail.* 1 *Salk.* 109. *Came* verſus *Coleman*, affirmed in Error in the Exchequer-Chamber. See *Duncomb* verſus *Walter.*

13. In Trover, the Caſe was, *T. S.* was arreſted and put in Bail, afterwards his Goods were taken in Execution by Vertue of a *Fi. fa.* and ſold to the Plaintiff, then he ſurrendered himſelf in Diſcharge of his Bail, and was *in Priſon two Months*, and then a Commiſſion of Bankruptcy was taken out againſt him: *Holt* Ch. Juſt. inclined contrary to 3 *Lev.* 57. *Duncomb* verſus *Singleton*, that he was a Bankrupt from the firſt Arreſt, and not from the Render; but if he was not in *Priſon two Months from the Time of the Render*; and if the Commiſſion was taken out before that Time expired, then 'tis taken out before he was a Bankrupt. 1 *Salk.* 110. *Smith* verſus *Stracy.*

14. A *Lawyer* went to *Lisbon* and turned *Factor*, and traded from thence to *England*, and back again to *Lisbon*, and broke; it was inſiſted, that the Statutes againſt Bankrupts do not extend to Perſons *out of the Realm*, but that Acts of Bankruptcy are confined to Things done here, as *Arreſts*, *Outlaries*, and *Departing out of the Realm*; and the *Statute* 21 *Jac.* which extends to *Aliens*, is only to *Aliens reſident here*; but adjudged, that Trading hither and back again gained him a Credit here, and that makes him ſubject to be a Bankrupt. 1 *Salk.* 110. *Bird* verſus *Sedgwick.*

15. Upon an Iſſue directed out of Chancery, whether Bankrupt, or not, at ſuch a Time; it was adjudged, that if a *Trader* commits a *plain Act of Bankruptcy*, as *Abſconding* from his Creditors, tho' he afterwards goes abroad and deals conſiderably, he is ſtill a *Bankrupt*; but if the Act was not plain, but doubtful, then his ſubſequent Going abroad will be an Evidence to explain it, (*viz.*) that it was not done to conceal himſelf from his Creditors; but if after ſuch plain Act he pays or compounds with his Creditors, he is a new Man. 1 *Salk.* 110. *Hopkins* verſus *Ellis.*

3 Mod. 226. 3 Lev. 309. * Anna 6.

16. In a Special Verdict in Treſpaſs, the Caſe was, that an *Inn-keeper* was *Part-Owner of a Ship, and having* 50 *l. Stock therein, abſconded*; adjudged, that the *Share of the Ship was only Stock to Trade in Potentia*, that there muſt be an *actual Trading* to make him a *Bankrupt*; that an * *Inn-keeper* is not a Trader, for he buys Proviſions, not for Trading, but to accommodate his Gueſts, and not to ſell again at large; ſo that where a Man buys to ſell again, under a particular Reſtraint, he is not a Seller within the Statute. 1 *Salk.* 109. *Newton* verſus *Trigg.*

(B)

Sale of his Eſtate by Commiſſioners, and Commitments by them, good.

See *Bonds.* (H) 16. *Eſcape.* (K) 1. Poſtea (C) 9.

1. A *Debtor* became a Bankrupt, and *after a Commiſſion awarded* he ſold all his Goods to *one of his Creditors* in Satisfaction of his Debt, and afterwards the Commiſſioners ſold thoſe Goods jointly to all the Creditors; adjudged, that the Sale by the ſaid Commiſſioners was good; for the Intent of the Statutes is to relieve the Creditors, *equally* in Diſtribution of the Bankrupt's Eſtate, and that he himſelf cannot diſpoſe his Goods after the Commiſſion awarded; and if a Creditor refuſe to come into the Commiſſion, and the Goods are ſold to others, 'tis likewiſe good. 3 *Rep.* 23. Caſe of Bankrupts. *Moor* 594. *Smith* verſus *Mills. S. P.*

2. In Treſpaſs, upon Not guilty pleaded it was found, that the Land was *Copyhold of Inheritance*, held of the Manor of *C.* and of which the Husband of the Defendant was ſeiſed in Fee; and that there was a Cuſtom in that Manor, that if a *Copyholder in Fee* died ſeiſed, living his Wife, that ſhe ſhould have the Copyhold during her Life, and twelve Years afterwards; then they found the Statute 13 *Eliz. of Bankrupts*, and that upon a Commiſſion of Bankruptcy, at the Complaint of the Creditors, the Husband was adjudged a Bankrupt, and that he being ſeiſed in Fee of the ſaid Copyhold, the Commiſſioners made a *Bargain and Sale* thereof to the Plaintiff and other Creditors, *&c.* they find, that the Widow, at a Court held, *&c.* was admitted Tenant *ſecundum conſuetudinem Manerii*, before the Plaintiff or the other Creditors were admitted; adjudged, the Sale by the Commiſſioners was good, and it ſhall bind the Eſtate of the Husband, who is no longer a Copyholder after the Bargain and Sale enrolled; 'tis true, the Bargainee hath no Title to the Profits till he hath paid a Fine and is admitted by the Lord; but when once he is admitted, the Eſtate ſhall veſt in the Bargainee, and ſuch Admittance ſhall have * *Relation* to the Bargain and Sale, therefore the Husband did not die ſeiſed of the Copyhold, and by Conſequence his Wife cannot be entituled to a Widow's Eſtate by the Cuſtom. *Cro. Car.* 410. *Parker* verſus *Bleek.* *Poſtea* Copyhold. (R) 5. *S. C.* W. Jones 451. * Poſtea 7.

3. After the Commiſſioners had ſold the Lands of the Bankrupt, ſome other of his Creditors prayed, that they might have a *Diſtribution*, tho' they had not joined in the Charge of the Commiſſion; adjudged, that the Commiſſioners may ſell and make Preparation for a Diſtribution preſently upon executing the Commiſſion, but they cannot *diſtribute till the four Months* are paſt, and till thoſe are paſt, and before any Diſtribution made, the Creditors at any Time may pray to be joined, but not afterwards; but then they muſt be contributory to the Charges of the Commiſſion, as well in ſuing it forth, as in the Defence and Execution thereof. *Hutt.* 37. *Ruggle's* Caſe. Hob. 287.

4. A Bankrupt was indebted to one Creditor in 20 *l.* and to another in 10 *l.* and had a Debt due to him upon a Bond of 20 *l.* adjudged, that this Bond-Debt may be aſſigned by the Commiſſioners reſpectively to the Creditors in Proportion to their Debts; and when 'tis ſo aſſigned, they may ſeverally ſue for the ſame, becauſe the Act of Parliament operates upon the Aſſignment. *Trin.* 10 *Jac. Godbolt* 195.

5. In a Special Verdict in *Aſſumpſit* brought by an Aſſignee of the Commiſſioners of Bankrupts, the Caſe was, *Thompſon* obtained a Judgment againſt *Watkyns* for 400 *l.* and on the 30*th Day of September* brought a *Fi. fa.* which was delivered to the Sheriff, and endorſed by him *in the Morning of the ſame Day*, and at Night *Watkyns* left his Houſe and became a Bankrupt; on the 10*th of October* following, the Sheriff levied of the Goods of *Watkyns* to the Value of 400 *l.* for which they were *ſold*, and the Money paid to *Thompſon*, *&c.* and afterwards the Commiſſioners aſſigned this Money to the Plaintiff *Phillips*, who brought this Action againſt *Thompſon*; it was inſiſted for *Thompſon*, that the Goods were bound to anſwer his Debt *from the Time of the Delivery of the Fi. fa. to the Sheriff*, for 'tis an Execution *ſerved and executed* within the Statute 21 *Jac. cap.* 19. but adjudged, that the *Aſſignment by the Commiſſioners* was good, for the new Statute makes no Difference in this Caſe; becauſe before that Statute was made, the Goods were bound from the * *Teſte of the Writ*, but now they are bound from the *Delivery of the Writ to the Sheriff*; that is, they are ſo bound that the Bankrupt himſelf cannot diſpoſe them, but the Commiſſioners may, by the expreſs Words of the *Statute* 21 *Jac.* which gives them a Power where the Execution is not *ſerved and executed*; now, admitting that the Delivery of the Writ to the Sheriff is a *Serving*, yet 'tis no *Execution* of it, therefore this Caſe differs from * *Stringfellow's* Caſe, and from † *Audley* and *Halſey's* Caſe, for there the *Extents were executed*, tho' not compleated till the *Delivery*; but tho' the Goods are liable, and for which an Action of Trover will lie, yet an *Aſſumpſit* will not lie for the Money for which they were ſold; becauſe the Commiſſioners could not aſſign the Money, for their Power is over the Bankrupt's Goods, but the Money for which they were ſold was never the Bankrupt's Money. 3 *Lev.* 69, 191. *Phillips* verſus *Thompſon.* * Poſtea (C) 4. * Execution. (C) 1. † Poſtea (C) 2.

6. The Defendant was committed by the Commiſſioners of Bankrupts for not anſwering and making a Diſcovery of his Eſtate; and being in Court upon an *Habeas Corpus*, he produced *Affidavits* that he had made a Diſcovery, and moved to be diſcharged, but it was denied; for if the Commitment was illegal, he might have an Action of Falſe Impriſonment, but he was diſcharged for another Reaſon, (*viz.*) The Statute impowers the Commiſſioners to examine him upon Interrogatories,

rogatories, which they muſt prepare and tender to him, ready drawn up in Writing; and this not being returned on the *Habeas Corpus*, the Warrant for Commitment was held void. 5 *Mod.* 368. *Gregory*'s Caſe. See *Statute* 5 *Georgii*.

7. The Commiſſioners, *&c.* aſſigned the Goods, *&c.* to *T. S.* who brought an Action of *Trover* againſt the Defendant on his own Poſſeſſion, (*viz.*) *& de bonis ſuis propriis*, and that they came to the Hands of the Defendant, and he converted them; and the Evidence of the Converſion was, that he took them by Vertue of a *Fi. fa.* after the Bankruptcy and before *the Aſſignment* to the Plaintiff, and there was no Proof that he ever demanded them; and this being made a Caſe, it was inſiſted for the Plaintiff, that by Vertue of the Aſſignment he had a Property, *by Relation*, from the Time of the Bankruptcy, as where Adminiſtration is granted, the Adminiſtrator hath a Property from the Death of the Inteſtate; but adjudged, that he hath a Property to avoid all meſne Acts between the Time of the Bankruptcy and the Aſſignment, but not the actual Property. 1 *Salk.* 111. *Kidgill* verſus *Player*.

8. *Indebitatus Aſſumpſit, &c.* the Defendant pleaded, that the Plaintiff was a Bankrupt, and that a Commiſſion of Bankruptcy was taken out againſt him, by Vertue whereof all his Goods and Chattels belonged to the Commiſſioners; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe, till the Commiſſioners make an *Aſſignment*, the Property is ſtill in the Bankrupt. See 1 *Jac.* 1. *cap.* 15. Paragragh 14. 1 *Salk.* 108. *Cary* verſus *Criſp*.

9. *Hollinſhed* was brought up by *Habeas Corpus*, and the Return was of a Warrant of Commitment by the Commiſſioners of Bankrupts for refuſing to be *examined, &c.* there to remain till
* 5 Mod. 309. S. P. he ſhall be diſcharged * by due Courſe of Law: *Et per Curiam*, this is ill, becauſe the Statute requires, that he ſhall be committed *till he ſubmit himſelf to be examined* by the Commiſſioners. 1 *Salk.* 351. *Hollinſhed*'s Caſe.

5 Mod. 308. 10. The Warrant of the Commiſſioners was returned on an *Habeas Corpus*, by which *Bracy* was committed by them to Priſon, *there to remain till he conform himſelf to our Authority*; the Caſe was, that he refuſed to anſwer Queſtions relating to the Bankrupt's Eſtate, and the Statute gives them Power to commit, till he *ſubmit himſelf to be examined*; now, in this Caſe it was held, that the Word *Conform* is of the ſame Senſe as *ſubmit*, but becauſe the Commiſſioners had other Powers given to them by the Statute, beſides the Power to examine; and it did not appear, but that they might require a Conformity to them in that reſpect; and ſince all Powers in Reſtraint of Liberty ought to be ſtrictly purſued, therefore this Return was adjudged ill. 1 *Salk.* 348. *Bracy*'s Caſe.

(C)

Sale by Commiſſioners not good.

1. WHen Debts are aſſigned by the Commiſſioners to the Creditors, they may bring Actions in their own Names for the Recovery of ſuch Debts, becauſe they have a Right to them transferred by Act of Parliament. 2 *Cro.* 105. *Bradſhaw*'s Caſe. *Poſtea* Wager of Law. (A) 10. *S. C.*

W. Jones 202. 2. A Merchant became bound in a *Statute* for a true Debt, which being forfeited, the Cogniſee ſued forth an Extent, 21 *Novemb.* 3 *Car.* and extended the Goods, and the Writ and Inquiſition were returned by the Sheriff, but *before that Time* the Cogniſor became a *Bankrupt*, and after he was a Bankrupt, the Cogniſee brought a *Liberate* upon the Extent, and 6 *Novemb.* 3 *Car.* the Goods were delivered to him according to the Appraiſement, 8 *Nov.* 3 *Car.* a Commiſſion of Bankruptcy was awarded againſt the Cogniſor, and 23 *Novemb.* 3 *Car.* the Commiſſioners ſold the Goods to the Plaintiff, who brought an Action of Trover againſt the Cogniſee, *&c.* it was inſiſted for the Plaintiff, that the Intereſt of the Goods remained in the Cogniſor, and that before the *Liberate*, the Commiſſioners might ſell them; but adjudged, that the Goods being *extended before the Cogniſor became a Bankrupt*, tho' delivered by the *Liberate afterwards*, could not be ſold by the Commiſſioners; becauſe after the Extent they were *in Cuſtodia Legis*, and then the Cogniſor had no Intereſt in them, *becauſe the Extent was returned*; and tho' they were not *delivered* to the Cogniſee by the *Liberate*, till after the Cogniſor became a Bankrupt; and tho' the Delivery was before the Commiſſion was taken out, yet when the *Liberate* is brought, it ſhall have *Relation* to the Extent. *Cro. Car.* 149. *Audley* verſus *Halſey*. *Poſtea* Execution. (C) 4. *S. C.*

W. Jones 215. 3. Upon a *Fieri facias* Money was levied by the Sheriff on an Execution for Damages and Coſts, and *before the Return of the Writ*, the Plaintiff at whoſe Suit the Execution was taken out, became a Bankrupt, and his Creditors having ſued out a Commiſſion of Bankruptcy, the Commiſſioners *aſſigned* this Money in the Sheriff's Hands to them; adjudged, that the *Aſſignment* was void, becauſe it was made after the Execution executed, and that was before the Party became a Bankrupt, ſo that the Money was *in Cuſtodia Legis*, and no Body could give a legal Diſcharge for it, but he who was a Party to the Record. *Cro. Car.* 16. 166, 176. *Benſon* verſus *Flower*.

4. A Bailiff took Goods in Execution by Vertue of a *Fi. fa.* which bore *Teſte* 4 *Junii*, but not taken out before 11 *Junii* following, and between thoſe two Days, (*viz.*) 6 *Junii*, the Owner of the Goods became a Bankrupt, and in an Action of Trover brought by the Aſſignee of the Commiſſioners againſt the Bailiff, in whoſe Poſſeſſion the Goods were, it was adjudged, that
* Antea (B) 5. they were liable to the Judgment from the Time of the * *Teſte of the Fieri facias*, for that *From the Time of the Delivery of the Writ to the Sheriff.*

is properly the Time *Emanationis Brevis*; and ſo the Execution was well ſerved. *Sid.* 271. *See* Record. (C) 1.

5. By the Statute 21 *Jac. cap.* 19. 'tis enacted, that *a Purchaſer for a valuable Conſideration, ſhall not be moleſted, unleſs the Commiſſion is ſued out within five Years after the Perſon becomes a Bankrupt:* The Caſe was, that *Harriſon*, a Merchant in *London*, being indebted to ſeveral Perſons, was *outlawed in the Year* 1642. and ſo became a Bankrupt; and about four Years afterwards he acknowledged two Judgments to *Andrews*, who extended his Lands; afterwards a Commiſſion of Bankruptcy was taken out againſt him, which was *within five Years after the Extent*, but not within five Years after the firſt Act of Bankruptcy done in 1643. *Andrews* thereupon ſet up a Title under a Leaſe of forty Years made to him by the ſaid *Harriſon* in the Year 1648. for 'tis plain he could have no Title by the Extent; and it was inſiſted againſt him, that he could have no Title by the Leaſe, becauſe it was inconſiſtent with the Extent; for if the Leaſe was good, then he extended upon himſelf, and by Conſequence the Leaſe is avoided. *Mr. Siderfin*, who reports this Caſe, tells us the Court was divided, the Queſtion being, whether the Commiſſion taken out *above five Years after the firſt Act of Bankruptcy* in the Year 1643. ſhall relate to that very Act, ſo as to avoid the Leaſe made by the Bankrupt to *Andrews* in the Year 1648. But *Serjeant Levinz*, who reports the ſame Caſe, tells us, it was adjudged, that the Leaſe was good, and ſhall not be defeated by an Act of Bankruptcy done before, if it was not *done within five Years* before the Suing out of the Commiſſion. 2 *Sid.* 69. *Ratford* verſus *Bludworth*, 114, 176. *S. C.* 1 Lev. 13.

6. In a Special Verdict in *Trover* for 120 *l.* the Caſe was a *Trader* committed an Act of Bankruptcy in 1673. and continued to the Trade till 1677, and then bound his Son Apprentice to one of the ſame Trade, and paid the Maſter 120 *l.* being the uſual Sum given in ſuch Caſes; and about two Years afterwards a Commiſſion of Bankruptcy was taken out againſt him, and he was found a Bankrupt, and this 120 *l.* in the Hands of the Defendant, was aſſigned by the Commiſſioners to the now Plaintiff, as the Money of the Bankrupt; but adjudged, that the Aſſignment was ill, it being ſo long before the Commiſſion, that the Money was paid, and when there was no Suſpicion of his being a Bankrupt, and no Manner of Fraud found. 3 *Lev.* 59. *Rider* verſus *Fowle.*

7. In a Special Verdict in *Treſpaſs*, the Caſe was, a Judgment was had againſt one *Toplady*, and the Sheriffs of *London*, by Vertue of a *Fi. fa.* ſeiſed his Goods on the *29th of April*; that the ſaid *Toplady* became a Bankrupt the Day before, (*viz.*) on the *28th of April*; that after the Seiſure, and before the *Venditioni exponas*, a Prerogative Writ iſſued out of the Exchequer, (*viz.*) *4th of May*, againſt a Perſon who was indebted to the King, and by Inquiſition *Toplady* was found to be indebted to this Perſon, whereupon Part of the Goods mentioned in the Plaintiff's Declaration, were ſeiſed by the Sheriffs, and ſold, and the Money paid, *&c.* but before the ſaid Sale, the Commiſſioners of Bankrupts aſſigned the Goods to the Plaintiff; *Et per Curiam*, the Prerogative Writ, which was an Extent) came too late, and ſo did the Aſſignment by the Commiſſioners; becauſe the Execution being well executed, the Goods were in *Cuſtodia Legis*, and made liable to the Judgment Creditor. 3 *Mod.* 236. *Letchmere* verſus *Thorogood, & al'.*

8. In Debt againſt the Defendant by the Plaintiff, who entitled himſelf by an Aſſignment of the Commiſſioners of Bankruptcy; the Caſe upon the Evidence was, that the Defendant, with others, covenanted with the King to provide Victuals for the Seamen in the *Dutch War*, at 8 *d. per* Man; and afterwards theſe Victuallers agreed with the Purſers of the Ships to provide for thoſe Men at other Rates; afterwards the Victuallers being diſcharged from that Employment, and having a great Sum due to them from the King, refuſed to pay the *Purſers*, ſuppoſing themſelves not to be Debtors until ſuch Time as their Accompts were allowed by the King, according to the Cuſtom of the *Navy*, whereupon a Commiſſion of Bankrupt iſſued out againſt them; but adjudged, that the *Employment in buying Stores and Proviſions for the Navy, did not make them Traders*; nor was it Buying and Selling intended by the Statute, for if it ſhould, every *School-maſter* who keeps Boarders, would be a Trader. 1 *Vent.* 270. *Sir Tho. Littleton's* Caſe.

9. *Monk* obtained a Judgment in Debt, and afterwards committed an Act of *Bankruptcy*; the Defendant, againſt whom the Judgment was had, brought a *Writ of Error in the Exchequer-Chamber*, and there the Judgment was affirmed, and the Record ſent back into *B. R.* then a Commiſſion of Bankruptcy was taken out, and the Commiſſioners aſſigned this Judgment to *Monk's* Creditor; but he ſued out Execution, and the Money was levied by the Sheriff, and brought into Court, and then the Aſſignee moved, that it might not be delivered to *Monk*, for that the Judgment was aſſigned to him, (the Creditor); the Court was of Opinion not to ſtay the Money upon this Suggeſtion, for it appeared to them to be due to *Monk*, and that the Aſſignee had been negligent, in not bringing a Special *Scire facias againſt Monk*, to ſhew Cauſe why he (the Aſſignee) ſhould not have Execution; however, upon the Importunity of the Aſſignee, they would detain it for a little Time, ſo as he would forthwith take out a *Scire facias* againſt Monk, in order to try the Bankruptcy. 2 *Vent.* 193. *Monk* verſus *Morris.* 1 *Mod.* 93. *S. C.* 1 Mod. 93.

10. Upon a Special Promiſe, the Caſe was, whether *Wm. Grice* was a Bankrupt or not, before he made a Conveyance to the Defendant, *dated* 23 *Septemb.* 23 *Car.* 2. and the Jury found a Special Verdict, that he was a Subject born, and lived in *Ireland*, and traded as a Merchant in *Dublin*, and got his Living by Buying and Selling; *that he came often into England, and bought Goods there*, and ſold them in *Ireland*, and became indebted to ſeveral People more than 100 *l.* *That he once did ſell in England* a Parcel of Neats Tongues, and at another Time ſold *Tallow in* T. Jones 141.

Ireland to be delivered at *Cheſter in England*; that he left his Houſe and Trade in *Dublin*, and abſconded from his Creditors in *England*, and ordered himſelf to be denied; and upon this Verdict he was adjudged a Bankrupt; for tho' it was found, that *he did ſell but once in England*, that is not Material; for many Merchants buy beyond Sea, and ſell here, and many likewiſe buy here and ſell beyond Sea; ſo that 'tis not the Buying and Selling here, but 'tis the Trading which makes the Perſon capable of being a Bankrupt. *Raym.* 375. *Doddeſworth* verſus *Anderſon.*

3 Lev. 57. 1 Vent. 370. 11. In a Special Verdict in *Aſſumpſit*, the Caſe upon the Pleading was, *ſſ.* One *Staley* being a Trader, became indebted by Bond and Judgment to *D. Walter* in 1000 *l.* and to *Eliz. Clerke* in 1000 *l.* and to ſeveral other Perſons; on the *5th of July* 1677, *Eliz. Clerke* made her Will, and conſtituted *John Crew* ſole Executor, and died; about a Year afterwards, (*viz.*) *6 Novemb.* 1678. *Crew* arreſted *Stayley* for this 1000 *l.* due to his Teſtatrix, and *Staley put in Bail* to the Action, and about a Fortnight afterwards, (*viz.*) 18 *Novemb.* 1678. he paid *D. Walter the* 1000 *l.* due to him, and on the ſame Day rendered himſelf to Priſon in Diſcharge of his *Bail to the Action of Crew*, and continued in Priſon to the Time of the Action brought againſt him, which was above *two Months*; That on 20 *Feb.* 1678. a Commiſſion of Bankruptcy iſſued againſt *Staley*, and about a quarter of a Year afterwards, (*viz.*) on the *14th of May* the Commiſſioners aſſigned *Staley's* Eſtate to the Plaintiff: Upon the arguing this Special Verdict, the ſole Queſtion was, from what Time *Staley* ſhall be accounted a Bankrupt, either on the *6th of November* 1678. when the Arreſt was made, or about a Fortnight after, when he ſurrendered himſelf to Priſon in Diſcharge of his Bail; for if he was a Bankrupt from the Time of the Arreſt, then the Plaintiff hath a Right, becauſe the Money was paid to *D. Walter by Staley after he became a Bankrupt*; and adjudged, that he was a Bankrupt from the Time of the Arreſt; and upon a Writ of Error brought, the Statute 28 *Jac. cap.* 19. was conſidered, by which 'tis enacted, *that a Man being arreſted for Debt, and lying in Priſon two Months, ſhall be adjudged a Bankrupt from the Time of the Arreſt:* Now it was objected, that here was not an immediate lying in Priſon upon the Arreſt, for *Staley* gave Bail, and was diſcharged; to which it was anſwered, that if he ſhould not be a Bankrupt from the Time of his Arreſt, then he might make over his Eſtate, and afterwards render himſelf to Priſon, and ſo elude the Statute, *&c.* *Raym.* 479. *Duncomb* verſus *Walter.*

(D)

Of Pleadings in Caſes of Bankrupts.

1. CASE by an *Aſſignee of Commiſſioners of Bankrupts*, ſetting forth the Cuſtom of Merchants, and that the Bankrupt and the Defendant being Traders, the Defendant gave a Bill to the Bankrupt for the Payment of 280 *l.* then he declared upon an *Indebitatus Aſſumpſit*, and an *inſimul computaſſet* for 280 *l.* the Defendant pleaded, that he *had accounted* with the Plaintiff for all Money due to him, and that upon the Balance there was 60 *l.* 10 *s.* and 5 *d.* due to the Plaintiff, and no more, which he had received in full Satisfaction, *&c.* The Plaintiff replied, that they had *not accounted, &c.* it was objected againſt this Declaration, that all the *Proceedings of the Commiſſioners of Bankrupts* ought to be ſet forth, which was not done here; but it was held, that the Precedents are both Ways. 1 *Lutw.* 274. *Lawſon* verſus *Lamb.* See 2 *Vent.* 63.

2. Debt for 150 *l.* againſt the Defendant as Adminiſtratrix of the *Marqueſs of Dorcheſter*, upon a Bill ſigned by him to a Goldſmith, wherein the Plaintiff ſet forth, that the Goldſmith being indebted to ſeveral Creditors, became a Bankrupt, and that a Commiſſion of Bankruptcy was taken out againſt him; and that about ſeven Years afterwards, upon the Death of the King, the Commiſſion was renewed, at the Petition of other Creditors, (*but did not ſay how much he was indebted to them*) and that the Commiſſioners aſſigned the Bill to the Plaintiff, who averred, that the Money was not paid *unde actio accrevit, &c.* Upon Demurrer to this Declaration, it was objected, that the Plaintiff had not ſet forth, that *the Commiſſioners adjudged the Goldſmith to be a Bankrupt*; that he had not alledged the *Bankrupt owed* 100 l. *at the Time of the renewing the Commiſſion*; that he had not alledged, that the Creditors who took out the firſt Commiſſion, *were not paid* before the Commiſſion was renewed; and there being ſeven Years between the Taking out the firſt Commiſſion, and the Renewing the ſecond, it may be preſumed, that in all that Time the Creditors might be paid; ſo if no Creditor, there can be no Bankrupt, for the Commiſſion is to be granted upon the Petition of the Creditors: Theſe Objections were all overruled; firſt, 'tis not neceſſary that the Commiſſioners ſhould adjudge this Goldſmith to be a Bankrupt, becauſe the Defendant cannot traverſe it, if they ſhould. Secondly, the Owing 100 is only a farther Deſcription of the Bankrupt. Thirdly, 'tis not neceſſary, that a Commiſſion ſhould be granted at the Petition of the Creditors; becauſe by the Statute 13 *Eliz. cap.* 7. it may be granted, upon a Complaint of any Perſon in Writing againſt the Bankrupt; but the Chief Objection was, that the Plaintiff ſhould have alledged *Notice* given to the Defendant, that the Commiſſioners had aſſigned this Debt to the Plaintiff, and the rather, becauſe the Defendant might have confeſſed the Action, and ſaved the Coſts; but adjudged, that *Notice was not neceſſary*, becauſe by the Aſſignment of the the Commiſſioners, the Property of the Debt is veſted in the Aſſignee by Vertue of the Statute 1 *Jac. cap.* 15. as if the Bill had been actually made to him. 1 *Lutw.* 451. *Slaughter* verſus *Pierpoint.*

3. The Defendant pleaded in Bar, that the Plaintiff was a *Grocer*, and was indebted to ſeveral Perſons, and became a Bankrupt; that a Commiſſion of Bankruptcy was taken out againſt him, and thereupon he was declared a Bankrupt, and that the Debt for which the Action was brought againſt the Defendant, was aſſigned to his Creditors, *&c.* Iſſue was taken upon the Bankruptcy, 1 *Lutw.* 701. *Hepworth* verſus *Haigh.*

4. *Sci. fa.* againſt the Executors of *Alderman Backwell*, upon a Judgment obtained againſt their Teſtator, they plead, that he was a *Trader*, and indebted to ſeveral Perſons, (naming them) *who petitioned the Lord Keeper* for a Commiſſion of Bankruptcy againſt him, and thereupon a Commiſſion, *&c.* was granted, *&c.* which they averred to be ſtill depending; and upon Demurrer it was held, that this Plea was ill; becauſe the Defendants did not alledge, that their Teſtator *was a Bankrupt at the Time of the Petition exhibited, or at the Time when the Commiſſion iſſued forth*; and this ſeems very material to be alledged, becauſe the Statute 13 *Eliz. cap.* 7. gives the Lord Chancellor Power to grant Commiſſions againſt Perſons therein deſcribed, *being Bankrupts.* 2 *Lutw.* 1273. *Gubbs* verſus *Backwell.*

5. *Sci. fa.* by an Adminiſtrator to revive a Judgment obtained by his Inteſtate; the Defendant pleaded the Statute of Compoſition of two Thirds of his Creditors in Number and Value, which was for Payment of 2 *s.* in the Pound, *Ita quod*, he paid it within five Years *after he ſhould be diſcharged out of Priſon, &c.* and upon a Demurrer to this Plea, the Queſtion was, whether the Defendant ſhould have *averred, that he was in Priſon*; and adjudged, that he ſhould; becauſe the Intent of the Statute was, that there ſhould be an abſolute and poſitive Compoſition between the Parties, either to take leſs than the Debt, or to give a longer Time of Payment, but not to Diſcharge the whole Debt of the Creditors: Now the Compoſition in this Caſe was not abſolute, but depended on an Incertainty; for it was to pay 2 *s.* in the Pound, *Ita quod* he paid it within five Years *after he ſhould be diſcharged out of Priſon*; and here the *Ita quod* made it a Condition precedent, for he muſt be diſcharged out of Priſon before he paid the Money: Now by this Plea *non conſtat* that the Defendant ever was in Priſon; and if ſo, then the Condition precedent never happened, and is never likely to happen; ſo then the Compoſition amounts to no more, than that the Defendant ſhall never pay the Money, which is void in Law; becauſe all Compoſitions by Vertue of this Act work by Way of Defeaſance. *Paſch.* 1 *Annæ. Far.* 10. *Feltham* verſus *Cudworth.*

Baptiſm. See Clergymen.

Bargain and Sale.

Where 'tis good, and by what Words made. (A)
Caſes where 'tis not good. (B)
Pleadings in it, good, and not good. (C)

(A)

Where 'tis good, and by what Words made. See *Uſes* (G) 2. *Fines.* (G) 9.

1. DEbtor to the Queen in 800 *l.* to be paid 20 *l.* every Year, till the Principal Sum was paid, covenanted with her to convey to the Lord Treaſurer, and his Heirs, certain Land to the Uſe of the Covenantor and his Heirs, until Default of Payment of either of the ſaid Sums, and after ſuch Default, then to the Uſe of the Queen, her Heirs and Succeſſors, until they ſhould have received out of the Profits the aforeſaid Debt, *and after the ſame was paid, then to the Covenantor and his Heirs*; and he levied a Fine to the Lord Treaſuer to the Uſes aforeſaid, and afterwards he *bargained and ſold* the Lands to a Stranger, the Money was not paid, the Queen entered and granted the Lands to *G. D.* and his Heirs, until the ſaid Debt ſhould be paid, which was aftewards paid and received out of the Profits; adjudged, that the Bargainor, at the Time of the *Bargain and Sale*, had an Eſtate in Fee, determinable upon Default of Payment, *&c.* which Eſtate paſſed by Bargain and Sale, and not the new Eſtate which accrued to him *by the Limitation to him and his Heirs*, after the Debt paid; becauſe that Eſtate was not in Being at the Time of the Bargain and Sale made; but if the Conveyance had been either by Fine or Feoffment, inſtead of Bargain and Sale, in ſuch Caſe, all Uſes and Poſſibilities had been carried away by Operation of it. *Mich.* 28 *Eliz.* 1 *Leon.* 33.

2. Te-

2. Tenant in Fee demiſed his Lands to *Husband and Wife*, *Habendum* to them for their Lives, Remainder to another for Life, rendring 40 *l.* Rent half-yearly, during their Lives; the *Husband died*, afterwards the Leſſor, *in Conſideration of* 10 *l.* to him paid, *demiſed and granted* the ſaid Lands to *G. D. habendum* to him for *99 Years*, from the Date of the Indenture, rendring Rent, &c. the Wife did not attorn; adjudged, that the Words * *Demiſe and Grant*, when 'tis made in *Conſideration of Money paid*, do amount to a Bargain and Sale for the ſaid Years, and that 'tis immediately executed by the Statute 26 *H.* 8. of *Uſes*, and there needs no *Enrollment*, becauſe only a Term for Years, and no Freehold paſſes; adjudged likewiſe, that if a Father, *in Conſideration of Money*, *covenant to ſtand ſeized* to the Uſe of his Son in Fee, if the Deed is inrolled, 'tis a good Bargain and Sale, tho' thoſe Words are omitted, becauſe it amounts to as much; ſo if a Man *in Conſideration of Money*, *alien and grant* his Lands in Fee by Deed indented and enrolled, the ſame amounts to a *Bargain and Sale*, and the Land ſhall paſs without Livery. 8 *Rep.* 43. *Foxe*'s Caſe.

* Cro. Eliz. 166. Taylor & Veale.

3. *Bargain and Sale* was made by Tenant in Tail of a Houſe in *London*, and this was in order to make a *Tenant to the Præcipe* to ſuffer a *Common Recovery*; two Days afterwards the ſame Tenant in Tail made a *Feoffment* to the ſame Perſon, and of the ſame Meſſuage, which was executed by *Livery and Seiſin*; adjudged, that the Houſe did paſs by the *Bargain and Sale* tho' not *enrolled* (for Houſes in *London* are out of the Statute of Enrollment) and not by the *Feoffment*; becauſe it was made to the ſame Perſon who had the Inheritance of the Houſe at that Time, by Vertue of the Bargain and Sale, and a *Poſſeſſion executed* ſhall always hinder a *Poſſeſſion executory*. *Yelv.* 123. *Darby* verſus *Bois*.

(B)

Not good.

1. THE Bargainor reciting in the Deed, that whereas *G. D.* became bound for him in ſeveral Recogniſances and Bonds; now *for divers Conſiderations*, he bargained and ſold the Lands to him and his Heirs; the Deed was enrolled within ſix Months, but it was not found that *any* * *Money was paid*; adjudged, this was not a good *Bargain and Sale*, becauſe in every ſuch Conveyance there ought to be *quid pro quo*; but if there had been apt Words in it, the ſame might be good by way of Covenant; for if the Father *Bargains and Sells* his Lands to his Son, no Uſe ariſeth by ſuch a Conveyance; but 'tis a good Conſideration to raiſe an Uſe by Way of *Covenant*. *Cro. Eliz.* 394. *Ward* verſus *Lambert*. *Moor* 569. *Fiſher* verſus *Smith*. *S. P.*

* Poſtea (C) 5.

2. The *Lord Lumley*, 15 *Junii Anno* 22 *Eliz.* by Bargain and Sale conveyed the Manor of *Huzelbury Brian in Com. Dorſet*, to the *Earl of Northumberland*, and his Heirs, *with a Covenant for farther Aſſurance*; and becauſe the Manor was held *in Capite*, the ſaid Earl, 3° *Sept.* in the ſame Year, procured a Licenſe for the Alienation in *Octab. Michaelis* following, the *Lord Lumley levied a Fine*, and 2 *die Novemb.* the Deed was enrolled, and not before; whereupon a *Sci. fa.* iſſued out of the Exchequer againſt the Tertenants for a Fine, upon an Alienation of the Lands, made by this *Bargain and Sale* without Licenſe; the *Earl of Northumberland* appeared, and pleaded all this Matter, and averred, that the *Fine* was levied by Vertue of the *Covenant for farther Aſſurance*; and upon Demurrer to this Plea the Defendant had Judgment; becauſe the Alienation by the *Bargain and Sale*, *was not* compleat till the Enrollment, and the Fine being levied after the Licenſe was procured, and before the Deed was enrolled, the Earl was in Poſſeſſion by Vertue of the Fine, which had prevented the Operation of the Deed before it was enrolled. *Moor* 337. *The Earl of Northumberland*'s Caſe.

(C)

Pleadings in it, good, and not good.

2 Cro. 291. 1. DEBT upon a Leaſe for Years, in which the Plaintiff declared, that by Indenture, bearing Date 27*th Nov. G. D.* in Conſideration of ſo much Money, bargained and ſold the Reverſion to him in Fee, which Indenture *was Inrolled* ſuch a Day, according to the Statute; and becauſe *he did not ſhew in what Court it was inrolled*, the Plea was held ill; for 'tis unreaſonable to put the Leſſee to ſearch the Courts at *Weſtminſter*, and the Rolls of the Clerks of the Peace. *Yelv.* 313. *Woolby* verſus *Purley*. Inrollment. (A) 9. *S. C.*

2. The Leſſor made a Leaſe for Years, rendring Rent, and afterwards he bargained and ſold the Reverſion to the Plaintiff, who brought an Action of Debt for the Rent, and averred, that the Deed of Bargain and Sale was enrolled within ſix Months, *according to the Statute*; it appeared, that this Deed bore Date before the Rent became due, but that it was actually due before the Expiration of the ſix Months: It was objected againſt the Declaration, that the Plaintiff had not ſhewed, whether the *Deed was enrolled before or after the Day the Rent became due*; but adjudged, that it being ſet forth to be enrolled, according to the Statute, is well enough, but the Bargainee is entituled to the Rent before the Enrollment of the Deed. *Latch* 157. *Hall* verſus *Dews*. 5 *Jac. Alſop*'s Caſe. *S. P.*

3. In Ejectment, the Defendant pleaded a Special Bar, but it was inſufficient; the Plaintiff replied, and conveyed a Title to his Leſſor by Bargain and Sale, acknowledged before *W. R.* a Juſtice of the Peace of the *Weſt Riding in Yorkſhire*, and before *R. B.* Clerk of the Peace there, which was enrolled within ſix Months: Upon Demurrer to this Replication, it was objected, that it was ill; becauſe the Plaintiff had not ſet forth, that the Lands which were conveyed, did lie within the *Weſt Riding*, &c. but adjudged, tho' the Statute requires it to be acknowledged before a Juſtice of the Peace of the *County*, yet it will ſerve before a Juſtice of the Peace of the *Weſt Riding*, if the Lands lie there. *Hill.* 13. *Jac. Hob.* 128. *Perkin* verſus *Perkin*. *Poſtea* Inrollment. (A) 7. S. C.

4. In Debt for Rent, the Plaintiff declared on a Leaſe for Years, made by *W. R.* who by a certain Indenture, *debito modo irrotulat'* in Chancery, did ſell the Reverſion to the Plaintiff: Upon *Nil debet* pleaded, the Plaintiff had a Verdict; but the Judgment was arreſted, becauſe he did not ſet forth, that the Inrollment was within *ſix Months*, or *ſecundum formam Statuti*; 'tis true, he ſet forth, that it was *debito modo irrotulat'*, but that might be at Common Law; and the *Verdict* will not make a Declaration good, which is incertain in the very Foundation of the Action. *Allen* 19. *King* verſus *Somerland*. Latch 19. Style 34.

5. In Replevin, the Caſe upon the Pleadings was, that the Defendant made a Title under Bargain and Sale, inrolled within ſix Months, and the Statute of Uſes, and did not ſhew that it was *in Conſideration of* * *Money*; but adjudged, that *after a Verdict*, as this Caſe was, it ſhall be intended, that Evidence was given at the Trial of Money paid. 1 *Vent.* 108. *Monington* verſus *Williams*. Raym. 200. 1 Lev. 308. * Antea (B) 1.

Baron and Feme.

What Chattels real of the Wife veſts in the Husband by Intermarriage. (A)

What Bones and other Goods and Eſtate of the Wife are given to the Huſband by Marriage. (B)

Where Bonds, and other Eſtate of the Wife, are not veſted in the Husband by the Marriage. (C)

What Acts ſhe may lawfully do during the Coverture, and which bind her and her Husband, and what Acts ſhe may do, when a Widow, relating to Things ariſing during the Coverture, and what will ſurvive to her after the Death of her Husband, and where he and ſhe may ſue alone. (D)

What Acts ſhe cannot lawfully do alone, nor with her Husband during the Coverture. (E)

What Acts of the Husband alone, before or during the Coverture, are good, and not good, and what Acts bind him and the Right of his Wife to anſwer Damages, and where he may ſue and be ſued alone. (F)

What Acts of the Husband do not bind the Wife. (G)

Where the Husband alone may bring an Action for an Injury done to his Wife, and where he ſhall be charged for Acts done by her as Executrix, and otherwiſe, and where not. (H)

Where they muſt join in Actions, where not, and be joined when Defendants, and where not, and other Caſes concerning married Women. (I)

Where they ſhall take by Moieties, where not, tho' they are but one Perſon in Law. (K)

Of Actions brought againſt them, and of Pleadings in Actions brought by and againſt them, and by and againſt their Leſſors and Leſſees. (L)

(A)

What Chattels real of the Wife ſhall be veſted in the Husband by the Marriage, and what not. See *Marriage*. (B) *Execution*. (C) 13. *Indictment*. (I) 7.

1. LESSEE for Years covenanted with the Leſſor, that if he, or his *Executors*, *aliened the Term*, it ſhould be lawful for him, &c. to enter; the Leſſee made his Wife *Executrix*, and died; the Widow married a ſecond Husband, who *aliened*, &c. adjudged, that by *the Marriage the Term veſted in the ſecond Husband*, as a Gift of the Wife; and if he had not aliened it ſhould return to her, if ſhe had ſurvived, this being a *Chattel real*; but perſonal Chattels are abſolutely in the Husband. *Paſch.* 28 *H.* 8. *Dyer* 3.

2. A Feme ſole, being poſſeſſed of a *Term for Years in Lands*, *married*, and then ſhe and her Husband mortgaged the Term for 20 *l.* but before the Day of Payment, the Wife died; and afterwards the Husband paid the Money at the Day, and entered, and having married a ſecond Wife, he made her Executrix, and died; then *G. D.* took out Adminiſtration of the Goods of the firſt Wife; but adjudged againſt him, for tho' the Leaſe did originally belong to the firſt Wife, and the Husband was poſſeſſed of it in her Right, ſo that if he had purchaſed the Inheritance the Leaſe had not been merged in it, yet by the Intermarriage he had a Power to alien the Term; and therefore he having ſurvived his Wife, he ſhall enjoy it againſt her Adminiſtrator. *Hob.* 3. *Young* verſus *Radford*. *Poſtea* Marriage. (B) 1. *S. C.* See *poſt.* (L) 1.

3. The *Husband poſſeſſed for a Term of Years in Right of his Wife*, made a Leaſe for Years of the ſame Lands, *to commence after his Death*, and in a ſhort Time afterwards he died, and his Wife ſurvived; adjudged, that the Leſſee of the Husband ſhall have the Lands during his Leaſe; becauſe the Husband, during his Life, might have diſpoſed or aliened the whole Term which his Wife had in thoſe Lands; and if he might diſpoſe of the Whole, by Conſequence he may diſpoſe any Part of it; but the Remainder of the Term, whereof no Diſpoſition was made by him, ſhall return to the Wife. *Mich.* 35 *Eliz. Poph.* 5.

4. The Husband being *poſſeſſed of a Term of twenty-one Years in Right of his Wife*, made a Leaſe thereof for *ten Years*, rendring Rent to him, or to his Executors or Aſſigns, and died; adjudged, that the Executors of the Husband ſhall not have the Rent; and that if after ſuch Leaſe the Husband had aſſigned the Reverſion of the Term, the Aſſignee ſhould not have the Rent; but in *Lampit's* Caſe, there is a contrary Reſolution, (*viz.*) if the Husband make a Leaſe of Part of the Term, which he had in Right of his Wife, rendring Rent, and dieth, his Executors ſhall have the Rent, tho' the Wife ſhall have the Reverſion of the Term; for the Rent was not incident to the Reverſion, becauſe ſhe was no Party to the Leaſe; ſo likewiſe, if the Husband had made a *Grant of the whole Term, upon Condition* that the Grantee ſhould pay a Sum of Money to his Executors, *&c.* and if after his Death they had entered upon a Breach of this *Condition*, this had been a good Diſpoſition of the whole Term, and the Wife had been barred, becauſe the whole Intereſt was paſſed by her Husband. 1 *Inſt.* 46. 10 *Rep. in Lampit's* Caſe. *S. P.* See *Godb.* 279. *Blaxton* verſus *Heath. S. P. Poph.* 145. *S. C. Poſtea* Rent. (C) 2. *S. C.* 4 *Leon.* 185. *S. P.*

5. *Feme ſole being Leſſee for Years*, the Leſſor covenanted with her to *repair* the Houſes during the the Term; afterwards ſhe married, and not long after ſhe died; adjudged, that the Husband ſhall have an Action of Covenant againſt the Leſſor for not repairing, and this he may have as well upon the Convenant in Law, upon the Words *Demiſe and Grant*, as upon an expreſs Covenant. 5 *Rep.* 17. *in Spencer's* Caſe.

* Poſtea 12. S. C.

6. *Feme ſole, Leſſee for Years*, *married*, and afterwards her Husband * purchaſed the Fee-ſimple of the Lands, the Term is extinct, becauſe the Husband had done an Act to deſtroy it; but if ſhe had married with him who had the Reverſion, in ſuch Caſe the Term ſhould not be extinguiſhed, becauſe the Husband had done no Act to deſtroy it. *Paſch.* 17 *Eliz. Godb.*

7. The *Husband was poſſeſſed of a Term for eighteen Years in Lands*, and of a Reverſionary Term for forty Years in the ſame Lands, and he dying Inteſtate, his Wife adminiſtred and married a ſecond Husband, who made a Leaſe of thoſe Lands for twenty-one Years, rendring Rent, and died, having firſt made a Will and an *Executor*, the Queſtion was, whether the Wife, or this Executor of her ſecond Husband, ſhould have the Rent? it was inſiſted for the Executor, that he ſhould have it; becauſe the firſt Term *for eighteen* Years was veſted in him by the Intermarriage, and he having made a Leaſe of the Lands for ſo long Time, and longer, nothing of that Term remains in the Wife; but for the laſt *three Years*, to make up the 21 Years, that being derived out of the Reverſion, the Wife ſhall have the Rent thereof, as annexed to the Reverſion. *Cro. Eliz.* 278. *Loftus's* Caſe.

8. The *Lady Cromwell was poſſeſſed of ſeveral Leaſes*, and conveyed them over in *Truſt*, and afterwards ſhe married *Sir John St. John*, then ſhe received the Money which came of the Truſt, and with Part of it ſhe bought *Jewels*, and left the other Part in ready Money, and died; her Husband adminiſtred; adjudged, that the Money received upon the *Truſt* was the Money of the Husband; but that a Leaſe conveyed by a Feme ſole *in Truſt*, for the Uſe of her ſelf, who afterwards marrieth, cannot be diſpoſed by the Husband; and if ſhe die, he ſhall not have it, but the Executors of the Wife. *March* 44. *Sir John St. John's* Caſe.

9. A Man and a Feme ſole were *Jointenants for Life*, the Woman married *W. R.* and then the Husband and Wife made a Leaſe for Years of their Moiety; adjudged, that this Leaſe was voidable by the Wife, if ſhe ſurvive her Husband, but ſhall ſtand againſt the other Jointenant after the Death of the Wife. *Bridgm.* 44. *Smallman* verſus *Agborow*. *Poſtea* Jointenants. (F) 8. *S. C.*

10. An *Annuity* was granted to a Feme ſole, who afterwards married; the Rent was in Arrear, and the Annuity determined by the Death of the Wife; but adjudged, that the Husband ſhall have an Action of Debt at the Common Law for the Arrears; becauſe an Annuity is more than a *Thing in Action*, for it may be granted over. *Paſch.* 26 *Eliz. Owen* 3.

Palm. 206. 2 Cro. 617.

11. A *Feme ſole made a Leaſe for Years*, rendring Rent, and afterwards *married*, and after the Marriage the Wife received the Rent, the Queſtion was, whether that Receipt ſhall bind the Husband, or whether he may diſagree to it; adjudged, that the Payment to her is void in Law, without giving Notice of the Marriage to the Leſſee. *Mich.* 19 *Jac. Sir Paul Tracy* verſus *Dutton*. *Bendl.* 93. *Poſtea* Nomine pœnæ. (A) *pl.* 6. *S. C.*

12. A

12. A *Feme Executrix was poſſeſſed of a Leaſe for Years*, of Lands, her Husband purchaſed the Reverſion in Fee, after the Determination of the Leaſe for Years; adjudged, that if ſhe ſurvive, the Term is *extinct* as to her; but as to the Creditors, it ſhall have a Continuance, and be *Aſſets* in her Hands. *Moor* 54. Antea 6. S. C.

13. The Husband poſſeſſed of a Term, in Right of his Wife, made a Leaſe of Part of it, rendring Rent, and afterwards made a Will, and *T. S.* Executor, and died; adjudged, that the Executor of the Husband ſhall have the Rent, tho' the Wife hath the Reverſion, becauſe ſhe was no Party to the Leaſe. 2 *Lev.* 100. *In Drew and Baily's* Caſe.

(B)

Where Bonds and other Goods, and Eſtate of the Wife ſhall be veſted in the Husband by Marriage.

1. THE Cogniſee of a Statute died Inteſtate, and Adminiſtration was granted to the Widow, who married a ſecond Husband, who was indebted to the King; and then the ſaid ſecond Husband and Wife aſſigned this Statute to the King in Satisfaction of the Debt; adjudged, that this Aſſignment was good, notwithſtanding *the Act* 7 *Jac.* which makes Aſſignments of Debts void, other than ſuch as did originally and *bona fide* grow due to the King's Debtor; now, tho' this did not originally grow due to the King's Debtor, for he had the Statute in Right of his Wife, who was Adminiſtratrix to her firſt Husband, yet by the Intermarriage, the Intereſt and Power of the Eſtate was veſted in him, and his Releaſe of it had bound the Wife; and if ſo, then by the ſame Reaſon he might aſſign it. *Hob.* 253. *Breadman* verſus *Coles.*

2. The Husband married a Widow, who had a conſiderable perſonal Eſtate, which Widow had a Grandchild; the Wife died, and the Queſtion was, whether the Husband ſhould maintain the Grandchild within the Statute? and adjudged, that he ſhould; becauſe the Eſtate, which he had with the Wife, *tranſit cum onere.* 2 *Bulſt.* 346. *Worceſter* verſus *Gerrard.*

3. Feme covert was Tenant for Life, Remainder to another for Life, and ſeveral *Hops* were growing out of the old Roots on the Lands in Queſtion, when the Wife died; adjudged, that the *Hops* ſhall go to the Husband, and not to the Tenant for Life in Remainder; becauſe there Things which grow by the Manurance and Induſtry of the Owner, and therefore like *Emblements*, ſhall go to the Husband; or if no Husband, then to the Executor or Adminiſtrator of the Tenant for Life. *Cro. Car.* 390. *Latham* verſus *Atwood.*

4. The Wife had a Portion given her, the Payment whereof was *charged on certain Lands*, and the Husband ſettled a Jointure on her in Marriage, and died before he received the Portion; it was decreed for his Executor, that this is not in the Nature of a *Choſe in Action*, but of a *Rent*; becauſe 'tis charged *on Lands*, and that 'tis given to the Husband by the Intermarriage, and by Conſequence goeth to his Executor, and not to his Wife ſurviving. 1 *Ch. Rep.* 189. *Withers* verſus *Kelſea.*

5. In an Action of Debt, brought by the *Husband alone*, upon a Bond made to his Wife *dum ſola*; the Defendant demanded *Oyer* of the Condition, which was to *pay her* ſo much, and then demurred to the Declaration; but the Plaintiff had Judgment. 3 *Lev.* 503. *Howell* verſus *Maine.* See (D) *pl.* 17.

(C)

What Bonds and Goods, and Eſtates of the Wife, are not veſted in the Husband by Intermarriage. See *Marriage.* (C) per Totum.

1. THE Husband deviſed, that after his Debts and Legacies were paid, the Reſidue of his Goods ſhould be to his Wife, to diſtribute for the good of his * Soul, and he made her *Executrix*, and died; afterwards ſhe married a ſecond Husband, who made *G. D.* Executor, and died, againſt whom the Widow brought an Action of *Detinue* for the Goods of her firſt Husband; and adjudged good, for they were not veſted in the ſecond Husband by the Intermarriage; becauſe the Wife had them as *Executrix*, and not as a Legatory to her firſt Husband; and ſo ſhe being poſſeſſed of them in the Right of another, they were not given to the ſecond Husband by the Intermarriage. 16 *Eliz. Dyer* 331. *Hunks* verſus *Alborough.* 1 And. 22, 157. * *And to pay his Debts.* 1 And. 22.

2. In a Special Verdict the Caſe was, a Feme ſole being ſeiſed of Lands, deviſed the ſame to *T. S. and his Heirs*, whom ſhe afterwards *married*, and ſoon after made a parol Revocation of this Will, declaring that her Husband ſhould not have the Lands, and died; after whoſe Death the Queſtion was, who ſhould have the Lands, the *Husband, or the Heir of the Wife*? it was inſiſted for him, that the Will was good, and ſhall be guided as Circumſtances were when it was made; for ſhe was at that Time of ſound Memory, and capable of making a Will, and ſhe had determined her Power to revoke it by marrying; becauſe after Marriage, ſhe is to be guided and directed by her Husband, and hath no Power, without his Aſſent, to make or revoke a Will; to which it was anſwered, and ſo adjudged, that true it is, ſhe cannot after Coverture make a

Will; but if the Will ſhe made before Coverture, ſhould by Operation of Law continue to be her Laſt Will, then ſhe who made that Will cannot alter it in her Life-time, for ſo it muſt neceſſarily be, unleſs the Law ſhall adjudge this Will to be void; and accordingly it was adjudged to be a void Will. 1 *And.* 181.

3. A Widow, who was an *Executrix*, married, and then ſhe and her Husband join in an Action, in which ſhe, as Executrix, and her Husband declared, but he was outlawed, and this Outlary was pleaded in Bar to the Action; adjudged, that he did not forfeit the Goods by the Outlary, becauſe he had them in Right of his Wife, as Executrix. *Trin.* 14 *Jac.* 3 *Bulſt.* 211. *Hix* verſus *Hanſon.*

W. Jones 248. 4. Debt brought by a Man and his Wife as Adminiſtratrix to her firſt Husband, upon a Bond due to him, in which they had a Verdict, and afterwards ſhe died before Execution, then the Husband brought a *Sci. fa.* to have Execution, *&c.* but adjudged, that it did not lie by him, becauſe it was a Duty which was demanded by the Wife in the Right of another; and tho' they both recovered, yet ſhe dying before Execution, the Duty remains to him who has the Right of Adminiſtration to her firſt Husband the Inteſtate; and tho' the ſecond Husband was a Party to the Judgment, yet he had no Property in the Debt, but he who brings a *Sci. fa.* muſt have both a Privity and Property to the Debt; 'tis true, if the Judgment had been entered, and afterwards the Wife had died, in ſuch Caſe the Husband might bring a *Sci. fa.* becauſe the Debt being recovered, the Husband ſhall have it after her Death. *Cro. Car.* 150. *Beaumont* verſus *Long*, and 464, and 334. *S. P. Poſtea* Sci. fa. (F) 4. *S. C.* See *Poſtea pl.* 7. See *Stat.* 17 *Car.* 2. *cap.* 8.

5. The Leſſor made a Leaſe *for Years* of Lands to the Leſſee, *to the Uſe of the Siſter* of the Leſſor, whom the Leſſee afterwards married, and died; after his Death the Widow married a ſecond Husband, and then ſhe died, and this ſecond Husband ſued the *Adminiſtrator of the Wife* in Chancery to have this Term; but decreed, by the Advice of all the Judges, that he had no * Allen 15. * Right to it, nor to the Uſe of it. *Cro. Eliz.* 466. *Witham* verſus *Waterhouſe.* *March Rep.* 44. 88. *S. P.*

6. A *Bond* was given to a *ſingle Woman*, ſhe afterwards married, and ſoon after her Marriage died; *W. R.* took out Letters of Adminiſtration to the Goods and Chattels of the Woman, and brought an Action of Debt upon this Bond againſt the Obligor, who pleaded, that by the Marriage the Debt became due to the Husband; adjudged, that it did not, for it was a Thing in Action, and not recovered in her Life-time. *Trin.* 24 *Car. Style* 105. *Cowles* verſus *Lockyer.*

7. In *Beaumont and Long*'s Caſe, the Husband and Wife, who was Adminiſtratrix to her Huſband, joined in an Action of a Debt on a Bond due to her firſt Husband, and recovered, and then the Wife died before Execution, and the Husband brought a *Sci. fa.* to have Execution; but adjudged, that it did not lie, becauſe the Judgment was obtained by them in Right of the firſt Husband; but if the Woman had recovered a Judgment *dum ſola*, or if a Debt had been due to her *dum ſola*, and afterwards ſhe marries, and then Husband and Wife bring an Action for that Debt, and recover, and the Wife dies before Execution, in ſuch Caſe the Husband ſhall have Execution by *Sci. fa.* becauſe the Debt being *originally due to the Wife*, the Recovery in the Action brought by her Husband and her, is in her Right, and by Conſequence 'tis become a proper Debt to him, and therefore he ſhall have a *Sci. fa.* after her Deceaſe; but if ſhe happen to die before the Debt paſſes *in rem judicatam*, (*i. e.*) before 'tis recovered, then the Husband cannot ſue for it; but if 'tis once recovered, then by the awarding Execution he ſhall have it by Survivorſhip. 1 *Mod.* 179. *Miles*'s Caſe, and 9 *Will.* 3. *Goodyear*'s Caſe. *S. P.* See *Antea pl.* 4.

(D)

What Acts ſhe may lawfully do during the Coverture, and which bind her and her Husband, and what Actions ſhe may have when a Widow for Things ariſing during the Coverture, and what ſurvives to her after the Death of her Husband, and where ſhe may be ſued alone, and be ſued alone. See *Covenant.* (F) 27.

1. TEnant *for Life*, Remainder to his Daughter, who was a Feme covert; the Father made a *Feoffment in Fee*, with Warranty, and afterwards *levied a Fine* to certain Uſes, and died, the Daughter, for her ſelf, and in the Name of her Husband, *entered*, and claimed the Inheritance; adjudged, that the *Entry* by the Wife alone, without her Husband, was good; and that the Warranty deſcending upon her during the Coverture did not bind her, becauſe her Entry was lawful. *Cro. Eliz.* 72. *Ards* verſus *Simpſon.*

2. A *Fine levied by the Husband and Wife*, is good, becauſe ſhe is examined, either by a Judge, or by a Perſon truſted by the King's Writ to enquire whether ſhe freely conſents to it; alſo if ſhe levy a Fine alone and without her Husband, it ſhall ſo far bind her, that ſhe ſhall never be admitted to ſay, that ſhe was a Feme covert at that Time, but her Husband may enter and avoid the Fine. 7 *Rep.* 8. in the Counteſs of *Bedford*'s Caſe, and *Hob.* 227. *Needler* verſus *Biſhop of Winton.*

3. *Husband and Wife ſuffered a Recovery* of an Houſe in *London*, in a Writ of Right brought there, which by *Cuſtom* binds as ſtrongly as a Fine at Common Law, and they declared the Uſes

to themſelves and their Heirs, until they had made a Leaſe of the Lands for forty Years, *&c.* rendring Rent, and afterwards to the Uſe of the Husband and Wife, and the Heirs of the Wife for ever; the Leaſe was made accordingly, and the Husband died; adjudged, that the Wife could not avoid this Leaſe, but ſhe ſhall hold under this Recovery, ſo as the *Term ſhall precede her Eſtate*, tho' the Limitation was to her Husband and to her ſelf, before the Leaſe was made; but then it was a Queſtion, that ſince the Rent was reſerved before ſhe had any Eſtate, what Remedy ſhe might have to recover it. *Trin.* 12 *Eliz. Dyer* 290. See 2 *Eliz. Dyer* 187.

4. In Propriety of Speech a *Feme covert cannot make a Will*, becauſe ſhe is by Law ſo entirely under the Power of her Husband, that what ſhe doth cannot be called her *Will*, but it may properly be called her *Appointment*; and the uſual Courſe is, for the intended Husband to enter into a * Bond to ſome Friend of the intended Wife, before Marriage, with a Condition, that he ſhall permit her to make a Will, or any Writing purporting a Will, and to diſpoſe ſo much Money, or ſuch Legacies to ſuch a Value as ſhall then be agreed on, and that he will pay what ſhe ſhall appoint, not exceeding that Value, and this Will binds him. *Cro. Eliz.* 27. *Eſton* verſus *Wood. Cro. Car.* 219. *Marriot* verſus *Kinſman. S. P. Poſtea pl.* 9. * Poſtea 9, 10, 11.

5. A *Rent* was granted to *Husband and Wife* for their joint Lives, which was afterwards in arrear, then the Husband died, and after his Death more Rent was arrear, and then the Wife died Inteſtate, and the Adminiſtrator brought an Action of Debt, as well for the Rent due in the Life-time of the Husband, as for that which was due to his Widow, the Inteſtate, after his Death; and adjudged, that the Action was well brought, becauſe the Arrears due in the Life-time of the Husband ſurvived to the Wife, and were due to her as well as what was in arrear in her Life-time. *Cro. Eliz.* 791. *Temple* verſus *Temple. Poſtea* Rent. (B) 9. *S. C.*

6. *Husband and Wife levied a Fine* of the Lands of the Wife to the Uſe of themſelves for their Lives, Remainder to the Heirs of the Wife: *Provided* always, that it ſhall and may be lawful for the *Husband and Wife*, at any Time during their Lives, to make Leaſes for twenty-one Years, or three Lives, *&c.* The Wife, during the Coverture, made a Leaſe for twenty-one Years; adjudged a good Leaſe againſt the Husband, tho' made by her alone whilſt ſhe was Covert, by Reaſon of this Proviſo. *Paſch.* 21 *Jac. Godbolt* 327.

7. Grant of a Rent jointly to Husband and Wife, he died, and the Widow took out Adminiſtration, and afterwards brought an Action of Debt as Adminiſtratrix, for Arrears of Rent incurred *in the Life-time of her Husband*; adjudged, that the ſame belonged to her *in jure ſuo proprio*, and not as *Adminiſtratrix* to her Husband, therefore the Declaring as Adminiſtratrix was *Surpluſage. Moor* 887. *Dembyn* verſus *Brown.*

8. An Action was brought againſt a *Feme covert*, as if ſhe had been ſole, and Judgment by Default; and afterwards the Husband and Wife brought a Writ of Error, and aſſigned for Error, that the Judgment was obtained againſt her as *Sole* when ſhe was *Covert: Per Curiam*, if ſhe was Sole, and pending the Writ ſhe married, it ſhall not abate the Writ, but in ſuch Caſe the Recovery againſt her is good; but if after the original Proceſs ſued, and before the Return ſhe marry, the Writ ſhall abate; and becauſe it did not appear to the Court, that ſhe was Covert at the Time of the original Proceſs ſued out, which ought to be expreſly averred in aſſigning the Error, the Judgment was affirmed. 2 *Roll. Rep.* 53. *Heydon* verſus *Miller.*

9. Debt upon Bond, the Condition whereof was, that whereas the Obligor being about to marry a Widow who was poſſeſſed of ſeveral Goods, if he ſhould permit her to *make a Will*, and to diſpoſe in Legacies not exceeding 50 *l.* and pay and perform what ſhe *appointed*, not exceeding 50 *l.* that then the * Bond ſhould be void; the Defendant pleaded, that ſhe did not make a Will; the Jury found, that ſhe did make a Will, and diſpoſed Legacies not exceeding 50 *l.* but *that ſhe was a Feme Covert at that Time*; adjudged for the Plaintiff, for tho' ſhe could not make a Will by Law, or diſpoſe any Goods without her Husband's Conſent, ſhe being a Feme covert, yet this was a Will within the Intent and Meaning of the Condition of her Husband's Bond, and 'tis a *good Appointment* which he was bound to perform. *Cro. Car.* 219. *Mariot* verſus *Kinſman.* See *Antea pl.* 9. *Antea 4. Poſtea 10, 11.

10. Debt upon Bond conditioned, that whereas the Defendant was about to marry a Widow, *&c.* if he ſhould ſurvive her, then if within three Months after her Deceaſe he ſhould pay to the Obligee the Sum of 300 *l.* to and for ſuch Uſes as his intended Wife, by any Writing under her Hand *ſhould appoint*, then the Bond ſhould be void, and the Breach was aſſigned in Non-payment of the Money: The Defendant pleaded, that the Wife made *no Appointment*; the Plaintiff replied, that ſhe made *a Will*, and did thereby appoint the Payment of ſo much Money to ſuch Perſons, and that he had not paid it; and upon a Demurrer to this Replication the Plaintiff had Judgment, for tho' in Strictneſs a Feme covert cannot make a *Will* without the Aſſent of her Husband after 'tis made, yet *this Appointment* which ſhe made in Form of a Will, is good. *Cro. Car.* 376. *Tylley* verſus *Peirce.*

11. Debt upon Bond conditioned, that whereas the Obligor being about to marry a Widow, if he ſhould permit her to make a Will to ſuch a Value, *to be paid* within a Year after her Deceaſe, then the * Bond to be void, and the Breach was aſſigned in Non-payment; the Defendant pleaded, that he did permit her to make a Will, *&c.* but upon a Demurrer to this Plea the Plaintiff had Judgment, for the Plea was not good; becauſe the Defendant did not plead, that he had paid the Money according to her Appointment; for, otherwiſe, the whole Condition of the Bond is not anſwered. *Cro. Car.* 376. *Sherman* verſus *Lilly.* 2 *Roll. Abr.* 247. *S. C.* *Ante 4.

2 Roll. Rep. 264.

12. A *Widow* brought an Action of *Treſpaſs*, which ſhe laid to be done by the Defendant 1 *May*, with a *Continuando* to the *16th of May*, and had Judgment in *C. B.* and now upon a Writ of Error in *B. R.* it was objected and aſſigned for Error, that ſhe was *married on the firſt Day of May*, and this Treſpaſs being with a *Continuando* to the *16th of May*, did not lie, for what was done in the Life-time of her Husband; but adjudged, that a Treſpaſs done on the Lands of the Wife during the Coverture, is puniſhable by her after the Death of the Husband, for the Damages ſurvive to her together with the Land; and it hath been adjudged, that ſhe may have an Action for Trees felled on her Land during the Coverture, *&c.* *Palm.* 313. *Peters* verſus *Roſe.*

2 Mod. 172. Brook *v.* Turner.

13. The Man, before Marriage, Covenants with the Relations of his intended Wife, to permit her to make a Will of ſuch Goods, and accordingly, after Marriage, ſhe made a Will of thoſe Goods, and died; which Will being brought to the Prerogative-Court to be proved, the Husband ſuggeſted for a Prohibition, that the Teſtatrix was *Fœmina viro cooperta*, and ſo diſabled to make a Will, and accordingly a Prohibition was granted; 'tis true, the Spiritual Court hath the Probate of Wills, but a Feme covert cannot make a Will; 'tis likewiſe true, that the Husband may depart with his Right, and ſuffer his Wife to make a Will, but whether he hath done ſo, or not, is a Fact triable at Law, and not in that Court; for if ſhe diſpoſeth any Thing by her Husband's Conſent, the Property paſſeth from him to the Legatee, and 'tis properly the Gift of the Husband. 1 *Mod.* 211.

* Quære, *It was vacated on a Motion.*

14. *Sir Lewis Dives* acknowledged a Statute to one *Sir John Fenner*, who made his Wife, the *Lady Fenner*, Executrix, and died; ſhe proved the Will and married a ſecond Husband, and then ſhe alone, without her Husband, acknowledged Satisfaction, tho' in Truth the Money was never paid by the Cogniſor, and this was adjudged * good, tho' it was done during the Coverture. *Sid.* 31. *Fenner* verſus *Dives.*

Raym. 6. 3 Lev. 403.

15. A *Leaſe for Years* was made to *a Feme ſole*, in which Rent was reſerved, payable yearly; ſhe married, then the Rent was arrear, and the Term ſoon afterwards expired, and the Wife died, and an Action of Debt being brought againſt the Husband, the Defendant demurred to the Declaration, for that he was not chargeable, it being a Thing in Action, and not recovered in the Life-time of his Wife; but adjudged, that the Husband is chargeable, in reſpect that he received the Profits of the Lands. 1 *Lev.* 25. *Vane* verſus *Minſhull.* See (B) *pl.* 5.

16. Debt upon a Bond conditioned, that the Husband ſhould leave his Wife 80 *l.* at his Death, ſo that ſhe might peaceably enjoy it to her own Uſe; this Action was brought againſt the Adminiſtrator of the Husband, who pleaded, that he made his Wife Executrix, and left Goods and Chattels to the Value of 100 *l.* and deviſed, that ſhe ſhould pay her ſelf; and upon Demurrer to this Plea it was adjudged ill, becauſe he might owe Debts on Judgments or Statutes, ſo that ſhe might not be able to pay her ſelf; and his Eſtate may be ſo litigious, that it may be better for her to renounce the Executorſhip (as ſhe had actually done) and ſue the Adminiſtrator. 3 *Lev.* 218. *Thomaſon* verſus *Wood.*

17. Grant of a *Rent-Charge of* 20 *l. per Annum* to Husband and Wife, and a Covenant to pay to the Children 300 *l.* a-piece, and if Default ſhould be made of Payment of the ſaid 300 *l.* to the Sons at twenty-one, and to the Daughters at eighteen Years of Age, then the Grantor farther granted to the Husband and Wife, and to the Heirs of the Wife, an *Annuity of four Pounds, over and above the Annuity of* 20 *l. as a Forfeiture or Penalty to be iſſuing out of the ſame Lands, with a Clauſe of Diſtreſs*; they had Iſſue one Son, who was of full Age in *April* 1670, ſo that 300 *l.* was due to him, which not being paid, the ſaid *Annuity of* 4 *l. per Annum* was due likewiſe to him; that his Father died about ten Years afterwards, and ſome Time after that his Mother died Inteſtate, and Adminiſtration was granted to the Son, who diſtrained for 40 *l.* due to him of the ſaid *Annuity of* 4 *l.* before the Death of his Father, and in Replevin made Cogniſance, *&c.* the Queſtion was, that admitting this 4 *l. per Annum* to be an *independant Rent*, and not a *Nomine Pœnæ*, then whether the Arrears incurred in the Life-time of the Husband as well as thoſe which were due in the Life-time of the Wife, ſhall go to her Adminiſtrator, or not; and agreed by the Court, upon the Authority of *Temple's* Caſe, that the Arrears due in the Life-time of the Husband ſhall ſurvive to the Wife, and that after her Death it ſhall go to her Adminiſtrator. 2 *Lutw.* 1151. *Egerton* verſus *Sheafe.* *See* Nomine Pœnæ. (A) *pl.* 7. *S. C.*

Mod Caſes 162. Sale. (B) 6. S.C.

18. The Defendant, who was Adminiſtratrix to her late Husband, did, in his Life-time, deal in *Tea*, and ſold four Tubs to the Plaintiff, one of which ſhe took away, and left 50 *s.* in Earneſt for the other three Tubs; adjudged, that if the Husband had been living, he had been liable upon this Contract of his Wife, becauſe they *cohabited.* 1 *Salk.* 113. *Langfort* verſus *Tiler.*

19. In an Action on the Caſe for Goods ſold and delivered, the Evidence was, that the Defendant's Wife bought the Goods of the Plaintiff to make her Clothes, and that they *cohabited*; on the other Side it was proved, that ſhe was very extravagant, and that ſhe had no Occaſion for theſe Clothes, and that when the Husband laſt paid the Plaintiff, he warned the Plaintiff's Servant not to truſt her again, and to give his Maſter Notice of it; adjudged, that whilſt they cohabit the Husband is liable to all Contracts ſhe makes for Neceſſaries, becauſe in ſuch Caſes his Conſent ſhall be preſumed; but if the contrary appear, as it did in this Caſe, by the Warning given to the Servant, then there is no Room for ſuch a Preſumption. 1 *Salk.* 118. *Etherington* verſus *Parrott.*

Mod. Caſes 171.

20. Adjudged, that tho' the Wife is very lewd, yet whilſt ſhe *cohabits* with her Husband he is chargeable for all *Neceſſaries* which come to her Hands, becauſe he took her for better for worſe,

and ſo he is if he run away from her; and the like if he turn her away, for then he gives her Credit for Neceſſaries where-ever ſhe goes: But if *ſhe goes away from her Husband*, then, as ſoon as ſuch Separation is notorious, whoever gives her Credit, doth it at his Peril, for the Husband is not liable unleſs he take her again. 1 *Salk.* 119. *Robinſon* verſus *Greinold.*

21. *Aſſumpſit, &c.* for Wages and Money lent; on *Non Aſſumpſit* pleaded, the Defendant at the Trial proved ſhe was married, and her Husband in *France*, yet the Jury found for the Plaintiff; whereupon ſhe moved for a new Trial, the Verdict being againſt Evidence, but it was not granted, becauſe it ſhall be intended they were divorced; beſides, her Husband is an alien Enemy, and therefore ſhe ſhall be charged as a Feme ſole. 1 *Salk.* 116. *Deerly* verſus *Dutcheſs of Mazarine.*

22. An ordinary working Man married a Wife of the ſame Condition, and after Cohabitation for ſome Time, he left her, and the Woman worked on and got Money, and an Action being brought againſt her for her Diet whilſt they lived ſeparate; it was adjudged, that the Money ſhe earned ſhould be paid towards her Maintenance. 1 *Salk.* 118. *Warr* verſus *Huntley.*

(E)

What Acts ſhe cannot lawfully do alone, or with the Husband during the Coverture.

1. HUsband *and Wife* made a Leaſe for Years, reſerving a Rent; the Husband died, the Widow married again, and then her Husband and ſhe brought an Action of Debt for Arrears of Rent due on that Leaſe; the Defendant pleaded, that the Anceſtor of the firſt Husband was ſeiſed of Lands in Fee, and that the ſame deſcended from him to the firſt Husband, who was ſole ſeiſed, and ſo the Wife had nothing in the Lands at the Time of the Leaſe made; and upon Demurrer this was adjudged a good Plea, for where two join in a Deed, and one of them hath no Manner of Intereſt, it enures by Way of Confirmation only from the other; but in the principal Caſe it did not, becauſe one of the Leſſors being a *Feme covert*, the Deed is void. *Mich.* 41 *Eliz. Cro. Eliz.* 700. *Brereton* verſus *Evans.*

2. Reſolved by all the Judges, that a *Wife cannot be produced as a Witneſs againſt or for her Husband*, becauſe they are *duæ animæ in una Carne*; and becauſe it might create many Diſſentions between them. *Paſch.* 10 *Jac.*

3. In *Waſte* againſt Husband and Wife, the Plaintiff declared, that the Queen by Letters Patents granted the Lands to *Elizabeth Jolliffe* for Life, Remainder to the Plaintiff, and that the Defendant married the ſaid *Elizabeth*, and committed Waſte; the Defendants, by their Plea, confeſs the Leaſe and the Marriage, but farther ſay, that 2 *Feb. Anno* 40 *Eliz.* they ſurrendered the Eſtate of the Wife to the Queen, to the Intent that ſhe ſhould grant a new Leaſe *to the Wife for Life*, and to two others for their Lives, which ſurrender the Queen accepted; and accordingly 3 *Feb.* made a new Leaſe; Iſſue being taken upon this Surrender and Demiſe, the Jury found the new Leaſe made 3 *Feb.* and that ſhe ſurrendered the Eſtate in Conſideration of Money, *&c.* and that the Leaſe was made with the Conſent of the Husband, and that he and the Wife agreed to it, and held claiming by the new Leaſe; adjudged, that the Conſideration which procured that Leaſe was the Surrender of the old Leaſe, which Surrender was not abſolute, but might be defeated by the Diſagreement of the Husband, and then the old Leaſe is revived; now the Freehold for Life, which the Husband had in Right of his Wife by Vertue of the *old Leaſe*, could not be given away by his *bare Aſſent to the Making the new Leaſe*; 'tis true, if that Leaſe had been made to him and his Wife, for their Lives, as it was made to her alone for her own Life, in ſuch Caſe the Acceptance of the new Leaſe had been a Surrender in Law of the old Leaſe, but that being not done, his *bare Aſſent* to the Making the new Leaſe ſhall not operate as a Surrender of the old Leaſe, if ſo, then that Leaſe is ſtill in Being, and by Conſequence the Action of Waſte well brought againſt Husband and Wife. *Trin.* 14 *Jac. Hutton* 7. *Swaine* verſus *Holman.*

4. The Plaintiff being an *Apothecary*, ſerved the Defendant's Wife with Phyſick, who did not cohabit with her Husband, but had a ſeparate Allowance from him; adjudged, that 'tis unreaſonable after ſuch a Separation by Conſent, that it ſhould be ſtill in the Power of the Wife to charge the Husband; therefore it ſhall be preſumed, that they who Truſt her do it upon her own Credit, and a perſonal Notice of their Separation is not neceſſary, 'tis enough if 'tis publick and notorious. 11 *Salk.* 116. *Todd* verſus *Stoakes.*

(F)

What Acts of the Husband alone, before, or during the Coverture, are good, and bind himself, and what Acts bind her Right, and also to answer Damages, and where he may be sued and sue alone. See *Scire Facias.* (F) per totum. *Waste.* (C) 3.

1. A Leaſe for Years was made to Husband and Wife; *Provided*, that if they had a Mind to diſpoſe of the Term, that then the *Leſſor* ſhould have the firſt Offer, he giving as much for it as another would; the Queſtion was, whether this was a Condition or a Covenant; if a Covenant, then the Wife is bound by it, if ſhe ſurvive, eſpecially it being a Covenant, which ariſeth upon the Eſtate. *Trin.* 28 *H.* 8. *Dyer* 13.

2. Husband and Wife ſeiſed of Lands in Right of his Wife, covenanted to ſuffer a Recovery thereof to the Uſe of the Recoverers, until they had made a Leaſe for forty Years, *&c.* and afterwards to the Uſe of the Husband and Wife, and to her Heirs; the Leaſe was made accordingly, and afterwards the Husband died; adjudged, that the Wife ſhall not avoid this Leaſe, becauſe her former Eſtate was gone and extinguiſhed by the *Recovery*. *Trin.* 2 *Eliz. Dyer* 290.

3. Husband and Wife ſeiſed of Lands in Right of his Wife, made a Leaſe for Years, rendring Rent, the Leſſee entered, and the Husband died before any Rent became due; the Wife married a ſecond Husband before the Day of Payment of the Rent, who afterwards accepted the Rent at the Day; adjudged, that the Wife having by Marriage reſigned the Term to her Huſband, his Acceptance of the Rent had made the Leaſe good. *Paſch.* 4 *&* 5 *Mar. Dyer.* 159.

4. The intended Husband levied a Fine of his Lands, to *the Uſe* of himſelf, and of *ſuch Wife as he ſhould marry*, and afterwards he married *E. R.* adjudged, that ſhe ſhould take jointly with the Husband, being upon *an Uſe*; but 'tis otherwiſe, if the Eſtate had been executed, by which it ſeems, that the Word *Wife* is a good Name of Purchaſe. *Paſch.* 10 *Eliz. Dyer* 274. 1 *Rep.* 100. *in Shelley's* Caſe. *Paſch.* 4 *Mariæ. Dyer* 146. *Bedell's* Caſe.

5. Land was given to Husband and Wife, and to the *Heirs of their two Bodies* to be begotten; they had Iſſue a Son, and the Husband made a Feoffment in Fee, and died, and afterwards the * Wife died *without making any Entry*; adjudged, that *at Common Law* this Feoffment was a Diſcontinuance to the Son, for he muſt claim as Heir of their *two Bodies*, which he cannot do, being prevented by the Feoffment of his Father, and by Conſequence his Entry would not be lawful; adjudged likewiſe, that tho' the Husband and Wife have Iſſue, and alſo a joint and undivided Eſtate, yet this joint Eſtate is within the Statute 32 *H.* 8. *cap.* 28. for ſhe had a Freehold and Inheritance in the Land, altho' ſhe had not the ſole Freehold; and therefore by that Statute the *Entry of her Son* is lawful; adjudged alſo, that if the Husband is Tenant in Tail, Remainder to the Wife in Tail, and if the Husband maketh a Feoffment in Fee, and dieth without Iſſue, the Wife may lawfully enter on the Feoffee; but if he had ſuffered a *Recovery*, then the Wife is barred by the Statute; adjudged laſtly, that if the Husband hath Iſſue, and alieneth, and the Wife dieth, the Iſſue cannot enter on the Alienee during the Life of the Husband; but if ſhe is divorced, then by Vertue of this Statute ſhe may enter on the Alienee in the Life-time of her Husband. 8 *Rep.* 71. *Greenly's* Caſe. *Poſtea* Formedon. (A) 6. *S. C. Hill.* 5 *Jac. Greales* verſus *Paſſey.* 1 *Brownl.* 131. *S. C.*

* Poſtea (G) 3.

6. The Husband being indebted to the King, purchaſed a Term for Years in Lands to him and his Wife, and before Execution he died; adjudged, that Execution might be ſued againſt the Wife; becauſe the Purchaſe was the Act of the Husband, and he had Power over the Term at the Time of his Death, and his Wife came to it without any valuable Conſideration; but if they had been poſſeſſed of a Term for Years, and he alone had ſold it for a Valuable Conſideration, ſuch a Sale is good againſt the Wife. 8 *Rep.* 171. *Sir Gerrard Fleetwood's* Caſe. *Poſtea* Execution. (L) 1. *S. C.*

7. The Husband having Lands in Right of his Wife, made a Leaſe thereof for five Years, to try the Title, and the Leſſee brought an Ejectment; the Defendant pleaded, that the Husband died after the Leaſe made, and before the Action brought; ſo that the Leaſe was void, being determined by his Death; but adjudged, that the Leaſe was good, becauſe the Wife had not entered after the Death of the Husband; for the Leaſe is not void by his Death, but voidable by the Entry of the Wife. 2 *Cro.* 332. *Jordan* verſus *Wikes.*

8. The Husband being ſeiſed of *Lands in Right of his Wife*, made a Leaſe thereof for twenty-one Years, and afterwards he and his Wife levied a Fine thereof, *ſur Cogniſance de droit, &c.* to *G. D.* and his Heirs; then the Husband died; adjudged, that the Cogniſee ſhould avoid this Leaſe.

9. In a Special Verdict in Ejectment, the Caſe was, Lands were given *to the Husband and Wife, and to the Heirs of the Body of the Husband*, and for want of ſuch Iſſue, the Remainder to the Right Heirs of the Husband; afterwards the Husband made a *Feoffment in Fee*, with Warranty, and took back an Eſtate to him and his Wife, for their Lives, Remainder to his two Daughters, and their Heirs, then he died, and the Wife died, the Queſtion was, whether this *Feoffment* made by the Husband was a *Diſcontinuance of his Eſtate-tail*; it was inſiſted, that it was no *Diſcontinuance*;

tinuance; becauſe the Husband and Wife were *Jointenants for Life*, with an Eſtate-tail expectant in the Husband, and none can diſcontinue the Tail, if he was not ſeiſed of it; and in this Caſe 'tis plain, that the Husband was not ſeiſed of it at the Time when he made the Feoffment, becauſe he and his Wife were *Jointenants for Life*; but adjudged, that it was a *Diſcontinuance*, and that by the Livery and Seiſin made on this Feoffment, the Husband was out of Poſſeſſion. *Trin.* 9 *Jac.* 2 *Bulſt.* 29. *Horewood* verſus *Holeman*. *Antea pl.* 5. *Poſtea* (G) 3.

10. In ſecond Deliverance the Defendant made Conuſance as Bailiff to *Peter and Helen* his Wife, ſetting forth a Leaſe made to the ſaid *Helen*, paying the yearly Rent of 10 *l.* to her, with a Clauſe of Diſtreſs, *habendum* to the ſaid *Helen* for Life; that ſhe afterwards married the ſaid *Peter*, and for Rent Arrear, *&c.* the Defendant made Conuſance, as in the Land of the ſaid *Peter and Helen*, ſubject to Diſtreſs; the Plaintiff in his Replication, pleaded an Acquittance from *Peter* alone of this Rent, and adjudged a good Bar to the Conuſance. *Moor* 87. *Moreton* verſus *Hopkins*. 1 And. 14.

11. *Husband and Wife were Jointenants* for ninety-nine Years, if they, or *either of them* ſhould ſo long live; the Husband alone granted a Term of twenty Years, to commence after his Death, and then died, and his Wife ſurvived; adjudged, that this was a good Leaſe for twenty Years, if the Wife ſhould ſo long live, *Moor* 395. *Growte* verſus *Lowcroft*, cited in *Harbin's* Caſe. *See* Jointenants (F) 12.

12. The Statute 32 *H.* 8. beforementioned, is thus: (*viz.*) *That all Leaſes made of Lands of Inheritance, of which the Husband is ſeiſed in Right of his Wife, or jointly with his Wife by Purchaſe, either before or during the Coverture, ſhall be good and effectual, and that the Wife ſhall have ſuch Remedy for the Rent as he who made the Leaſe*; Proviſo, that ſuch Leaſe ſhall be made of ſuch Land, *whereof the Inheritance is in the Wife, &c.* and that ſhe ſhall be a Party to and ſeal the Leaſe; after the making this Statute the Husband purchaſed Lands *to him and his Wife, and to their Heirs*, and about twenty Years afterwards, he, without his Wife, made a Leaſe of Lands to *G. D.* for ſixty Years, rendring Rent, if they lived ſo long; and upon Evidence to a Jury in Ejectment, the Queſtion was, whether this Leaſe ſhould bind the Wife, her Husband being then dead? and adjudged, that it ſhould, for it was a good Leaſe within the Body of the Statute, and it was not within the Proviſo, becauſe the Husband and Wife were joint Purchaſers, and by Conſequence the Lands were not the *ſole Inheritance* of the Wife; and 'tis very plain, that the Proviſo extends to ſuch Lands only, whereof the ſole Inheritance is in the Wife. *Cro. Car.* 15. *Smith* verſus *Trinder*.

13. Where a Feme covert Executrix ſurvives her Husband, ſhe ſhall be charged with the Damages recovered in a *Devaſtavit*, during the Coverture; but not for the Coſts *de Bonis propriis*, becauſe ſhe could have no Goods during that Time. 2 *Lev.* 145, 161. *Horſey* verſus *Daniell*. *Poſtea* Devaſtavit. (D) 6. *S. C.* See *Cro. Car.* 519. *Moor* 761. *Sid.* 337. 3 *Mod.* 189. *Trotman* verſus *James*.

14. *Aſſumpſit, &c.* in which the Plaintiff declared, that the Defendant being indebted to his (the Plaintiff's) Wife in 10 *l.* as Executrix of *T. S.* for Arrears of Rent, and in Conſideration he (the Plaintiff) had given the Defendant a farther Day to pay the Money, he promiſed to pay, *&c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the *Wife was not joined* in this Action, as ſhe ought, for ſhe being Executrix, may ſurvive her Husband, and if ſo, the Money will be Aſſets; beſides, her Life ought to have been averred, which is very true; and moreover, if the Husband die before he get Judgment, ſhe will be reſtored to an Action for theſe Arrears, for the Duty was not extinguiſhed by this Promiſe made by the Defendant to her Husband, and if ſhe die, then he cannot ſue, which is the Reaſon her Life muſt be averred; But yet it was adjudged, this Action is well brought by the Husband alone, becauſe ſhe was not Privy to the Contract, and he might receive this Money and releaſe it, the Adminiſtration being devolved on him by the Intermarriage. 1 *Salk.* 117. *Yard* verſus *Ellard*.

15. The Wife libelled in the Spiritual Court againſt Mrs. *Chamberlaine*, for Adultery with her Husband, and had Sentence againſt her with *Coſts*, which the Husband *releaſed*, and yet the Wife proſecuted her in the Spiritual Court for theſe *Coſts*; and upon a Motion for a Prohibition, it was argued againſt it, that ſince the Principal Matter is of * Eccleſiaſtical Conuſance, that Court ought not to be prohibited to determine what is incident to it; but adjudged, that the Wife is barred by this *Releaſe* of the Husband; ſo if the Husband and Wife are * *divorced a menſa & thoro*, and a *Legacy* is left to her, the Husband may releaſe it, becauſe the Marriage continues; but in ſuch Caſe of *Divorce*, if the Wife hath *Alimony*, and ſues for Defamation, or any other Injury, and hath Coſts, her Husband's Releaſe ſhall not bar her; becauſe theſe Coſts are in Lieu of what ſhe ſpent out of her ſeparate Maintenance and Alimony, which is not in the Power of her Husband. 1 *Salk.* 115. *Chamberlaine* verſus *Hewſon*. 5 Mod. 69. * Legatee (D) 6. contra. * 3 Cro. 309.

16. *Husband and Wife* brought an Action againſt the Defendant, for Work done by the Wife in making a *Peruke*, and this was upon a Promiſe to pay, *&c.* which he had not done, *ad damnum ipſorum*; there was a frivolous Plea; and upon Demurrer to it, adjudged, that here being no expreſs Promiſe made, but only a Promiſe in Law, which muſt be to the Husband, therefore the Action ought to be brought by him alone, he is to have the Fruits of her Labour, and the Advantage of her Work ſhall not ſurvive to her, but go to the Executors of her Husband; for if ſhe die, her Debts will fall upon him, for which Reaſon the Benefit of her Work ſhall go to the Husband, and if he die, to his Executors; but this muſt be of Work done during the Coverture; this is not like * *Burchard's* Caſe, for there was an expreſs Promiſe made to the Wife, to which the * Poſtea (I) 36.

the Husband aſſented by bringing the Action. 1 *Salk.* 114. *Buckley* verſus *Collier.* See 2 *Cro.* 205, 110, 438. 3 *Cro.* 61, 96.

17. Upon Evidence, at a Trial before *Holt, Ch. Juſt.* the Caſe was, The Wife had Lands as Heireſs, and the Husband being in Debt, he promiſed her, that if ſhe would join with him in the Sale of her Lands, he would leave her 400 *l.* at his Death, he being a Tradeſman, the Land was ſold, and he had the Money, and being ſickly, he made a Bond to *T. S.* conditioned to pay his Wife 300 *l.* after his Death, and ſoon afterwards died; the Ch. Juſt. directed the Jury, that this Bond was not *fraudulent againſt Creditors*, tho' in Law the Husband cannot make a Promiſe to his Wife, and tho' the Bond was made ſo long after the Promiſe. 2 *Lev.* 148. *Clerk* verſus *Nettleſlip.*

(G)

What Acts of the Husband do not bind the Wife.

1. HUsband and Wife were Leſſees for Years of an Houſe in *Fleet-ſtreet*; the Husband made a Leaſe of it to another for Part of the Term, *excepting the Shops for his proper and only Uſe*, and afterwards died within the Term; adjudged, that the Wife ſhall have both the Houſe and the Shops againſt the Leaſe of her Husband; becauſe the *Exception* was only temporary, (*viz.*) for the *proper Uſe of the Husband*, and he being dead could no longer uſe them. 9 *Eliz. Dyer* 264.

2. Leaſe of Lands to the Husband and Wife, *for their Lives*, Remainder to the *Survivor* of them for *ſo many Years*; the Husband granted over the *Term for Years*, and died; adjudged, that notwithſtanding this Grant, the *Wife ſhould have the Term*, becauſe neither of them had any Power to grant until there was a *Survivor*; and if the Wife had died after the Grant, the Husband ſhould have enjoyed it againſt his own Grant. *Poph.* 5.

3. In a Special Verdict in Ejectment, the Caſe was, (*viz.*) a Feoffment in Fee was made to Husband and Wife, *habendum* to them and *to the Heirs of their Bodies between them to be begotten*, by Vertue of which they entered, and afterwards the Husband made a Feoffment in Fee of the Lands to his *youngeſt Son*, and died, and then the Wife died before ſhe made any Entry; adjudged, that this Feoffment by the Husband was not Hurtful to the Wife, nor any *Diſcontinuance* to her Heirs, but that the eldeſt Son, who was Plaintiff in this Ejectment, might enter, and that his Entry was lawful by the Statute 32 *H.* 8. of Feoffments made by the Husband during the Coverture. 1 *Brownl.* 131. *Greales* verſus *Paſſie.* *Antea* (F) 5. *S. C. Antea* (F) 8.

Cro. Eliz. 721. 4. The Son in Law granted an Annuity to his Mother *for Life*, her Husband died, and in a Writ of Annuity brought by the Widow againſt the Defendant, he pleaded in Bar, that her Husband, in his Life-time, had releaſed the Annuity; and upon Demurrer to this Plea, the Plaintiff had Judgment, becauſe the releaſe of the Husband could not extinguiſh this Annuity to the Wife, it being for her Life. *Moor* 522. *Thompſon* verſus *Butler.*

5. Upon Evidence to a Jury, the Caſe was, *Husband and Wife were Tenants in Special Tail*, Remainder to *T. S.* Remainder over in Tail, the Husband *diſcontinued* and died, and afterwards the Widow levied a Fine: Now, tho' by the Statute 32 *H.* 8. this Diſcontinuance of the Husband ſhall not prejudice the Wife, but that ſhe may enter after his Death, yet till ſhe enters it ſhall be a *Diſcontinuance*, which now by levying the Fine ſhe can never do; for it hath coroborated the Diſcontinuance, and ſhe cannot be remitted to her Eſtate-Tail. *Palm.* 365. *Moor's* Caſe.

(H)

Where the Husband alone may bring an Action, and where he may ſue for an Injury done to his Wife, and where he ſhall be charged for Acts done by her as Executrix, or otherwiſe, and where not. See *Devaſtavit.* (D) per Totum. *Adminiſtration.* (Y) 12. *Aſſault.* (A) 1.

Moor 396. 1. FEME ſole Executrix made *a fraudulent Deed of Gift* of the Goods of her Teſtator, and continued ſtill in Poſſeſſion of them, and being ſo in Poſſeſſion, ſhe married and died; one of the Creditors of her Teſtator brought an Action of Debt on a Bond againſt the Husband, as Executor to his Wife, who pleaded *Plene Adminiſtravit*; and this Matter being found Specially, it was adjudged for the Plaintiff in the Action; becauſe *the Gift being fraudulent*, the Property of the Goods ſtill remained in the Wife as Executrix, in Reſpect to the Creditors of her Teſtator; 'tis true, as to all other Perſons the Deed is good, but as to the Creditors 'tis void; and if ſo, then the Property being ſtill in the Wife, and the Husband having poſſeſſed himſelf of the Goods ſince her Death, and *paid Legacies*, this made him an *Executor of his own Wrong*, and ſo the Action is well brought againſt him. *Cro. Eliz.* 405. *Wilcocks* verſus *Watſon.* Aſſets. (A) 11. *S. C. and* Aſſets. (A) 8. *S. P.*

2. And as the Husband is chargeable, ſo in ſome Caſes *his Executor* ſhall have no *Benefit*; as where a Rent is granted to him and his Wife for their Lives, this Rent was arrear in his Life-time, and then he died, and more Rent became due after his Death, and then the Wife died Inteſtate,

teſtate, and her Adminiſtrator brought an Action of Debt for the *Whole*; and adjudged, that the Action did lie, becauſe the Arrears due in her Husband's Life-time ſurvived to her, and ſo became due to her as well as the Arrears incurred after his Death, and conſequently ſhall go to her Adminiſtrator, and not to the Executor or Adminiſtrator of the Husband. *Cro. Eliz.* 791. *Temple* verſus *Temple*. *Poſtea* Rent. (B) 6. *S. C.*

3. Treſpaſs of Aſſault and Battery, for that the Defendant did aſſault and beat the Plaintiff, *necnon* he aſſaulted and beat the Plaintiff's Wife, *per quod conſortium amiſit uxoris ſuæ* for three Days, ſhe living with the Defendant all that Time in a lewd Manner: Upon Not guilty pleaded, the Plaintiff had a Verdict and Damages; and upon a Motion in Arreſt of Judgment, it was objected, that the Husband ought not to join the Battery of his Wife, with that done to himſelf, and that *the Wife ought to be joined in this Action*; becauſe the Battery being done to her, ſhe ought to have the Damages, if ſhe ſurvive the Husband; but adjudged, that the Action is well brought by the Husband alone; for 'tis not only for the Harm done to his Wife, but for his particular Loſs of her Company for three Days, which is a Damage to him; and ſo it was adjudged *Anno* 23 *Eliz. in Cholmley*'s Caſe, where the Action was brought by the Husband for the Battery of his Wife, *per quod negotia ſua infecta remanſerunt.* 2 *Cro.* 501. *Guy* verſus *Liverſay.* 2 Roll. Rep. 51.

4. So where the *Husband* brought an Action for an Aſſault on his Wife, and detaining her for five Years, *per quod ſolamen & conſortium necnon conſilium & auxilium in rebus domeſticis amiſit, quæ idem* (the Plaintiff) *habere debuiſſet:* Upon Not guilty pleaded, the Plaintiff had a Verdict, and 300 *l.* Damages; and upon a Writ of Error brought, it was objected, that the Action could not be maintained by the *Husband alone*, for the Wrong done to his Wife; which is very true, if it had been only brought for an Injury done to her; but here it was for a Loſs and Injury done to the * Husband, in depriving him of the Company and Aſſiſtance of his Wife, and therefore the Judgment was affirmed. 2 *Cro.* 538. *Hide* verſus *Seiſſors.* *Cro. Car.* 63. *Young* verſus *Pridd. S. P.* adjudged in Error in the Exchequer-Chamber. * W. Jon. 440. S. P. Litt. Rep. 339.

5. Sentence againſt a Feme covert, who renders her Body to priſon, and there abides, the Lands of her Husband ſhall be ſequeſtred, and the Profits thereof for the Fine of his Wife, and for her Recuſancy, if he do not render her to Priſon. 4 *Leon.* 249. *Sir Richard Egerton*'s Caſe. 2 Roll. Rep. 51. S. P.

6. Leaſe for Years, in which there was a Covenant for the Leſſee to *Repair*; afterwards the Leſſor granted the Reverſion to the Husband and Wife, and to the Heirs of the Husband, and the Husband alone brought an Action of Covenant for not repairing; adjudged amongſt other Points, that the Action is well brought, tho' the Intereſt in Reverſion is as well in his Wife, as in him; for 'tis a Rule in Law, that where the Husband is to have the ſole Benefit and Profit of that which is to be recovered, and may alone releaſe or diſcharge it, there he alone may bring the Action, as in the Principal Caſe he had. 3 *Bulſt.* 163. *Brett* verſus *Cumberland.* 1 Roll. Rep. 359. 2 Cro. 319, 399. Poph. 136.

7. The Husband made a Will, and appointed his Wife Executrix, and died; afterwards ſhe poſſeſſed her ſelf of the Goods of her Husband, which ſhe waſted, and then ſhe married a ſecond Husband; now, tho' none of thoſe Goods came to his Hands, yet my *Lord Coke* was of Opinion, that he ſhall be charged *de bonis propriis* for the Waſte done by his Wife before he married her. 1 *Roll. Rep.* 268. *Lumley* verſus *Hatton.* *Poſtea* Devaſtavit. (D) 1. *S. C.*

8. But in ſome Caſes, the Husband is not chargeable; as where the Teſtator *deviſed a Legacy to T. P.* and made his *Wife Executrix*, and died; afterwards ſhe married a ſecond Husband, and he poſſeſſed himſelf of the Goods of the firſt Husband, and then ſhe died Inteſtate; adjudged, that this ſecond Husband cannot be charged with the Payment of this Legacy by *way of Action*; becauſe he is neither Executor or Adminiſtrator, or in any wiſe privy to the Will of the firſt Husband, who gave the Legacy, and he being entituled to the Goods by the Intermarriage with the Executrix, is neither chargeable in the Spiritual Court, or at Common Law, unleſs he had converted them to his own Uſe *after the Death of the Wife*; for in ſuch Caſe he might be compelled to adminiſter to her, to the Intent that he may be ſued in the Spiritual Court for the Legacy. *Yelv.* 184. *Smith* verſus *Jones.* 2 Cro. 257.

9. A Man died Inteſtate, and the Right of Adminiſtration was in a *Feme Covert*, who afterwards adminiſtred, and died, and in an Action brought againſt her Husband as Executor, he pleaded *ne unques Executor*, upon which they were at Iſſue, and the Jury found, that Adminiſtration was granted to his Wife, and that ſhe was dead, and that her Husband poſſeſſed himſelf of the Goods, and kept *bonam partem* thereof in his Hands, and afterwards ſold them; 'tis true, *Bona pars bonorum* is very incertain; but adjudged, that if he detain any Part thereof, he is *Executor of his own Wrong*, and ſo liable to an Action to be brought againſt him. *Jones* 175.

10. Debt againſt Husband and Wife, as Adminiſtratrix to her firſt Husband, and brought againſt them by one of the Creditors, in which Action he recovered a Judgment againſt them, and then he brought a *Fieri facias*, upon which the Sheriff returned *nulla bona* of the Inteſtate; afterwards a *Teſtatum Fi. fa.* was brought againſt them, according to * *Pettifer*'s Caſe, and the Sheriff, upon an Inquiſition found, returned the ſame as before, (*viz.*) That they had no Goods of the Inteſtate, but that the Wife had ſome of his Goods to the Value of 100 *l.* which ſhe *waſted* during her Widowhood, and that the Husband had not waſted, *& ſi devaſtaverunt* according to the Writ, the Jury pray the Diſcretion of the Court; and adjudged, that by the Return of what was found by the Jury, it was a *Devaſtavit* in both. *Cro. Car.* 603. *Knight* verſus *Hilton.* * Execution. (D) 7.

2 Cro. 655.

11. Treſpaſs brought by Husband and Wife, *Quare clauſum fregit & domum intravit*, and declared likewiſe of a Battery on the Wife, and concluded, *ad damnum ipſorum*; the Defendant, as to breaking the Cloſe and entring the Houſe, pleads a Licenſe from the Husband, and upon the Trial that was found for him; and as to the Battery of the Wife he pleads Not guilty, and that was found againſt him, and Damages aſſeſſed, *&c.* and it was moved in Arreſt of Judgment, *that the Husband and Wife ought not to join as to their Entry in the Houſe*, for that and the Battery are Actions of different Natures; beſides, ſhe can have no Damage for entering the Houſe during the Coverture; therefore to ſay *ad damnum ipſorum*, is ill, and of this Opinion were two Judges, which was admitted by the other two, if upon the whole the Verdict had been for the Plaintiffs; but here the Defendant was found *Not guilty as to the Entring the Cloſe, &c.* ſo that the Damages where aſſeſſed for the *Battery* of the Wife, in which ſhe may *join with her Huſband*; and tho' the Action was abatable *quoad* the Entering the Houſe, becauſe ſhe was *joined*, yet that being found for the Defendant, and Damages only given for that which was found againſt him, the Verdict had helped this Matter, and made it in the Nature of ſeveral Declarations; but the Court being divided, no Judgment was given. *Palm.* 338. *Buckley & Ux'* verſus *Haley.*

* *The contrary was held by 3 Judges in the Earl of* Derby's *Caſe, where the Action was brought againſt the Earl and the Counteſs, it ought not to be brought againſt her.*

12. In a Special Verdict in an *Indebitatus Aſſumpſit*, the Action being brought *againſt the Huſband*, the Jury found the Wares were ſold to *his Wife for convenient Apparel*, which ſhe wore; and in arguing this Special Verdict, it was adjudged, that the Wife may charge the Husband for * *Neceſſaries*; as for *Cloaths, Diet, and Lodging*, if the Husband doth not make a particular Allowance to her, that ſhe may provide for her ſelf; but the Declaration in this Caſe was ill; becauſe it was in Conſideration, that the Plaintiff *venderet & deliberaret, &c.* and he did not *aver, that he did ſell and deliver the Goods*; beſides, if there had been ſuch an Averment, this Declaration would not have been good, becauſe the Promiſe is laid to be made by the Husband, and the *Sale and Delivery* to him; therefore it may be a Queſtion, whether the Sale and Delivery to the Wife will make good the Averment of a Sale and Delivery to him; it ſhould have been *deliberaſſet*. *Allen* 61. *Dent* verſus *Scott*. This was by the Opinion of three Judges againſt the *Chief Juſtice Hale*; but this Judgment was reverſed in the Exchequer-Chamber. See *Scott* verſus *Manby*.

4 Leon. 42. The Earl of *Derby*'s Caſe.

1 Lev. 4. 2 Lev. 26. 3 Mod. 156. 1 Mod. 124. 1 Vent. 24, 42. 2 Vent. 155.

13. In a Special Verdict *in Aſſumpt*, the Caſe was, the *Lady Scott* departed from her Huſband, and againſt his Conſent, and after ſome Time, ſhe deſired to cohabit with him again, which he refuſed, and forbad ſeveral Perſons to truſt her with Goods, and if they did he told them he would not pay, and amongſt the Reſt the Plaintiff, who notwithſtanding this Prohibition, truſted her with Silks and Velvets to the Value of 40 *l.* for which he brought this Action againſt *Sir Edw. Scott* her Husband, and the Jury found all this Matter, and that it was for *Neceſſaries ſuitable to the Degree* of her Husband, and whether he ſhould be charged upon an *Aſſumpſit* in Law, was the Queſtion: Thoſe who argued for the Plaintiff, ſaid, that by the Laws of God and Man, Husbands are bound to maintain their Wives; that tho' 'tis generally true, that a Feme covert cannot make a Contract but that it will be void, yet *quoad ſuſtentationem vitæ*, and for *Neceſſaries*, ſuch Contract is good; that by the Marriage all the Eſtate of the Wife is veſted in the Husband, and 'tis reaſonable ſhe ſhould be allowed what is neceſſary for her: If ſhe takes the Goods of another, the Law ſuppoſes it to be the Converſion of the Husband; if ſhe commit a Treſpaſs, the Husband is puniſhable; and if the Law will charge him when his Wife is doing a wrongful Thing, it will certainly charge him, when ſhe doth that which is Right; beſides, if Husband ſhould not be charged with the Contracts of their Wives, it would be a Means for them to turn them away at Pleaſure; 'tis true, the Wife may ſue in the Spiritual Court for *Alimony*, but not in this Caſe; becauſe there is not *Divorce*, and that Court never decrees *Alimony*, but where they decree a Separation; but the Spiritual Court hath no Juriſdiction in this Caſe; becauſe this Action is not founded on the Marriage, but on the Misbehaviour of the Huſband; but Judgment was given in the *Exchequer-Chamber* for the Defendant, that he was not chargeable with this Contract of his Wife: Firſt, by Reaſon of the Diſability of her Perſon to make a Contract, Secondly, from the Nature of a Contract, in which there muſt be at leſt two Perſons conſenting, and here the Husband did never conſent, for 'tis not pretended, that he did actually conſent or make any Contract with the Plaintiff; and if ſo, then the Contract muſt be fictitious: Now, if the Contract of the Wife ſhall in Law be the Contract of the Husband, then the Law would, likewiſe give her a Property to retain the Goods for which ſhe contracted; but this it doth not, and therefore *a pari ratione* it will not enable her to make a Contract. It ſeems more reaſonable for her to *Pawn her Husband's Goods*, and to compell him to redeem them, than to make a Contract to bind him; but the Law will not allow her ſo to do; if it would, then the *Mercer, the Gallant*, and the *Wife*, might confederate to ruin the Husband, and a *London* Jury, and probably of Mercers, might cloath her; 'tis true, a general Prohibition to truſt her might be inconvenient; but 'tis unreaſonable that the Husband ſhould be charged in an *Aſſumpſit* at *Law*, by a Perſon whom he had particularly forbid to truſt her, and the Finding that the Goods were *Neceſſaries ſuitable to the Degree* of the Husband, is not material; becauſe it may be ſuitable to his Degree, but not to his *Eſtate*; and it may be Neceſſaries, but not *ex neceſſitate*; Judgment for the Defendant. *Sid.* 109. *Scott* verſus *Manby*. See *antea pl.* 11.

14. *Aſſumpſit, &c.* for Goods ſold and delivered to *Mary, adtunc & adhuc* the Wife of the Defendant, to the *Uſe of the Defendant*, being her Husband; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe it was for Goods ſold to a *Feme covert*, who is diſabled by Law to make a Contract, but adjudged well enough, becauſe it was *ad uſum* of the Defendant, and ſo found by the Verdict. *Sid.* 425. *Dyer* verſus *Eaſt. Poſtea* (L) *pl.* 15. *S. C.* 1 Lev. 7. 1 Mod. 9. 1 Vent. 42.

15. *Aſſumpſit* brought againſt the Husband for *Diet and Lodging of the Wife*; upon *Non Aſſumpſit* pleaded, the Caſe was, the Husband left his Wife in the Country, and lived in *London* ſeveral Years, where he married another Woman, for which he was indicted, and his Wife came to *London* to proſecute him, whereupon he cauſed her to be arreſted, and ſhe was committed to the Plaintiff as Gaoler, who brought an Action againſt the Husband for her *Diet and Lodging*, whilſt in Priſon: *Hale* Ch. Juſt. before whom the Cauſe was tried, directed the Jury, that the Husband is not chargeable without ſome Evidence of his *Aſſent*, as if he viſited her in Priſon; for if the Husband will not allow Neceſſaries, ſhe ought to complain in due Courſe of Law for her Maintenance; the Plaintiff was nonſuited. 2 *Lev.* 16. *Calverly* verſus *Plummer*.

16. So where the Husband and Wife had a Decree in Chancery for Money due *in Right of the Wife*, and afterwards the Husband died, his Wife who ſurvived, and not the Executor of her Husband, ſhall have the Benefit of this Decree. 1 *Ch. Rep.* 27. *Manney* verſus *Martin*.

17. The Caſe was, a Feme covert and her Husband *parted by Conſent*, ſhe came afterwards out of *Yorkſhire to London, her Husband allowing her ſeparate Maintenance*, and lived there four Years in Adultery, and being with Child, ſhe lodged at the Plaintiff's Houſe, who was likewiſe at ſome Charge for her lying in, for which he brought an Action againſt the Husband; it appeared, that the Plaintiff did not know any Thing of her Circumſtances, and that ſhe lived modeſtly in his Houſe, and that her Maintenance was paid conſtantly; but tho' the Husband is bound to pay his Wife's Debts for her reaſonable Maintenance, yet if ſhe Parts from him, which muſt be intended for ſome Misbehaviour, and lives in Adultery, and he allows her a Maintenance, he ſhall never again be charged, unleſs they cohabit, ſo the Plaintiff was nonſuit. *Mod. Caſes* 147. *Cragg* verſus *Bowman*.

18. The Husband alone brought an Action for the Battery of his Wife *per quod conſortium amiſit*, and this was adjudged good; but where they joined in an Action on the Caſe in Nature of a *Conſpiracy* againſt *T. S.* for that he *falſo & malitioſe crimen feloniæ impoſuit*, and endeavoured to have them indicted, this was held ill; becauſe Husband and Wife cannot join when the Wrong is done to the *Husband*; but if the *Conſpiracy* had been to indict the Wife, they might join. *W. Jones* 440.

(I)

Where they muſt join in Actions, and where not; and be joined when Defendants, and where not; and other Things concerning Feme Coverts. See (L) per totum. (H) 10, 17.

1. IN *Debt againſt Husband and Wife* he was *outlawed* and his Wife was *waived*, afterwards ſhe pleaded the Queen's Pardon; adjudged, that ſhe ſhall be diſcharged of her *Impriſonment*, but the Pardon was not allowed, becauſe ſhe could not ſue out a *Scire facias* againſt the Plaintiff to make him declare upon the Original without her Husband, and becauſe there was a Condition in the Pardon, (*viz.*) *Ita quod ipſa ſtaret recta in Curia*, which ſhe could not do without him. *Hill.* 10 *Eliz. Dyer* 271.

2. An Action of Debt was brought *by the Husband alone*; upon a *Judgment* obtained in an Action brought by him and his Wife; and becauſe the Wife was not joined in this Action, the Defendant demurred to the Declaration; but adjudged, that the Action was well brought by the Husband alone. *Cro. Eliz.* 844. *Butler* verſus *Delt*.

3. *Husband and Wife* ſeiſed of Lands in Right of the Wife, made a Leaſe thereof for twenty-one Years, and the Leſſee covenanted for himſelf, his Executors, *&c.* to build a *Brick Wall* upon Part of the Lands, the Leſſee afterwards aſſigned his Term to another, and the Husband and Wife joined in an Action againſt the Aſſignee of the Leſſee, for not Building the Wall, and adjudged, that the Action was well brought by both. 5 *Rep.* 16. *Spencer*'s Caſe. *See* Bradle *v.* Sherman. *Poſtea* Tithes. (R) 3.

4. Where a Right of Action doth accrue to a Woman before Marriage, as where a Bond is made to her and forfeited, there, if ſhe marry, ſhe muſt be joined with the Husband in an Action of Debt againſt the Obligor; but where the Right doth accrue after Marriage, there it may be otherwiſe; however, in that Caſe 'tis the ſafeſt Way to join both in the Action. *Paſch.* 5 *M. Owen* 82. *Cro. Car.* 419. *S. P. Litt. Rep.* 284. *Hob.* 189. *S. P.*

5. Where a *Feme ſole* is indebted, and afterwards married, ſhe and her Husband ſhall both be ſued *for her Debts*, and the Action muſt be *joint* againſt both during her Life; but if ſhe dieth, the Husband ſhall not be charged with her Debts, unleſs Judgment was had againſt him and his Wife during the Coverture. *F. N. B.* 120.

6. The Husband being ſeiſed of an Houſe in Right of his Wife, who was Tenant thereof for Life, brought an Action alone againſt the Defendant, for Waſte done to the Houſe; it was a Queſtion, whether he could maintain this Action alone, becauſe the Wrong was done to the E-

ſtate which he had in Right of his Wife, and it might ſo happen, that no Loſs or Injury might accrue to him, for no Action might be brought againſt him by the Leſſor in the Life-time of his Wife, and if ſo, then he is not chargeable after her Death, for which Reaſon the Wife ought to be joined in the Action; the Court doubted, and no Judgment was given. *Cro. Eliz.* 461. *Jermy* verſus *Lowther*. See *Jefferſon* verſus *Jefferſon*.

7. *Raviſhment of Ward* was brought upon the Statute *W.* 2. *cap.* 35. againſt Husband and Wife, the Jury found the Wife guilty, but acquitted the Husband, and aſſeſſed Coſts and Damages; adjudged, that the Wife was not within this Statute, becauſe ſhe being a Feme covert, cannot make Satisfaction, having nothing of her own to do it; for the Goods and Lands of her Husband, who is innocent, are not liable by this Statute for the Injury done by his Wife, but the Plaintiff might have an Action of Treſpaſs at Common Law againſt thoſe which did the Injury, or a Writ *de valore Maritagii* againſt the Heir. 9 *Rep.* 71. *Dr. Huſſey's* Caſe.

8. Debt againſt *Husband and Wife as Executrix* to her former Husband; he appeared upon the *Exigent*, and would have put in a *Superſedeas* for himſelf alone, but was not admitted by the Court ſo to do, but was compelled to put in an Appearance, and to appoint an Attorney, and a *Superſedeas* for his Wife as well as for himſelf. *Mich.* 31 *Eliz. Cro. Eliz.* 118. *Bilford* verſus *Fox*.

9. *Trover againſt Husband and Wife*, and the *Converſion* is charged on the Wife alone; if *they both plead Not guilty*, and the Plaintiff hath Judgment, 'tis not good, becauſe the Husband being not charged with any Wrong, the *Iſſue* ought to have been *quod ipſa* is not guilty, and thereupon the Judgment was reverſed, and that Reverſal was affirmed in a Writ of Error. *Cro. Eliz.* 883. *Carpenter* verſus *Foſter*. 2 *Cro.* 5. *S. C.*

2 Cro. 288. 10. *Aſſumpſit againſt Husband and Wife*, after Imparlance the Record was *ad quem diem tam prædict'* (the Plaintiff) by his Attorney, *quam præd'* (the Husband and Wife) by their Attorney *veniunt, &c. & præd' Brigitta dicit quod ipſa non Aſſumpſit*; the Plaintiff had a Verdict, but could never get Judgment; becauſe the Plea is only by the Wife, and ſhe alone cannot plead without her Husband, for by Law they muſt both join in Pleading. *Yelv.* 210. *Tompion* verſus *Newſam*. *Poſtea* Repleader. (A) 6. *S. C. Mich.* 9 *Jac. Cholmley* verſus *Alſop. S. P.*

11. Error of a Judgment in *Aſſumpſit by Husband and Wife* againſt the Defendant, who promiſed, that in Conſideration the Wife would cure him of ſuch a Wound, he would pay her 10*l.* the Error aſſigned was, that the Husband alone ſhould have brought the Action, for the Promiſe being made during the Coverture, the not Performing it was a Damage to the Husband and not to the Wife; but * adjudged, that the Action was well brought *by both*, becauſe the Cauſe of the Promiſe did ariſe from the Skill and Labour of the Wife. 2 *Cro.* 77, 205. *Baſhford* verſus *Buckingham*.

* *Upon Error in the Exchequer-Chamber.*

1 Roll. Rep. 293. 2 Cro. 437. 1 Cro. 513. 12. *Debt againſt Husband and Wife*, wherein the Plaintiff declared for 39 *s.* upon a Contract of the *Wife dum ſola*, and for 39 *s.* more upon an *inſimul computaſſet* with the Husband; upon *Nil debet* p'eaded, it was found for the Plaintiff, but he could never get Judgment, becauſe he had declared upon ſeveral Contracts of the Husband and Wife, in which Caſe they cannot be *joined in one Action*. *Hob.* 19. 184. *Revell* verſus *Grey*. See *Buckley* verſus *Hales*. See *Talbott* verſus *Baron*.

13. Error of a Judgment in an *inferior Court*, in an Action of *Trover againſt Husband and Wife*, the Goods were alledged to be in her Poſſeſſion, and a Requeſt made to both to deliver them; and that ſhe and her Husband refuſed, and afterwards the Wife *converted* them to her own Uſe; the Error aſſigned was in the Entry of the Judgment, which was, that the *Wife be in miſericordia*, when it ſhould be the *Husband and Wife in miſericordia*; becauſe both were required to deliver the Goods, and for this Reaſon the Judgment againſt them was reverſed. 3 *Bulſt.* 150. *Wood* verſus *Sutcliffe*. *Poſtea* Eſcape. (B) 12. Judgment. (C) 10. *S. C.*

Yel. 106. S. C. 14. Treſpaſs and Aſſault againſt Husband and Wife, ſuppoſing, that they *both* beat the Plaintiff; upon Not guilty pleaded the Jury found, that the *Wife only* beat him; adjudged, that in ſuch Caſe the Verdict is againſt the Plaintiff, becauſe it appears that his Action is falſe, for the Husband is not joined for Conformity only in this Action. 1 *Brownl.* 209. * *Drewry* verſus *Dennis*. *Poſtea* Verdict. (C) 10. *S. C.*

* *Denied to be Law.* Poſtea (L) 18.

15. Treſpaſs, *&c.* againſt the Defendant, brought by the Husband and Wife, for Beating the Wife, and *Taking the Goods of the Husband* only, *ad damnum ipſorum*; it was objected againſt this Declaration, that the Wife cannot join for a Treſpaſs done to her Husband alone, but he may join in a Treſpaſs done to her alone; ſo if Husband and Wife bring an Action of Treſpaſs for Beating the Wife, * he may declare of a Treſpaſs done to him *ad damnum ipſius* the Plaintiff. *Hetley* 2. *Thomas* verſus *Newſam*.

* 4 Leon. 88. Cholmly *v.* Conge. S. P.

16. A Leaſe was made to Husband and Wife of an antient Mill, where the Inhabitants of ſuch Houſes uſed to grind their Corn, and for not Grinding they brought an Action againſt them, in which they had a Verdict, but could never get Judgment, becauſe the Action was brought *by the Husband and Wife*, and being only for Damages, and not for the Term, the Wife ſhould not be *joined*. *Hob.* 189. *Larkin* verſus *Green*.

17. A *Feme ſole* was Proprietor of a Parſonage, and married, and then the Husband alone brought an Action upon the Statute 2 *Ed.* 6. *for treble Damages* againſt a Pariſhioner for not *Setting out his Tithes*; adjudged, that tho' the Husband may ſue alone for a Thing which is perſonal, yet in this Caſe the Statute giving the Action to the *Proprietor*, the Husband cannot be intended

tended to be the Proprietor, but the Wife; therefore ſhe ought to be joined in the Suit. 2 *Brownl.* 9. *Ford* verſus *Pomeroy.*

18. In *Falſe Impriſonment* brought by *the Husband* for Aſſaulting and Impriſoning his *Wife*; the Defendant juſtified by Vertue of a Warrant upon a *Ca. ſa.* to take *Julian Goddard, Widow*, who, in Truth, at that Time, was a *Widow*, but before ſhe was taken, ſhe was married to one *Doily*, the now Plaintiff; adjudged, that this was a good Deſignation of the Party who was to be taken, and that the *Capias* was well awarded againſt her alone; and if the Sheriff had returned, that ſhe was *married, or non eſt inventa*, it had been an ill return; becauſe directly againſt all the Proceedings againſt her by the Name of *Julian Goddard*; for if an Action is brought againſt a Widow, and ſhe marries before Judgment, the *Capias* ſhall be awarded againſt her and not againſt her Husband. 2 *Bulſt.* 80. *Doily* verſus *Waters.* *Poſtea* Falſe Impriſonment. (A) 18. *S. C.* 2 Cro. 323.

19. Aſſault and Battery againſt Husband and Wife, the Husband juſtified, for that the Plaintiff aſſaulted his Wife, in Aid of whom *molliter manus impoſuit, &c.* the Wife pleaded by her ſelf *Son aſſult Demeſne*; the Plaintiff replied *de injuria ſua propria abſque tali cauſa*; and both Iſſues being found for him, and entire Damages given, which being moved in Arreſt of Judgment, adjudged, that it was ill, and that the Trial was ill, becauſe the Wife could not plead * by her ſelf. *Paſch.* 8 *Jac.* 2 *Cro.* 239. *Watſon* verſus *Thorpe.* See *Poſtea* 20. *S. P.* * 2 Cro. 530. 2 Roll. Rep. 90. Cro. Car. 594.

20. Action *againſt Husband and Wife*, upon a Promiſe made by her *dum ſola*, they both appeared, and the Woman pleaded *quod ipſa non Aſſumpſit*, upon which they were at Iſſue, and the Plaintiff had a Verdict; and upon a Motion in Arreſt of Judgment it was inſiſted, that a Plea of a Feme covert, * without her Husband, is not good, and by Conſequence an Iſſue joined upon ſuch a Plea is idle, and not helped by the Statute of Jeofails, and ſo it was adjudged. *Mich.* 9 *Jac.* 2 *Cro.* 288. *Thompſon* verſus *Newſam.* Yel. 210. * Antea 19.

21. The *Husband* diſtrained for Arrears of Rent due to the *Wife dum ſola*; and upon a Reſcous made, the Husband alone brought the Action againſt thoſe who reſcued the Diſtreſs; adjudged, that he alone, or both, might bring this Action, but for a Debt due to the Wife *dum ſola*, they muſt both join in the Action. *Moor* 422. *Fenner* verſus *Plasket.* Cro. Eliz. 459. S. C.

22. *Husband and Wife* brought an Action againſt the Defendant, for that he preſented them in the Spiritual Court, for making *Hay on Midſummer-day*, and this upon Oath, and that they made this Hay in Time of Divine Service, when in Truth they did not make Hay on that Day in Time of Divine Service; the Defendant pleaded, that they did make Hay on that Day, *&c.* upon which they were at Iſſue, and the Plaintiff had a Verdict, but the Judgment was ſet aſide, becauſe the *Husband and Wife ought not to join* in this Action, no more than in an *Aſſault and Battery*, for the falſe Oath againſt the Husband could not be ſo againſt the Wife. 1 *Roll. Rep.* 108.

23. *Caſe, &c.* againſt *Husband and Wife* for ſcandalous Words ſpoken *by the Wife*; the Defendants pleaded, that *ipſi non ſunt culpabiles*, and the Jury found *quod ipſi ſunt culpabiles*; it was objected in Arreſt of Judgment, that the Husband was *joined* only for Conformity, and therefore it cannot be ſaid, that * *ipſi ſunt culpabiles*, but that *ipſa eſt culpabilis*, and the Verdict ſhould have been ſo accordingly: But *per Curiam*, the Plea of the Husband is void, and if ſo, the Verdict is good againſt the Wife. 1 *Roll. Rep.* 216. *Carpenter* verſus *Welch.* 3 Bulſt. 62. Hob. 126. contra. * *See* Repleader. (A) 9.

Cox *verſus* Cropwell. Noy 41. S. P. *See* Antea Needler *verſus* Simnell.

24. A Promiſe was made to the Wife, and the Husband and Wife brought an *Aſſumpſit*, and concluded *ad damnum ipſorum: Sed per Curiam*, they ought not to join in this Action, for a Wife cannot agree to a Contract during the Coverture, in her own Name. 2 *Roll. Rep.* 250. *Abbot* verſus *Blofeild.*

25. If the Husband is poſſeſſed of a Rectory in Right of his Wife, or if ſhe hath it in Jointure by a former Husband, they may join in an Action of Debt againſt the Farmer, for not ſetting out Tithes. *Moor* 912. *Wentworth* verſus *Criſpe.*

26. In an Action of Debt, the Caſe was, one *Braine* was ſeiſed in Fee, and made a Leaſe for Years to the Defendant, and afterwards conveyed the Reverſion to the Plaintiff and his *Wife* in Fee; the Leaſe expired, and the Husband alone brought this Action for Arrears of Rent; and upon a Demurrer to the Declaration it was objected, that the Wife ought to be joined in the Action, becauſe the Reverſion was in her as well as in her Husband; the Court inclined to this Opinion. 1 *Roll. Rep.* 52. *Nooth* verſus *Viat.* 2 Bulſt. 233. *'Tis well by the Husband alone, becauſe the Action is grounded on a Duty.*

27. The Feoffor made a Feoffment, and covenanted with the Feoffee to make farther Aſſurance, *&c.* afterwards the Feoffee conveyed the Lands to *W. R.* and his Wife, and to the Heirs of the Husband, who required the Feoffor to levy a Fine, brought an Action alone for his Refuſal, his Wife being then alive; and adjudged, that the Action was not well brought by the *Husband alone.* *Cro. Car.* 503, 505. *Middlemore* verſus *Goodale.* *Poſtea* Releaſe. (B) 16. *S. C.* W. Jones 406.

28. The Husband covenanted to ſtand ſeiſed, *&c.* to the Uſe of himſelf and his Wife, for their Lives, for her Jointure, and afterwards to his Son and Heir, excepting the Timber-Trees, *ſaving, that his Wife ſhall have the Shrowds and Loppings*; the Husband died, and the Widow married again; then the Son and Heir of the firſt Husband cut down five Oaks, and then the ſecond Huſband and his Wife brought an Action on the Caſe againſt him, ſetting forth all this Matter, and that they loſt the Benefit which they might have by the *Loppings*; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Action ought not to be W. Jones 376.

be brought by *the Husband and Wife*, when it ſhould be brought *by the Husband alone*, becauſe the Wrong was done to his Poſſeſſion, and he might have releaſed the Damages; but adjudged, that it was well brought *by both*; for he having the Land in Right of his Wife, he may join her in the Suit for the Damages, and ſhe ſhall be entituled both to them and to the Action, if ſhe ſurvive her Husband. *Cro. Car.* 438. *Tregonell* verſus *Reeves*.

Cro. Car. 254. 29. *Trover againſt Husband and Wife* for certain Goods, and the Plaintiff in his Declaration ſets forth, that they converted the Goods *ad commodum ſuum proprium*; upon Not guilty pleaded, the Plaintiffs had a Verdict, but the Judgment was ſet aſide, becauſe Husband and Wife cannot join in a Converſion of Goods during the Coverture, for it ſhall be to his Uſe. *W. Jones* 264. *Bullen*'s Caſe.

30. But in *Hillary-Term*, 14 *Car.* 2. *B. R. Rot.* 141. It was adjudged to the contrary: It was *Trover and Converſion againſt Husband and Wife*, wherein the Plaintiff declared, that ſuch Goods came to their Poſſeſſion, and that they converted them to their own Uſe; after a Verdict for the Plaintiff the ſame Objection was made in Arreſt of Judgment: *Sed per Curiam*, where a Woman has Goods, tho' they are preſently veſted in the Husband by the Marriage, yet there was an Inſtant of Time after the Marriage, when they were her own Goods, before the Property was veſted in her Husband; and if they jointly commit a Treſpaſs, the Action againſt them ſhall be *Quare bona & catalla ceperunt & aſportaverunt*; and an Action of *Trover* is in Nature of an Action of *Treſpaſs*; for if they commit a Treſpaſs in taking Goods, 'tis in the Election of the Plaintiff to bring Trover or Treſpaſs, and Judgment was given for the Plaintiff. *W. Jones* 443. *Hodges* verſus *Sampſon*.

2 Cro. 600. 31. Caſe, *&c. by Husband and Wife* againſt the Defendants, being likewiſe *Husband and Wife*, ſo that the Wife of the Defendant ſpoke theſe Words of the Wife of the Plaintiff, (*viz.*) *Thou haſt ſtolen my Faggots*, *Innuendo*, the Faggots of the Husband and Wife; after a Verdict for the Plaintiff it was objected, that this Action would not lie, becauſe a *Feme covert* could not have Faggots, the Property being in her Husband; but adjudged, that tho' ſhe could not have a Property in Law, ſo as to entitle her to an Action, yet *loquendum ut vulgus*, ſhe may be ſaid to have a Property; beſides, ſhe may have it as Executrix, but if not, and tho' by the *Innuendo* 'tis alledged, that theſe were *her Faggots*, yet ſince ſhe can have no legal Property in them, then they muſt be the Faggots of her Husband; and if ſo, then the *Innuendo* is void, for 'tis the Office of an *Innuendo* to explain, but never to deſtroy Words. *Palm.* 358. *Strong & Ux'* verſus *White & Ux'*.

32. Caſe by *Husband and Wife* againſt the Defendant, who was an *Executor*, upon a Promiſe made by his Teſtator after Coverture, to pay 8 *l. per Annum* to the Wife during the Coverture; after a Verdict for the Plaintiff it was objected, that it ſhould have been brought by the Husband alone, becauſe the whole Benefit is to him, the Promiſe being made ſince the Marriage; but adjudged, that 'tis in the Election of the Husband to bring the Action in his own Name, or to join his Wife. *Allen* 37. *Hilliard* verſus *Hambridge*.

33. Caſe, *&c.* upon an *infimul computaſſet*, and likewiſe upon an *Indebitatus Aſſumpſit* for Wares bought by the Defendant; upon *Non Aſſumpſit* pleaded, the Jury found, that the Defendant's Wife *dum ſola was indebted* to the Plaintiff for Wares ſold, *&c.* and that after her Marriage with the Defendant, he and and his Wife accompted with the Plaintiff for the Money due, and upon the Accompt 9 *l.* 13 *s.* was found due to the Plaintiff, which the Defendant promiſed to pay; in arguing this Special Verdict it was inſiſted for the Plaintiff, that the Debt of the Wife is the Debt of the Husband, and he is to be charged in the *Debet* and *Detinet*, and that by this Accompt with the Husband he hath made it his proper Debt; and the Jury having found an expreſs Promiſe of the Husband, he may be charged alone: But adjudged, that the Accompt doth not alter the Nature of the Debt, but reduceth it to a Certainty, and that this Verdict doth not Warrant the ſecond Promiſe, which was for Wares bought by the Defendant, whereas the Jury find they were bought by the *Wife dum ſola*, and they conclude to both Promiſes; therefore ſince the Conſideration found by the Jury as to the ſecond Promiſe, is different from that in the Declaration, then 'tis not the ſame Promiſe on which the Plaintiff hath declared; Judgment againſt the Plaintiff. *Allen* 72. *Drue* verſus *Thorn*.

34. Treſpaſs *againſt Husband and Wife*, for a Treſpaſs done by the *Wife alone*; they *both plead* Not guilty as to Part, and as to the reſt they plead in Bar, that the *Husband* was ſeiſed of the Lands in his Demeſne, as of Fee in Right of his Wife, and being ſo ſeiſed, he demiſed it to the Plaintiff for a Year, rendring Rent, which being in arrear, the *Wife* entered and diſtrained; and upon Demurrer it was objected, that the *Husband alone* ought not to have pleaded that he was ſeiſed in his Demeſne, as of Fee in Right of his Wife, but that *they were both ſeiſed in her Right*, and ſo are all the Precedents; beſides, the Charge in the Declaration is againſt the *Wife alone*, and yet they *both plead Not guilty* as to Part, and conclude to the Country, when it ought to be, *quod ipſa* is Not guilty, ſo that the Iſſue is ill taken, and for theſe Reaſons the Plaintiff had Judgment. 2 *Lutw.* 1421. *Catlin* verſus *Milner*. Departure. (A) 18. *S. C.*

35. *Aſſumpſit* brought *by Husband and Wife*, wherein they declared, that in Conſideration he would marry *M. R.* his now Wife, the Defendant promiſed to pay ſo much, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiffs had a Verdict; but it was inſiſted in Arreſt of Judgment, that the Wife ought not to join in this Action, becauſe the Promiſe was not made to her, but to her Husband, and for his Benefit, for which Cauſe the Judgment was ſtayed. *Style* 297. *Cotterell* verſus *Theobalds*.

36. *Trover, &c. by Husband and Wife*, as Executrix of her firſt Husband, and for converting the Goods of the Teſtator: After a Verdict for the Plaintiffs, it was moved in Arreſt of Judgment, that the Declaration was ill, for they had ſet forth a joint Poſſeſſion of the Goods *by Huſband and Wife*, and Damages was given to them *jointly*, when in Truth the Goods belonged only to the Wife, as Executrix of her firſt Husband; but adjudged, that the Poſſeſſion of the Wife as Executrix, was the Poſſeſſion of her Husband, and ſo the Damages might belong to both. *Style* 48. *Fremlinſh* verſus *Clutterbuck.*

37. *Caſe* for *Words* brought *againſt Husband and Wife:* Upon Not guilty pleaded, the Jury found the *Husband guilty*, and the Wife *Not guilty*; adjudged in Arreſt of Judgment, that the Action being jointly againſt Husband and Wife, was ill, becauſe they could not jointly ſpeak the Words, and therefore they ought not to be joined in the Action; but that this was helped by the Verdict, which was not againſt both, ſo that the Judgment is againſt one alone. *Style* 349. *Burchard* verſus *Orchard.*

38. *Aſſumpſit* brought by the *Husband and Wife* againſt the Defendant, who, in Conſideration, that his Daughter ſhould have Diet, *&c.* of the Plaintiff, and that ſhe ſhould be inſtructed in Needle-work by the Wife, and in Conſideration of a Bond enter'd into by the Husband, he (the Defendant) promiſed to pay them ſo much, *&c.* After a Verdict for the Plaintiffs, it was objected in Arreſt of Judgment, that tho' there were three Things mentioned as a Conſideration for this Promiſe, yet the whole was intire, and being void in Part, 'tis void to the Whole; that it was void as to the Wife, for there could be no Conſideration moving from her, to induce the Defendant to make this Promiſe; but adjudged, that the Husband might have brought the Action in his own Name, or in both their Names, at his Election, as he might in an Aſſault and Battery, in an Action of Debt for Rent, *&c.* 2 *Sid.* 128. *Fountain* verſus *Smith.*

39. In Arreſt of Judgment in *Trover and Converſion* brought by *Husband and Wife*, and the *Trover* is ſuppoſed to be *before the Marriage*, and the * *Converſion after it*; two Judges of Opinion, that the Action ought to be brought by the *Husband alone*, becauſe 'tis the *Converſion* which is the Cauſe of Action; for if the Goods of a Feme ſole are diſtrained, and ſhe afterwards marries, the Husband alone may bring *Replevin*; two othes Judges, (*viz.*) *Windham and Twiſden*, of a contrary Opinion, and they diſtinguiſhed between Actions which are brought to affirm a Property, as *Replevin*, *Detinue*, *&c.* and Actions brought to deſtroy it in another, as *Treſpaſs*, *Trover*, *&c.* in the one the Action is well brought by the Husband alone, but in the other they muſt join. *Sid.* 177, 172. *Powes & Ux'* verſus *Marſhall.* See 2 *Lev.* 108. * Poſt. 45.

40. *Aſſumpſit* by the Husband, in which he declared, that the Defendant being indebted to his Wife *dum ſola*, ſhe being an Executrix, he (the Defendant) promiſed to pay; and he farther declared upon an *inſimul computaſſet* with himſelf: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; but the Judgment was ſet aſide, becauſe the Action was brought by the *Husband alone*, when his Wife ought to be joined; 'tis true he might have releaſed the Debt, but as long as the firſt Contract made to the Wife *dum ſola* continues, ſhe muſt be joined; becauſe if ſhe die the Husband is not intituled, but as Adminiſtrator to her; 'tis true likewiſe, if upon ſuch an *inſimul computaſſet* the Defendant had promiſed to pay upon Forbearance, there the Husband might have brought the Action alone, becauſe that is a new Contract. *Sid.* 299. *Tirrell* verſus *Bennett.*

41. Adjudged, that where Words ſpoken of a *Feme Covert*, are not actionable in themſelves, but only in Reſpect of collateral Damages, the Husband alone muſt bring the Action; for if he joins his Wife, and they obtain Judgment, it ſhall be arreſted. *Sid.* 346. 1 *Cro.* 438. *S. P.*

42. A *Feme Covert* was indicted alone for *Buying and Engroſſing Fiſh* contrary to the Statute, of which ſhe was found guilty; and it was moved to quaſh the Indictment, becauſe a married Woman cannot make a Contract without her Husband, and he ought to be joined in this Indictment, for if any Profit ariſes by Buying and Engroſſing, it accrews to the Husband; 'tis true, for greater Offences, as Felony, *&c.* ſhe may be indicted alone; no Judgment. *Sid.* 410. *The King* verſus *Fruen.*

43. *Treſpaſs* by Husband and Wife, for beating the Wife, and taking his Goods: Upon Not guilty pleaded, the Defendant was found guilty as to the Beating, * and acquitted for the Reſidue; and it was moved in Arreſt of Judgment, that the Action was not well brought as to the Goods, becauſe the Wife was joined with the Husband in it, and the Severance by the Verdict did not cure it; the Judgment was ſtaid. 1 *Lev.* 3. *Talbot* verſus *Bacon.* See * *Buckley* verſus *Hales, and* * *Revell* verſus *Grey. S. P.* * Poſtea 53. * Baron and Feme (H) 10. * Antea (I) 12.

44. The Husband kept a *Victualling-houſe*, and he and his Wife joined in an Action againſt the Defendant, for ſaying to her, *Thou art a Bawd to thy own Daughter*, by Reaſon whereof *W. R.* who accuſtomed his Houſe, forbore, *&c. ad damnum ipſorum.* After a Verdict for the Plaintiff, the Judgment was arreſted; becauſe the Words were not actionable, but in Reſpect of the Special Damages, and that is to the Loſs of the Husband only. 1 *Lev.* 140. *Coleman & Ux'* verſus *Harecourt.*

45. *Sci. fa.* againſt the Wife upon a Judgment, and after two *Nihils* returned, a Motion was made to quaſh it, becauſe before the *Sci. fa.* brought ſhe was married, and this Writ was brought againſt her as ſole, by the Contrivance of the Husband and the Plaintiff, to oppreſs her, and the Plaintiff knew that ſhe was married, and that ſhe could have no Relief either by Writ of Error,

Error, or *Audita querela*, becauſe her Husband would releaſe it; the Judgment may be ſet aſide for this Miſdemeanor. 1 *Vent.* 208. *The Lady Prettyman's* Caſe.

* Antea 39. 46. *Trover, &c. by Husband and Wife*, and the *Converſion* was laid * *after the Marriage*; it was objected, that the Wife ought not to be joined in this Action for that very Reaſon; but adjudged, that the *Trover* being laid before the Marriage, the Cauſe of Action then began, and the Wife might be joined, the Goods being her Property before; as where one has the Cuſtody of a Woman's Goods, and ſhe marries, ſhe may join in the *Detinue* with her Husband; but in the Principal Caſe the Husband might bring the Action alone, or join with his Wife. 1 *Vent.* 260. *Balmore & Ux'* verſus *Graves.*

47. In an Action of *Battery againſt the Husband and Wife*, the Jury found the *Wife* only guilty, and not the Husband; it was moved in Arreſt of Judgment, that this Verdict was againſt the Plaintiff, for he declaring of a Battery by *both*, and the Husband being acquitted the Action fails; but the Plaintiff had Judgment contrary to the Caſe of * *Drury & Dennis. Yel.* 106. 1 *Vent.* 93.

* Antea 14.

2 Mod. 66. 48. In an Action of *Battery brought by the Husband and Wife*, for beating both of them: Upon Not guilty pleaded, the Jury gave them ſo much Damages for Beating the Husband, and ſo much for the Wife; adjudged in Arreſt of Judgment, that the Husband might releaſe the Damages for Beating himſelf, and take Judgment for the other. 1 *Vent.* 328.

2 Mod. 66. 49. *Aſſault, Battery and Wounding the Husband and Wife:* Upon Not guilty pleaded, the Jury found the Defendant guilty, as to the *Wife*, and *quoad reſiduum* Not guilty; it was moved in Arreſt of Judgment, that the Husband and Wife could not join in an Action of Treſpaſs for Beating them both; beſides, there is nothing found as to the beating the Husband, for 'tis *quoad reſiduum*, which extends only to other Treſpaſs done by the Wife, and ſo the Verdict is imperfect; but adjudged, that the Verdict cured the Miſtake in the Action. 2 *Vent.* 29. *Hockett & Ux'* verſus *Seagold.* 2 *Cro.* 355, 655. *S. P. Style* 349. *S. P.*

50. Upon a Suggeſtion of a *Devaſtavit* by the Wife, who was an *Executrix*, it was, that the *Husband and Wife* had *waſted, &c.* and *converted to their* own Uſe: Upon Not guilty pleaded the Plaintiff had a Verdict, and it was inſiſted in Arreſt of Judgment, that the Husband and Wife *could not convert to their own Uſe*, which is very true, if Trover had been brought againſt them; but here the moſt material Part of the Iſſue was upon the *Devaſtaverunt*, which they might do *jointly*, and the Converſion is not material. 2 *Vent.* 41. 1 *Saund.* 305. *S. P.*

51. *Aſſumpſit, &c.* in which the Plaintiff declared *againſt the Husband* for ſo many Months Lodging for his *Wife at his Requeſt*, and the laſt Promiſe was for *Goods ſold to himſelf*; the Defendant pleaded in Bar, that long before he (the Plaintiff) had found Lodging for his (the Defendant's) Wife, ſhe went from him without his Conſent, and lived in Adultery, *&c.* and that the Plaintiff had Notice of her Departure, and yet he provided her Lodging, and ſold to her the Wares and Goods ſuppoſed in the Declaration to be ſold by the Defendant, without the Aſſent or Notice of the Defendant, and traverſed, that he promiſed *modo & forma*, as the Plaintiff had declared againſt him: and upon Demurrer, the Court inclined, that this Special Matter might have been given in Evidence upon *Non Aſſumpſit* pleaded, and that as to the Lodging for the Wife, the Plea amounted to the General Iſſue; but tho' it was a Fault, yet it was cured by the Demurrer; but they ſeemed to be againſt the Defendant, becauſe he did not anſwer to the *Aſſumpſit* laid for the Goods ſold *to himſelf*, but only, that the Goods alledged to be ſold to him were ſold to his Wife, which is not to the Purpoſe. 2 *Vent.* 155. *Beaumont* verſus *Welden.*

52. Treſpaſs, *&c. Quare clauſum fregit* againſt *Husband and Wife*; the *Chief Juſtice* was of Opinion, that the Wife could not be joined, tho' the Treſpaſs was done on her own Land; but *Juſtice Ventrice* was of a contrary Opinion; becauſe the Action will ſurvive, and they have Election, either to join, or the Husband might have brought it alone. See (I) *placito* 10. 1 *Brownl.* 21. *S. P. Hob.* 189. *S. P.* 1 *Cro.* 96. *S. P.* 2 *Vent.* 195. *Bright* verſus *Addy.*

53. A Motion in Chancery againſt the Husband, for the Writ *Ne exeat Regnum*, there being a Sentence againſt him at the Suit of his Wife for *Alimony*; and he being ſuſpected to go beyond Sea, to avoid the Sentence, the Writ was granted in aid to the Eccleſiaſtical Court, and alſo a *Supplicavit de bono geſtu*, the Court being informed that he uſed his Wife very ill. 2 *Vent.* 346. *Sir Jerome Smithſon's* Caſe

54. A Woman was indebted upon the Statute 1 *Jac. cap.* 11. for *marrying a ſecond Husband*, the firſt being alive: Upon Not guilty pleaded, the firſt Husband was produced to prove the Marriage, but the Court would not admit his Evidence, becauſe he could not be a Witneſs againſt his Wife, nor ſhe againſt her Husband, in any Caſe but Treaſon; and they denied the Lord *Audley's* Caſe in *Hutt.* 116. to be Law. *Raym.* 1. *Mary Grigg's* Caſe.

55. A Leaſe was made to a Woman *dum ſola* of a Houſe, with the Appurtenances, rendring Rent; then ſhe married, and during the Coverture, the Rent being in arrear, ſhe died, and the Leſſor brought an Action of Debt againſt the Husband for this Rent ſo in arrear; and adjudged, that it would lie. *See the Statute* 10 *H.* 6. *Raym.* 6. *Payne* verſus *Minſhull. See* 3 *Lev.* 25. 3 *Mod.* 189.

56. Action on the Caſe for ſcandalous Words brought againſt one *Mary Allen*, who pleaded in Bar, that *ante diem of exhibiting* the Bill, *viz.* 1 *die Julii* 12 *Car.* 2. the Plaintiff married her; and upon Demurrer to this Plea ſhe had Judgment, tho' it was pleaded in Bar. *Raym.* 395. *Walſal* verſus *Mary Allen.*

57. In an Action of Battery brought by the Husband and Wife, for a Battery upon them, the Declaration concluded *ad damnum ipſorum*: After a Verdict for the Plaintiffs the Judgment was arreſted; becauſe it ſhould have been *ad damnum* of the Husband alone. *Mod. Caſes*, 149. *per Holt.* Ch. Juſt. *Cole* verſus *Turner.*

58. *A Feme ſole* obtained a *Judgment*, and then *married*; afterwards her Husband and ſhe brought *a Scire facias*, *&c.* and had an *Award of Execution*, but before it was executed ſhe died; then the Husband brought a new *Scire facias*, and upon Demurrer to it, the Defendant inſiſted, that the Award of Execution upon the firſt *Scire facias*, made no Alteration, becauſe the Execution muſt ſtill be grounded on the Judgment, and that this being a *Choſe in Action*, muſt go to the Adminiſtrator of the Wife; but adjudged, that the Award of Execution is attached in the Husband, and ſhall ſurvive to him. 1 *Salk.* 116. *Woodyer* verſus *Greſham.*

59. Treſpaſs and Falſe Impriſonment by Husband and Wife, for impriſoning the Wife, by Reaſon whereof the Domeſtick Affairs *of the Husband* were left undone for ſo long Time, to the Damage, *ipſorum*, *&c.* After a Verdict for the Plaintiffs, it was inſiſted in Arreſt of Judgment, that this Action ought to have been brought by him alone, becauſe the Special Damage is laid in him; but adjudged, that the *per quod* was laid only to * *aggravate* the Damages. 1 *Salk.* 119. *Ruſſell & Ux'* verſus *Corne.* Mod. Ca. 127. * *See* Newman *v.* Smith. Treſpaſs.

60. Action againſt *Husband and Wife*, for a Battery done to *his Wife*; he was in Cuſtody in *B. R.* before the Action brought, and the Plaintiff delivered a Declaration to the *Turnkey* againſt both, and upon Rules given to plead, had Judgment againſt both, and the Wife was taken in Execution; it was inſiſted for her, that this was irregular; becauſe upon the Delivery of the Declaration, the Husband ſhould have filed Common Bail for himſelf and Wife, or appointed an Attorney to appear for both, which not being done, this Judgment was ſet aſide; and adjudged, that where there is Proceſs againſt *Husband and Wife*, and he is arreſted, *he muſt put in Bail for both*; but if he cannot be taken, and his Wife is arreſted, then upon *Non eſt inventus* returned, as to him, and a *Cepi Corpus* as to the Wife, and upon Common Bail filed as to her, ſhe ſhall be diſcharged, and if the Husband is in Cuſtody, then upon a Declaration delivered, as abovementioned, there may be Judgment againſt both. 1 *Salk.* 115. *Carpenter* verſus *Fauſtin.* See 2 *Cro.* 445. 1 *Mod.* 8.

61. Caſe, *&c.* by the Husband and Wife, *for Work done by the Wife during the Coverture*; *Per Curiam*, they cannot join in this Action, becauſe 'tis for a perſonal Thing, which would not ſurvive, and in * perſonal Things they muſt never join; they may join in Treſpaſs for entring the Land, * *& herbam ipſorum ibidem creſcen' aſportantes.* 4 *Mod.* 156. *Buckley* verſus *Collier.* * Cro. El. 133. * Cro. El. 96.

62. A Leaſe was made by Husband and Wife, in which the Leſſee covenanted with them to Repair; the Husband alone brought an Action of Covenant for not repairing, in which he ſet forth the Leaſe *& quod teneat ei conventionem*, according to the Form of the Indenture made between *him*, on the one Part, and the Defendant on the other Part: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that Covenant did not lie by one alone, becauſe it was made by both. *Sed per Curiam*, it being made by both, 'tis therefore, that it was made by the Husband, and he may refuſe *quoad* her, and bring the Action alone. 2 *Mod.* 217. *Beaver* verſus *Lane.* Cro. Car. 434.

63. Caſe, *&c.* by the Husband alone, in which he declared, that he in the Right of his Wife, was ſeiſed of a Meſſuage, and a Bake-houſe, and that the Defendant had built an Houſe of Office ſo near the Bake-houſe, that the Walls of his Houſe were ruinous, *&c.* and that he loſt his Cuſtomers: Upon Not guilty pleaded, the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Wife ought to join in this Action; for where ſhe may maintain an Action if ſhe ſurvive her Husband for a *Tort* done in his Life-time, and where ſhe may alſo recover Damages, in ſuch Caſes ſhe may join: ſo is *Cro. Car.* 418. that ſhe ought to join with her Huſband in an Action for Stopping a Way on her Land; ſhe muſt join with him in an Action of Debt on the Statute 2 *Ed. 6. cap.* 13. for not *ſetting out Tithes. Et per Curiam*, where ever the Action will ſurvive to her, ſhe muſt join; but if ſhe joined in the Principal Caſe, the Action could not have been maintained, becauſe intire Damages were given, and for loſing the Cuſtom to his Bake-houſe, he alone was intitled to the Action. 2 *Mod.* 269. *Frosdike* verſus *Sterling.* 2 Cro. 205, 393.

64. Debt upon Bond brought by Husband and Wife, the Defendant pleaded, that they never were *lawfully married*; and upon Demurrer, this was adjudged an ill Plea: becauſe a *Marriage de facto* was ſufficient to entitle the Plaintiff to this Action: Now by this Plea the Manner of Trial is altered, for it admits a *Marriage*, tho' not a *lawful* one, and whether lawful or not, muſt be tried by a *Certificate from the Ordinary*, and not by a Jury. 2 *Salk.* 437. *Allen & Ux'* verſus *Grey.*

65. The intended Wife, by the Conſent and Privity of her intended Husband, ſettled her Eſtate in Truſt, reſerving to her ſelf a Power to diſpoſe by her laſt Will, ſo much of her Eſtate in Legacies as ſhe ſhould think fit; afterwards they married, and the Wife made her Will, and died, and her Executor proved this Will; adjudged, this not a *Will*, but only a *Writing in Form of a Will*, and the Ordinary ought not to grant a Probate; if he doth a Prohibition lies; but it appearing, that he had only granted Adminiſtration *quoad* the Goods in this Will, it was allowed; 'tis true, where Woman is Executrix, and marries, there ſhe may make a Will with the Conſent of her Husband, but not without. 1 *Salk.* 313. *Shardelow* verſus *Naylor.* Cro. Car. 219. Jones 157.

66. *Indictment* againſt Husband and Wife, for an *Aſſault and Battery*, ſetting forth, that they *Vi & armis inſultum fecit, verbaraverunt, vulneraverunt, &c.* Upon Not guilty pleaded, the Jury found both guilty, and it was moved in Arreſt of Judgment, that *inſultum fecit* being in the ſingular Number, could refer but to one of the Defendants, and not to both; and if ſo, then 'tis uncertain to which of them: adjudged, that the Indictment had been good, if the *inſultum fecit* had been left out, for there cannot be a *Beating and Wounding*, without an *Aſſault*; 'tis true, in a civil Action, if one Part of the Declaration is ill, and the Jury give *intire Damages*, the Judgment muſt be arreſted, becauſe the Court cannot Apportion the Damages; but in Indictments, the Court may Aſſeſs the Fine according to the Fact which is well laid; and tho' ſome other Facts may be *ill laid*, yet there being ſufficient to maintain the Indictment, and well laid, the Indictment ſhall ſtand. 1 *Salk.* 384. *The Queen* verſus *Ingram & Ux'.*

67. A *Feme ſole* gave a *Warrant of Attorney* to confeſs a Judgment, and before it was entered ſhe *married*; adjudged, this was a *Countermand* of the Warrant, and that the Judgment ſhould not be entered againſt Husband and Wife, becauſe that would be to charge the Husband. 1 *Salk.* 399.

68. A *Feme covert*, who lived by her ſelf and acted as a *Feme ſole*, gave a *Warrant of Attorney* to confeſs a Judgment, *which was entered*, and upon a Motion to ſet it aſide, it was denied; let her bring a Writ of Error. 1 *Salk.* 400.

69. Treſpaſs by *Husband and Wife* for an *Aſſault* and *Battery on his Wife*; the Defendant pleaded *ſon Aſſault Demeſne of the Wife*; to which the Wife replied, that the Defendant was about to Wound her Husband, and that ſhe *inſultum fecit, &c.* to defend him; and upon Demurrer to this Replication, it was inſiſted that it was ill, becauſe the Plaintiff omitted theſe Words, (*viz.*) *molliter manus impoſuit*, inſtead of *inſultum fecit*; which is very true, if it had been in the Caſe of a Defence of his Houſe or Cloſe; but certainly a Wife may *juſtify an Aſſault in Defence of her Husband*, and ſo may a *Servant* in Defence of his *Maſter*, but not *e converſo*, becauſe the *Maſter* may have an Action *per quod ſervitium amiſit.* 1 *Salk.* 407. *Leeward & Ux'* verſus *Baſiſlee.*

(K)

They are but one Perſon in Law, and yet in ſome Caſes they ſhall take by Moieties, and in ſome not.

1. IF a Feoffment with *Warranty* is made to a Man, and to a *Feme ſole*, and they afterwards marry, and vouch the Feoffor to Warranty, and *recover in Value*, in ſuch Caſe they ſhall not take by Moieties; for altho' they were both ſole when the Warranty was made, yet when they recovered in Value they were Man and Wife, and one Perſon in Law; ſo where a *Reverſion* is granted to a Man, and to a *ſingle Woman*, and they afterwards intermarry, and then the Tenant attorneth, they ſhall not take by Moieties, but by Entirety. *Plow. Com.* 483. *In Nicholl's* Caſe.

2. Husband and Wife purchaſed Lands *together with a third Perſon*, to the Uſe of them and the Heirs of the Husband; afterwards this third Perſon *releaſed* to the Husband, but did not ſay *to him and his Heirs*; then the Husband and Wife made a Leaſe of all the Lands, rendring Rent to them, and to the Heirs of her Husband, who died, and after his Death the Heir brought an Action againſt the Leſſee for a Moiety of the Rent; adjudged, that the Releaſe made by the third Perſon, who was a joint Purchaſer with the Husband and Wife, enured to the Huſband alone; and that the Word *Heirs* was not neceſſary in the Releaſe, but that all the Intereſt which the Releaſor had was veſted in the Husband, and nothing in the Wife, by the Releaſe, for ſhe and her Husband are but one Perſon in Law. *Trin. 9 Eliz. Dyer* 263.

3. *Sir Robert Catline* purchaſed Lands which were held *in Capite*, to the Uſe of himſelf and *his Wife*, and to his own Right Heirs; this Purchaſe was made without Licence, and afterwards the Queen pardoned all Offences *pro quacunque alienatione ſibi facta*, but the Wife was not mentioned in the Pardon, and yet it was allowed in the Exchequer, and they were both diſcharged; for a Pardon to the Husband was ſo to the Wife, becauſe they are but one Perſon in Law. 3 *Eliz. Dyer* 196.

4. Debt againſt *Husband and Wife* for the *Recuſancy* of the Wife, in which Action the Huſband would have appeared alone; but adjudged, that they muſt both appear, or be both outlawed, for they are but one Perſon in Law. 1 *Hob.* 179. *Lovelace's* Caſe.

5. Sir *Tho. Wiatt* made a Feoffment in Fee, *&c.* to the Uſe of himſelf for Life, *Remainder to his Son*, and *to his Wife who ſhould be*, who afterwards married: then the Father levied a Fine to the Queen, and bound himſelf and his Heirs to Warranty, and died; the Son was attainted of Treaſon and executed, leaving Iſſue then living; then the Queen by Letters Patents granted the Lands to another, and afterwards the Widow and her Iſſue were reſtored; in ſuch Caſe it was held, that ſhe had a Right but to one Moiety, and the Patentee to the other; becauſe before her Marriage it was ſo ſettled, that her Husband and ſhe took only by Moieties. 2 *&* 3 *M. Dyer* 122. *Sir Thomas Wiatt's* Caſe.

6. Lands were given to a Man and to ſuch a Woman, who ſhall be his Wife; in ſuch Caſe the Man ſhall have the Whole; but if a Feoffment be made to the Uſe of the Feoffor, *and his Wife that ſhall be*, and afterwards he marrieth, there his Wife ſhall take jointly with him, tho' all at firſt was veſted in the Husband. 1 *Rep.* 101. In *Shelley*'s Caſe.

7. If a *Reverſion* is granted to a ſingle Man and Woman, and they afterwards intermarry, and the Tenant attorneth, they ſhall not take by Moieties, according to the Purport of the original Grant, but by Entireties, becauſe the Marriage was the Act of Grantees themſelves. 2 *Rep.* 48. In *Tooker*'s Caſe.

8. Trover by Husband and Wife, in which they declared, *quod cum poſſeſſionat' fuerunt*, of ſuch Goods, *&c.* which came to the Hands of the Defendant, and that he converted them to his own Uſe *ad damnum ipſorum*, *&c.* adjudged ill after a Verdict, becauſe the Poſſeſſion of the Wife is the Poſſeſſion of the Husband, and ſo is the Property, therefore the Converſion cannot be to her Damage. 1 *Salk.* 114. *Nelthrop & Ux'* verſus *Anderſon.*

(L)

Of Actions brought againſt them, and of Pleadings in Actions brought by and againſt Husband and Wife, and by and againſt their Leſſors or Leſſees. See *Repleader.* (A) 5, 9. *Trover.* (A) 6. *Verdict.* (C) 10, 11.

1. LEaſe was granted to Husband and Wife for a certain Term of Years, ſhe ſurvived her Husband and married again; and in declaring upon this Leaſe, the Plaintiff ſet forth, that he and his Wife were poſſeſſed, but did not ſay, that he was poſſeſſed *jure Uxoris*, as he ought, becauſe the Term remained in her during the *Coverture*, and it was only conditionally in the Husband, in caſe he ſurvived her, and this was held a material Objection; but becauſe this Declaration ſet forth, that they were married, *per quod* they were poſſeſſed, this ſhews *how* he came to be poſſeſſed, and ſo it was held to be well enough. *Plow. Com.* 191. See *Antea* (A) 2.

2. *Debt againſt Husband and Wife*, upon a Bond made by the Wife *dum ſola*; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe it was in the *Detinet* only, when it ſhould have been in the *Debet* and *Detinet*, for the Marriage was a Gift in Law of all the perſonal Goods to the Husband, and to his own Uſe, and therefore *Debet* the Money due on this Bond, as well as *Detinet*, and ſo it was adjudged. 5 *Rep.* 36. *Walcott*'s Caſe.

3. Caſe, *&c.* wherein the Plaintiff declared, that Husband and Wife were ſeiſed to them, and to *the Heirs of the Husband*, of five Acres of Meadow, lying near a River called *Weſtbury River*, which they leaſed to him for twenty-one Years, paying ſuch a Rent, and that the Defendant erected a *Water-Mill* on the ſaid River, by which he ſtopped the Courſe of Water running to his Meadow; and upon Demurrer to this Declaration it was objected, that it was ill, becauſe the Plaintiff ſet forth, that the Husband and Wife were ſeiſed to them, and to the Heirs of the Husband, and did not ſhew *how that Eſtate began*, for it being a *ſpecial Eſtate in the Husband*, and but a *particular Eſtate in the Wife*, he ought to have ſhewed the Beginning of it; but adjudged good, the Action being brought by their Leſſee, ſo that 'tis but an Inducement to it, and 'tis plain, that the Inheritance is in the Husband; then it was objected, that the Declaration was on a Leaſe made by the *Husband and Wife*, in which there was a Rent reſerved, for which Reaſon it could not be the Leaſe of the Wife; but adjudged, that it was her Leaſe till ſhe diſagree to it, and the *Inheritance* being in the Husband, the Leaſe ſhall be good againſt him and his Heirs. *Mich.* 30 *Eliz. Cro. Eliz.* 112. *Jackſon* verſus *Mordant.*

4. And yet in *Treſpaſs* brought by Husband and Wife, for breaking the Cloſe of the Husband *ad damnum eorum*; and after a Verdict for the Plaintiffs, the Judgment was arreſted for this very Fault in the Declaration, and reſolved, that it was not helped by any Statute. 2 *Cro.* 473. *Marſhall* verſus *Doyles.* *In Treſpaſs, &c. they declared, that the Defendant broke their Cloſe, & herbam meſſuit & viginti careſtat' fœni inde provenien' cepit & aſportavit, this was held good after a Verdict.* Cro. Eliz. 96. Cookſon & Ux' *verſus* Caſtlin. *See* Cro. Eliz. 133. Dyer 305. S. P.

5. So in *Trover and Converſion* againſt Husband and Wife *ad uſum ipſorum*; upon Not guilty pleaded, there was a Verdict for the Plaintiff, and it was inſiſted in Arreſt of Judgment, that the Wife could not convert any Thing to her *own Uſe* * during the Coverture, *where ſhe joins, or is joined in the Action with her Husband*, becauſe the Converſion in ſuch Caſe is the Act of the Husband alone, and ſo it was adjudged. *Cro. Car.* 184. *Rhemes* verſus *Humfrie*, and 355, 434. *Perry* verſus *Diggs. S. P. Style* 115. *Gallop* verſus *Simpſon. S. P.* 1 *Leon.* 312. *Marſh*'s Caſe *contra.* * Palm. 343. Berry *v.* Newy. 2 Cro. 661. S. C. Jones 16. S. C.

6. Husband and Wife being ſeiſed of Lands in Right of the Wife *for Life*, *demiſed*, *granted*, and to farm let, certain Lands for Years, if the Wife ſhould ſo long live, the Husband died, and his Widow entered, and avoided this Leaſe, and made another to a Stranger, whereupon the Leſſee brought an Action of Covenant againſt the Executor of the Husband, upon the Words *Demiſe and Grant*; the Defendant demurred to the Declaration, and had Judgment, becauſe a Covenant in Law, as this was, ſhall not extend to make the Husband do more than he can Warrant, which

was to warrant it as long as he lived, and no longer. 1 *Brownl.* 22. *Bragg* verſus *Wiſeman. Poſtea* Covent. (B) 4. *S. P.*

7. Error in the Exchequer-Chamber, on a Judgment in an Action of *Debt brought againſt Husband and Wife*, upon a Bond made by the Wife *dum ſola*, for that the Judgment was, that the Husband be *in miſericordia*, and that the Wife *capiatur*, for which Cauſe the Judgment was reverſed; for it ſhould be, that the Husband and Wife *Capiantur*. *Moor* 704. *Burdolph* verſus *Perry & Ux'*. Judgment. (C) 10. *S. P.*

8. The Plaintiff brought an Action againſt Husband and Wife, upon a Bond of the Wife before Marriage; the Defendants plead, that *tempore confectionis, &c.* ſetting forth the Day ſhe was *Covert Baron*; the Plaintiff in his Replication, confeſſed that it was ſo, but that ſhe ſealed the Bond in the Morning of the ſame Day, in which ſhe was married; and upon a Demurrer to this Replication it was held good, and the Plaintiff had Judgment. 2 *Roll. Rep.* 428. *Jackſon & Uxor's* Caſe.

9. Caſe againſt Husband and Wife, for ſlanderous Words ſpoken by the Wife; the Husband pleaded, *quod ipſi non ſunt Inde culpabiles*, and the Jury found *quod ipſi ſunt culpabiles*; it was moved in Arreſt of Judgment, that it ſhould have been *Inde culpabiles:* But *per Curiam*, 'tis well enough, for the Husband is to pay the Damages. 2 *Roll. Rep.* 433. *Henborow* verſus *Pooracre.*

10. *Trover and Converſion by Husband and Wife*; adjudged, that this Action is not founded upon any Property, but upon the Poſſeſſion only, and that the Point of it is the *Converſion*; therefore, where they are Plaintiffs in this Action, they cannot alledge the Poſſeſſion to be in themſelves, becauſe the Law transfers the whole Intereſt in Point of Ownerſhip to the *Husband*, but where they are Defendants in this Action, the Converſion may be alledged in the Wife, for ſhe may convert, tho' ſhe cannot contract during the Coverture. *Yelv.* 165. *Draper* verſus *Fulks.* *Cro. Car.* 254. *S. P.* 1 *Vent.* 12, 24, 33. *S. P.*

11. Action on the Caſe in Nature of a Conſpiracy, was brought by Husband and Wife, for cauſing them to be indicted of Felony, falſly and malitiouſly, *&c. Ad damnum ipſorum*; upon Not guilty pleaded, there was a Verdict and Judgment for the Plaintiffs, and upon a Writ of Error brought, the Error aſſigned was, that a Wife cannot join with her Husband for * *Damages*, becauſe 'tis ſeveral in reſpect of Wrong done to them both, and therefore they ought not to conclude *ad damnum ipſorum*, and of that Opinion was one Judge; but *Croke* Juſt. held the contrary, becauſe the Action is grounded upon one entire Wrong, in which they were both injured, and they may join if they will, or the Husband may have an Action alone. *Cro. Car.* 398. *Dalby* verſus *Dorthall.*

* *Treſpaſs by Huſband and Wife, for Beating the Wife, and the Defendant* alia enormia eis intulit, *where the Word* eis *muſt relate to both; and for that Reaſon it was objected, that the Wife could not join for an Injury done to her Husband; but adjudged in Error, that thoſe Words are only in Aggravation of Damages, and the Plaintiffs had Judgment.* 2 Cro. 664. Thomlins *verſus* Hoe.

12. So where *Trover and Converſion* was brought againſt Husband and Wife for two Sheaves of Corn, and the Converſion was laid * *ad uſum ipſorum*, it was adjudged ill, becauſe the Wife could have no Property during the Life of the Husband; but *Jones* Juſt. was of Opinion, that in this Caſe there might be a Converſion by the Wife to her own Uſe, (*viz.*) to make Bread of the Corn, and eat it her ſelf. *March* 60. *Hodges* verſus *Simpſon.*

* Poſtea 14.

13. *Husband and Wife as Adminiſtratrix* brought an Action on the Caſe *ad reſpondend'* to the Husband and Wife, *cui* the Adminiſtration of the Goods, *&c.* were granted; after a Verdict for the Plaintiff, a Writ of Error was brought, and the Error aſſigned was, that the Declaration was incertain, becauſe by the Word *Cui* no Man can tell to which of them the Adminiſtration was granted; but adjudged, that it ſhall relate *ad proximum antecedens*, which is the Wife, and ſo 'tis certain enough. *Paſch.* 2 *Car. Latch* 212. *Walter* verſus *Hayes.*

14. Debt upon a Bond made to a ſingle Woman, who afterwards married, and the Action was brought by the Husband and Wife * *ad damnum ipſorum*; and adjudged good, for it was a Damage to the Woman, the Money not being paid to her when ſhe was ſole, and being now married, 'tis a Damage to the Husband. *Mich.* 24 *Car. Style* 134.

* Antea 4, 5, 11, 12.

1 Lev. 7. Sid. 425. 1 Mod. 9.

15. *Indebitatus Aſſumpſit* againſt the Husband *pro diverſis Mercimoniis, &c. ſold and delivered to the Wife*, to the Uſe of her Husband, it being for *neceſſary Apparel* for her; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, it being, that *the Sale was to the Wife, to the Uſe of her Husband*; but adjudged, that the Declaration was good, and that the Husband is chargeable. 1 *Vent.* 42. *Dyer* verſus *Eaſt.*

1 Lev. 216.

16. Where they are arreſted in an Action which requires Special Bail, the Husband muſt put in Bail for his Wife as well as for himſelf; but if he lies in Priſon, the Wife cannot be diſcharged upon common Bail. 1 *Ven.* 49. 1 *Mod.* 8. *S. P.*

Sid. 395.

17. *Ca. ſa. againſt Husband and Wife*, the Husband eſcaped; adjudged, that unleſs the Plaintiff retake him, the Wife ſhall be diſcharged, for the Eſcape of one is the Eſcape of the other. 1 *Vent.* 51. *Jackſon* verſus *Gabree.*

Verdict. (C) 10.

18. Aſſault and Battery againſt Husband and Wife, the Jury found the Wife guilty; and in Arreſt of Judgment it was inſiſted, that this Verdict was againſt the Plaintiff, for he having declared of a Battery by both, and one being acquitted, he is barred of his Action; but adjudged for the Plaintiff. 1 *Vent.* 93. The Caſe of * *Drury* and *Denny* denied to be Law.

Poſtea 21.

19. Debt againſt *Husband and Wife* for her Debt *dum ſola*, whereupon he was *outlawed* and ſhe *waived* and taken in Execution, but the Husband could not be found; it was moved, that ſhe

ſhe might be diſcharged upon an Affidavit made, that ſhe was but ſeventeen Years old when ſhe married, and ſo could not contract a Debt; and as to the Outlary, that ſhe was pardoned by the General Pardon, ſo he was diſcharged. *Sid.* 20. *Biron* verſus *Bickley.* See *Dyer* 271. *b. S. P.*

20. Treſpaſs by Husband and Wife, for Beating her and tearing her Petticoat *ad damnum ipſorum*; after a Verdict for the Plaintiffs, the Judgment was ſtayed, becauſe, as to the Tearing the Petticoat, the Action brought is Wrong, for it ſhould be in the Name of the Husband alone; now the Wife ought not to be joined in an Action with her Husband for a Wrong done, but where ſuch Action will ſurvive to her after his Death; but ſhe cannot bring an Action for Tearing her Petticoat, after his Death. *Sid.* 224. *Stanton & Ux'* verſus *Hobert*, and 387. *Horton* verſus *Byles. S. P.* See *Poſtea pl.* 21. *S. P.*

21. Debt againſt Husband and Wife, for a Debt as was ſuppoſed to be owing by her *dum ſola*; there was ſpecial Bail, and Judgment was had againſt them, and they ſurrendered themſelves in Diſcharge of the Bail; it was moved, that the Wife might be diſcharged, for in Truth the Debt was not due from her *dum ſola*, but this Action was contrived between the Plaintiff and the Huſband, to get the Wife into Gaol; it was agreed, that if the Wife is taken upon meſne Proceſs before her Husband, ſhe ſhall be * diſcharged, and when the Husband is afterwards taken, he ſhall give an Appearance for the Wife, but if it be upon an Execution, the Wife may be taken firſt; but if upon Examination it appears to be a Contrivance to charge the Wife, ſhe ſhall be diſcharged, and the Judgment ſhall be taken off the Roll. *Sid.* 395. *Gabry* verſus *Gabry & Ux'*. See *Lev.* 216. *Whitefeild* verſus *Holmes. S. P.* See *pl.* 19. Vent. 51. * Antea 19.

22. Debt upon Bond ſealed by both, and they being taken on the *Capias*; adjudged, that an *Habeas Corpus* might be brought without Motion, and they being in Court, the Wife may be diſcharged, and the Husband recommitted. 1 *Lev.* 1. *Slater* verſus *Slater.*

23. The Husband confeſſed a Judgment againſt himſelf and his Wife, for a Debt owing by the Wife (as he pretended) *dum ſola*, when in Truth it was contracted after the Marriage, and they were both taken in Execution; but the Wife was diſcharged upon Motion. 1 *Lev.* 51. The *Lady Chaworth's* Caſe.

24. Treſpaſs brought by the Husband and Wife, for the Battery of the Wife, and Taking from her an * *Apron and Pinner*; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that 'tis not alledged in whom the *Property* was, for it cannot be in the Wife, and it may be in a Stranger, and then the Husband hath no Cauſe of Action, and if they were the Goods of the Huſband, then the Wife ought not to be joined in the Action, but the Husband is to bring the Action alone; and ſo it was adjudged. 2 *Lev.* 20. *Dunwell & Ux'* verſus *Marſhall.* See 2 *Cro.* 46. *Burſer* verſus *Martin. S. P.* which was Treſpaſs for Taking a Horſe from the Plaintiff, and did not ſay *his Horſe.* * Antea 20.

25. *Aſſumpſit, &c.* againſt Husband and Wife, for Wares bought by her *dum ſola*; upon *Non Aſſumpſit* pleaded, there was a Verdict, and Judgment for the Plaintiff in *C. B.* and upon a Writ of Error in *B. R.* the Error aſſigned was, that the Wife was within Age, and appeared by Attorney, when it ought to be by *Guardian*; the Defendant pleaded *in nullo eſt erratum*, which is a Demurrer, ſuppoſing that he joining with her, ſhe might appear *per Attornatum*; but adjudged 'tis Error in Fact, and confeſſed by the Demurrer. 2 *Lev.* 38. *Baddington* verſus *Freeman.*

26. In *Trover* by Husband and Wife, the Plaintiff declared, that his Wife loſt the Goods *dum ſola*, and that afterwards they married, and the Defendant converted them, *&c.* after a Verdict for the Plaintiff, it was objected, that *Trover* being laid before the Marriage, and the Converſion after, they ought not to join in this Action, but the Husband alone ſhould have brought it, becauſe the Converſion is the Cauſe of Action; but adjudged, the Cauſe of Action began when the Wife was *ſole*, (*viz.*) the Trover, tho' it was not compleat till after the Marriage, (*viz.*) by the Converſion. 2 *Lev.* 107. In *Blackburne* and *Graves's* Caſe.

27. Debt upon a Judgment by Husband and Wife, in which they declared, that one *Clerke* recovered 90 *l.* and made the Plaintiff an Executrix, and died, and that ſhe took to Husband *Quendam Philippum Bickerſtaffe, &c.* The Defendant pleaded, that the Plaintiffs were never married; and upon a Demurrer to this Plea it was adjudged, that the Declaration was ill, becauſe *Quendam Philippum* ſhall not be intended the Plaintiff *Phillip*, according to *Dyer* 70. *b.* 2 *Lev.* 207. *Bickerſtaffe & Ux'* verſus *Peircy.*

28. *In Replevin, &c.* The Defendant pleaded, that *he was ſeiſed, &c. in jure Uxoris*, and ſo avowed *Damage-feaſant*; and upon a Replication and Demurrer, and ſome Objections made to the Replication, it was objected likewiſe againſt the Declaration, for that the Plaintiff declared, that *he was ſeiſed, &c. in jure Uxoris*, when it ſhould be, that *he and his Wife* were ſeiſed *in jure Uxoris*, and this was held a good Exception. 2 *Lutw.* 1594. *Allen* verſus *Bailey.* Tender (B) 14. *S. C.*

29. If the Wife is arreſted, ſhe muſt be diſcharged upon *Common Bail*, let the Cauſe of Action be what it will; but if the Husband is likewiſe arreſted, he ſhall not be diſcharged, unleſs he give Bail for his Wife as well as for himſelf. *Mod. Caſes* 17. *Corniſh* verſus *Markes.*

30. A Feme covert was arreſted by the Name of *Minors*, and *gave Bail by that Name*, in an Action of Debt upon a Bond, and afterwards the Plaintiff declared againſt her by that Name, and then ſhe pleaded a *Miſnoſmer*; adjudged, that whatever a *Bail-Bond* may do in other Caſes, yet in the Caſe of a Feme covert it ſhall not eſtop her to plead a *Miſnoſmer.* 1 *Salk.* 7. *Linch* verſus *Hook.* *See* Oyer. (A) 2. Mod. Caſes 311. Cro. Eliz. 198, 249, 583. 1 Vent. 13.

31. Debt

31. Debt againſt the Defendant as a *Feme ſole*, the Action was brought in the *Palace-Court*; ſhe pleaded, and afterwards married, and then removed the Cauſe by *Habeas Corpus* into *B. R.* and there the Plaintiff declared againſt her in *Cuſtod' Mar'*, ſhe pleaded in Abatement, that ſhe was *married at the Time of the Habeas Corpus* brought; and upon Demurrer this was adjudged a good Plea, the Courſe had been for the Plaintiff to move for a *Procedendo* upon the Return of the *Habeas Corpus*; for tho' 'tis a Writ of Right, yet the Court may refuſe it where 'tis brought to abate a juſt Action. 1 *Salk.* 8. *Hetherington* verſus *Reynolds.*

Bar.

(A)

Of Pleas in Bar, perpetual, and good to a common Intent, and where the Matter is in Abatement. See *Covenant.* (M) 10. *Pleas.* (K) 9.

1. THE Defendant pleaded in Bar, that *W. R.* died ſeiſed, and that *T. R.* entered *as Son and Heir* to *W. R.* this is a good Bar, and yet he might not be *his Heir*, for 'tis not expreſly pleaded, that he was *his Son and Heir*, but only, that he entered *as Son and Heir*; but becauſe it was pleaded in Bar, the beſt ſhall be intended for the Defendant. *Plow. Com.* 28, and 31. In *Colethirſt* and *Bejuſhin's* Caſe.

2. A Plea in *Bar* goes to the Deſtruction of the Plaintiff's Action, and in all Actions perſonal, as *Debt*, *Accompt*, *&c.* 'tis perpetual, and in ſuch Caſe the Party hath no Remedy, but by a Writ of Error or Attaint; but if a Man is barred in a *real Action* by a Judgment, either on *Demurrer*, *Verdict*, or *Confeſſion*, yet he may have an Action of as high a Nature, becauſe it concerns his Freehold and Inheritane, as for Inſtance, if he is barred in a *Formedon in Deſcender*, yet he may have a *Formedon* in the *Remainder* or *Reverter*, becauſe the Fee-ſimple is to be recovered. *6 Rep.* 7. *Ferrer's* Caſe. *Poſtea* Formedon. (A) 2. *S. C.*

3. In many Caſes a Plea in Bar is good to a *common Intent*, as for Inſtance, a Widow who was Executrix to her Husband, agreed with the Defendant, that in Conſideration of 100 *l.* to be paid to him at a certain Day, he ſhould, upon Requeſt, reconvey certain Lands to her, *&c.* which were formerly the Lands of her ſaid Husband, which he promiſed to do, but afterwards refuſed to reconvey; then the Widow married a ſecond Husband, and he and his Wife exhibited a Bill in Chancery for a Reconveyance, which was decreed, and accordingly, upon Payment of the 100 *l.* by the Husband, it was made to the *Wife*, *which ſhe accepted*, then the Husband and Wife brought an Action againſt the Defendant upon this Agreement, who pleaded in Bar, the Decree and the Performance thereof, by a Feoffment made to the Wife; and upon Demurrer it was objected againſt this Plea, that there was no Averment of any *Acceptance* by the Husband, and he ſhall not be barred by the Acceptance of his Wife; but adjudged, that this Plea was good to a *common Intent*, for by the Reconveyance the Lands ſhall be as well in him as his Wife, until he diſagree to it; and he having paid the 100 *l.* did thereby take Notice of the Decree, that it ſhould be in full Diſcharge of the Promiſe made to his Wife. 1 *Bulſt.* 89. *Woolverton* verſus *Day.*

4. *Debt againſt an Executor*, upon a Bond of the Teſtator, the Defendant pleaded a Statute acknowledged by the ſaid Teſtator, *&c.* and averred, that he had not, at the Day of the Bill brought, any Goods, *quæ fuerunt Bona Teſtatoris tempore mortis ſuæ*, in his Hands to be adminiſtered; beſides, to ſatisfy the ſaid Statute, and upon Demurrer to this Plea it was objected, that it was ill, becauſe the Defendant might have *Goods liable* to Debts, tho' they were not the Teſtator's Goods *tempore mortis ſuæ*; but adjudged, that the Plea in Bar was good to a *common Intent*, for it ſhall not be intended, that he had ſuch Aſſets, being Special Aſſets, unleſs it was ſpecially ſhewed. 2 *Cro.* 131. *Gawen* verſus *Rolls.*

5. Debt upon Bond for *quiet Enjoyment* from Time to Time; the Defendant pleaded, that after the Making the ſaid Bond to the Time of the Bill exhibited, the Plaintiff enjoyed the Lands; and upon Demurrer to this Plea it was objected, that the Defendant ought not only to ſay, that the Plaintiff enjoyed it after the Making of the Bond, *&c.* but *always after the Making it*; but adjudged, that a Bar is good to a common Intent, for it ſhall be intended, that he *always* enjoyed it, unleſs the contrary is ſhewn. *Cro. Car.* 141. *Harlow* verſus *Wright.*

6. Treſpaſſer againſt three Defendants, who pleaded the General Iſſue as to Part, *&c.* and as to the Reſidue they plead in *Bar*, that the Plaintiff brought an Action againſt *Two of them*, and others, for the ſame Treſpaſs, *&c.* and they concluded their Plea likewiſe in Bar, but this was held ill, becauſe *all* the Defendants had pleaded an Action depending againſt *Two of them*, and ſaid nothing of the *Third*; and tho' this Matter was properly to be pleaded in *Abatement*, and not in *Bar*, yet the Defendants having begun and concluded their Plea in Bar, Judgment final ſhall be given for the Plaintiff *quod recuperet damna*, *&c.* 1 *Lutw.* 42, and *Vol.* 2. 1532. *Wallis* verſus *Savill.* *Cro. Eliz.* 202. *S. P. Sid.* 189. *S. P.* 1 *Mod.* 239. *S. P.*

Barratoz.

See *Indictment.* (E) per Totum.

(A)

'TIS written *Baretor* by Mr. *Lambert*, and yet he derives it from the *Latin Balatro*, a vile Knave; but the proper Derivation is from the French, *Barratour*, (i. e.) a Deceiver, and this agrees with the Deſcription of a Common Barrator in my Lord *Coke*'s Reports, (*viz.*) That he is a common Mover and Maintainer of Suits and Quarrels in Diſturbance of the Peace, and in Taking and Detaining the Poſſeſſion of Houſes and Lands or Goods by falſe Inventions, *&c.* and therefore it was adjudged, that the Indictment againſt him ought to be in theſe Words, (*viz.*) that he is *Communis malefactor, calumniator & ſeminator litium & diſcordiarum inter vicinos ſuos, & malefactor & pacis Regis perturbator*; and there it is ſaid, thar a *Common Barrator* is the moſt dangerous Oppreſſor in the Law; for he oppreſſeth the Innocent by Colour of Law, which was made to protect them from Oppreſſion, and therefore the Words *Oppreſſor Vicinorum ſuorum* are very material to be inſerted in every Indictment againſt a Common Barrator 8 *Rep.* 37. *Caſe of Barretry.* See 3 *Mod.* 97.

Baſtardy.

Of Baſtardy in general. (A)
Orders of Juſtices of Peace and Seſſions concerning Baſtards. (B)
Of a Baſtard, and where to be ſettled. (C)

(A)

Of Baſtardy in general. See *Action on the Caſe.* (O) per Totum. *Titles.* (A) 1.

1. THIS is of Eccleſiaſtical Juriſdiction, but then it muſt be intended *general Baſtardy*; for 'tis divided into *General* and *Special Baſtardy*, and if *General Baſtardy* is pleaded in Diſability to the Perſon, either in a real or perſonal Action, it ſhall be tried by the *Certificate of the Biſhop*; as for inſtance, if the Plea is, that *nunquam in legitimo matrimonio copulati fuerunt*, there the Word *Legitimo* muſt be intended according to the Laws of the Church, and in ſuch Caſe the Temporal Judge, before whom the Cauſe is depending, writes to the Biſhop, to certify whether the Marriage was *lawful* or not, and according to his Return the Judgment is formed; but in the Caſe of *Special Baſtardy*, 'tis otherwiſe, (*i. e*) where the Plea is, that the Plaintiff was *begotten and born at L. &c. inter W. R. & quandam A. R. ante aliqua ſponſalia inter eoſdem W. R. & A. R. celebrat'*; the Plaintiff may take Iſſue upon this Plea, and it ſhall be tried by a Jury. 7 *Ed.* 6. *Dyer* 79. and 13 *Eliz. Dyer* 296. and 14 *Eliz. Dyer* 313. and 18 *Eliz. Dyer* 345. *The Duke of Suffolk*'s Caſe, and *Thorneton*'s Caſe.

2. A Baſtard is by the Common Law *quaſi nullius filius*; but certainly he may be called a Son in Reſpect to his *Mother*, and a reputed Son is a good Name of Purchaſe. *6 Rep.* 65. in *Sir Moile Finch*'s Caſe; and yet where the Caſe was thus, (*viz.*) * The Feoffor made a Feoffment in Fee to the Uſe of himſelf for Life, Remainder to ſuch Iſſue Male of the Body of *M. L.* who ſhould be ſuppoſed or reputed to be begotten by the Feoffor, whether by the Laws they ſhould be adjudged lawful or not; afterwards he had Iſſue by her the Plaintiff, and the Defendant having recovered againſt the Father of the Plaintiff in an Aſſiſe, and the Father being now dead, the Son was Plaintiff in a Writ of Error brought by him as in *Remainder*, and averred, that he was the Iſſue begotten on the Body of *M. L.* and always ſince his Birth, reputed to be begotten by the Feoffor; adjudged, that he hath not well intitled himſelf to any Remainder, and by Conſequence can have no Writ of Error; for tho' a Limitation of a Remainder to a Baſtard *in eſſe*, is good, becauſe he is a Perſon known, and may in Time be reputed the Son of another, yet it cannot be good to a Baſtard before 'tis born; for the Law will never expect that any ſuch ſhall be; therefore a Remainder to his firſt reputed Son or Baſtard, is not good; becauſe the Law does not favour ſuch

* Moor 430.

ſuch Births, and therefore will not ſuffer any ſuch Limitation. *Cro. Eliz.* 509. *Bledwell* verſus *Edwards*. *Poſtea* Titles. (A) 1. *Worſley*'s Caſe. *S. P.*

3. In a Writ of Partition brought by *Ralph Howard* and the Lady *Anne Powes* his Wife; the Defendant pleaded, that the ſaid *Anne* ought not to have Partition as *Daughter*, and one of the Heirs of *Charles Duke of Suffolk*, becauſe ſhe was begotten and born between the ſaid Duke (when called by the Name of *Charles Brandon, Eſq*;) and one *Anne Brown*, before they were married, *&c.* upon which they were at Iſſue; adjudged, that a Baſtard is a meer Stranger to the Father, becauſe in Law ſhe is *nullius filia*; therefore where in a *Præcipe quod reddat* a *Baſtard* was named *filius W. R.* for that Cauſe the Writ did abate. *Mich.* 18 *Eliz. Dyer* 345. *Thornton*'s Caſe. See *ibid.* 296, *and* 313.

3 Leon. 48. 4. So a Deviſe to the Uſe of *Jane his Daughter*, and to the Heirs of her Body, which Daughter was a *Baſtard*; my *Lord Dyer* makes a Queſtion, whether ſhe ſhould take by the Name of Daughter; but it being referred to him, and to another Judge, they, upon farther Conſideration, were of Opinion, that a Baſtard ſhall take by the Name of *Daughter* or *Child*, by the Intention in the Will of the reputed Father. *Dyer* 323. *Lingen*'s Caſe.

5. Since the Father of a Baſtard Child is compelled by the Statute 18 *Eliz. cap.* to make Proviſion for him, the Law allows, that it may be by Deed executed in his Life-time; and if ſuch Baſtard *is commonly known and reputed to be the Son of the Donor*, a Remainder may be limited to him by the Name of his Son. 3 *Leon.* 48.

6. There ſeems to be a contrary Opinion in *Serjeant Moor*'s Reports, where we are told, that if a Man grants all his Goods *to his Children*, and one of them is a *Baſtard*, he ſhall take nothing by ſuch a Grant; but he makes a Queſtion of it, whether a Baſtard ſhould not take by the Will of his reputed Father, and by his Name; but 'tis clear that he might take by the Mother's Will, and by her Name, becauſe he is known to be the *Child* of his Mother. *Moor. Rep.* 10.

7 So where an Action is brought for calling the Plaintiff Baſtard, and the Defendant juſtified that he was and is a Baſtard, this ſhall be tried by the Country. *Trin.* 14 *Jac. Hob.* 179.

Palm. 9. Godb. 281. Litt. Rep. 178. *there cited.* * Moor 523. Cro. Eliz. 566. 8. In Evidence to a Jury in Ejectment, the Caſe was, the Husband died, and his Widow *forty Weeks and ten Days* after his Death, was delivered of a Daughter, and the Queſtion was, whether ſhe ſhould be Heir to the Husband, or a Baſtard; and upon Opinions of Phyſicians on Oath, it was, adjudged, that one born *after forty Weeks* as well as one born at the End of *ſeven Months*, might be legitimate, and ſo it may, tho' born the laſt Day of the 10*th Month* after Conception, reckoning Solary, and not Lunary Months. *Mich.* 17. *Jac.* 2 *Cro.* 541. *Alſope* verſus *Bowtrell*. *Style* 277. * *Thecker* verſus *Duncumb*, *S. P.*

3 Lev. 410. 9. In Ejectment, the Plaintiff, *Mr. Pride*, made a Title as Heir to *George Duke of Albermarle*, proving himſelf the Son of one who was Daughter of the elder Brother of that Duke, and that he died without Iſſue; the Evidence for the Defendant was, that *Duke George* had Iſſue *Duke Chriſtopher*, under whom he made a Title both by Deed and Will; the Plaintiff gave Evidence, that Duke *Chriſtopher* was a Baſtard begotten on ſuch a Woman, who, at the Time of her pretended Marriage with *Duke George*, was married to another Man then and yet living; it was inſiſted, that ſince *Duke George* and this Woman cohabited as Man and Wife, and were both dead, and Duke *Chriſtopher* alſo, who during his Life, was reputed to be legitimate, and ſtiled by *Duke George* in his Deed of Settlement and Will, to be his Son and Heir, the Plaintiff ſhall not be admitted to prove him a Baſtard; for the Rule is, *non juſtum eſt aliquem poſt mortem facere Baſtardum*; which is very true, of ſuch Baſtard as *Littleton* meant, (*viz.*) one born before the Marriage of his Father and Mother, *who marry afterwards*, which is called *Baſtard Eigne and Mulier puiſne*; 'tis true alſo, that the Spiritual Court cannot give Sentence to annul a Marriage after the Parties are dead; becauſe that Court proceeds only *pro ſalute Animæ*, and then 'tis too late; but in the Principal Caſe, the laſt Marriage of this Woman, whilſt her firſt Husband was living, was void without any Divorce, and the Jury ſhall try the Fact which proves it no Marriage. 1 *Salk.* 120 *Pride* verſus. *Earl of Bath and Mountague.*

(B)

Of Orders made by Juſtices, &c. in Caſes of Baſtardy.

1. TWO Juſtices made an Order, by which they adjudged one *Hammond* to be the reputed Father of a Baſtard Child, and ordered him to maintain it; he entered into a Recogniſance with Sureties to appear at the next Quarter-Seſſions, and accordingly appeared, and the Seſſions made *another Order*, which he refuſing to obey, they committed him; adjudged, that this was illegal; becauſe the Seſſions have not Power to make a *new Order*, but only to *quaſh or affirm* the Order made by the two Juſtices; and if they have no Power to make a *new Order*, by Conſequence they cannot commit for refuſing to obey it. 2 *Bulſt.* 342. *The King* verſus *Hammond.*

2. The Caſe laſt mentioned ſeems to be contrary to another reported in the ſame Book, (*viz.*) *Two Juſtices* made an Order againſt *W. R.* for the Maintenance of a Baſtard Child, he being adjudged the reputed Father, and upon his Appeal from the ſaid Order to the next *Quarter-Seſſions*, the Juſtices in their Seſſions made a *new Order*, by which they charged another Perſon

ſon to be the Father of the Child; and upon a Petition to the Judge of Aſſiſe, he refuſed to enter into an Examination of the Matter, but confirmed the Seſſions Order, and ſaid that it was final. 2 *Bulſt.* 355. *Beckford*'s Caſe.

3. A Woman was delivered of a Baſtard-Child, but there were no Proceedings againſt her for this Offence, and afterwards ſhe was delivered of another Baſtard-Child, and then the Queſtion referred to the Judge of Aſſiſe was, whether ſhe might be puniſhed by the Statute 7 *Jac. cap.* 4. for this ſecond Offence, *having not been puniſhed for the firſt*; and he was of Opinion, that ſhe could not. 2 *Bulſt.* 349.

4. A *Baſtard-Child* was born *in one Pariſh*, and lived with his reputed Father ten Years *in another Pariſh*, who married, and had ſeveral other Children in that Pariſh, and there died; it was the Opinion of the Juſtices, that the Baſtard-Child ought to be ſent to the Mother in-Law, if ſhe was of Ability to maintain it, but if not, then to the Pariſh where it was ſettled ten Years with the Father; for the Law reſpects ſuch Settlement as well as the Place of Birth of a Baſtard. 2 *Bulſt.* 350.

5. An Order was made by two Juſtices againſt one *Pridgeon*, by which he was adjudged the reputed Father of a Baſtard-Child, and ordered to keep it; he appealed from this Order to the *next Seſſions*, where it was ſet aſide; afterwards the Matter was re-examined *at another Seſſions*, and a new Order was made, by which he was once more adjudged the reputed Father, and ordered to keep the Child, and that, if he did not perform this laſt Order, that he ſhould be committed, which he not performing, was accordingly committed; and all this Matter appearing upon the Return of an *Habeas Corpus*, it was adjudged, that he being diſcharged upon his *Appeal* from the firſt Order, according to the Statute 18 *Eliz.* no ſubſequent Quarter-Seſſions had any Power to examine or alter what they had done. *Cro. Car.* 341, 248. *Pridgeon*'s Caſe. W. Jones 330.

6. A Woman charged a Man for getting a Baſtard-Child on her Body; the Juſtices in their *Quarter-Seſſions*, upon Examination of the Matter, and upon Proof, that another Perſon had the Uſe of her Body, made an Order, by which that other Perſon was adjudged the reputed Father, *&c.* and the Perſon accuſed by the Woman was diſcharged; this being thought irregular, Complaint was made to the *Judge of Aſſiſe*, who ordered that the two next Juſtices to the Place where the Child was born, ſhould examine the Matter; whereupon they adjudged the Perſon whom the Woman had charged, to be the reputed Father, and ordered him to maintain it, and upon his Refuſal to be committed. This Order being removed by *Certiorari*, it was adjudged, that before the Statute 3 *Car. cap.* 4. *the Quarter-Seſſions* could not make an *Original Order* in the Caſe of Baſtardy, for they had no Power till the *two next Juſtices* had made an Order therein, according to the Statute 18 *Eliz.* but by the Statute 3 *Car. Juſtices of their ſeveral Limits may make Orders in Baſtardy*; therefore the firſt Order made at the Quarter-Seſſions, was good, and not to be revoked or ſet aſide by the ſecond Order of the two Juſtices. *Cro. Car.* 337. *Slater*'s Caſe.

7. It was moved to quaſh an Order for Keeping a Baſtard-Child, which was removed by *Certiorari*, for that it was *Ad Seſſionem pacis in Com' præd'*, and doth not ſay *tent' pro Com' præd'*; adjudged, that ſuch Strictneſs is not required in an Order, tho' 'tis in an Indictment; then it was objected, that it ought to appear, that the Child was chargeable to the Pariſh, which is very true, but the Order was, to *pay ſuch Charges which the Pariſh had been at*, by which 'tis plain, that the Child had been chargeable to the Pariſh; the Order was confirmed. 1 *Vent.* 37. *The King* verſus *Nelſon.*

8. Appeal from an Order of two Juſtices, by which *R.* was adjudged the putative Father of a Baſtard-Child, the Seſſions vacated the Order, and referred the Matter back again to the Juſtices, who did nothing farther; the next Seſſions *one Burwell* was adjudged to be the Father, and ordered to pay ſo much a Week, *&c. until the Child was twelve Years old*; this Order being removed into *B. R.* it was adjudged, that the Seſſions could not refer the Matter back to the Juſtices; and that this Order was void, it being to pay ſo much *per* Week, * *until the Child was twelve Years old*, it ſhould be, as long as 'tis chargeable to the Pariſh; for the Father might take it when he would. 1 *Vent.* 48. *Burwell*'s Caſe. 1 *Salk.* 121. *The King* verſus *Barbaker. S. P.* * Poſtea (C) 1, 8.

9. *Appeal* from an Order of *two Juſtices* for *T. S.* to be the Father of a Baſtard-Child; if the *Order be reverſed upon the Appeal*, in ſuch Caſe *T. S.* is for ever diſcharged, and if the Pariſh cannot find out another Father, they muſt provide for it where it was born. 1 *Vent.* 59.

10. An Order was made by the Juſtices of Peace in *Kent*, in *Maidſtone* Diviſion, and this for the reputed Father to keep the Baſtard-Child, from which Order the Statute 18 *Eliz. cap.* 3. gives an Appeal *to the next Seſſions*; the Queſtion was (upon a Motion to quaſh this Order) whether the *Appeal muſt be to the next Quarter-Seſſions* of the Diviſion, or to the next in the County; for if ſo, then the Appeal ought to be to the Seſſions at *Canterbury*, for that was the next held in the * County; and tho' it was, that one Diviſion doth not intermeddle with Matters done in the other Diviſion, yet ſince the Statute takes particular Notice of *Yorkſhire*, where there are diſtinct Seſſions in the Same County, and makes Proviſion in that Caſe, and takes no Notice of *Kent or Suſſex*, that the next Seſſions muſt be the next in the County. *Sid.* 149. *The King* verſus *Coyſtan.*

11. An Order of Seſſions, for the Maintenance of a Baſtard Child being removed into *B. R.* it was moved to quaſh it, for that it was made by two Juſtices, without ſaying *Quorum unus*; and for that the Money was to be paid *Weekly*, when it ſhould be *Monthly*; and till the Child

ſhould be of the *Age of fourteen*, when it ſhould be as long as 'tis chargeable to the Pariſh, and that the Father ſhould give ſuch Security *as the Churchwardens ſhould think fit*; the Court inclined, that it was ill. *Sid.* 222. *The King* verſus *Sharp.*

12. An Order of two Juſtices, that the reputed Father ſhould pay 8 *l.* for the Relief of a Baſtard-Child, and afterwards ſo much *per Week*, but the Court would not quaſh it; yet, becauſe the reputed Father had no *Notice* of this Order till the Time of an Appeal to the Seſſions was lapſed, the Court made a Rule, that the Matter ſhould be heard upon the Appeal at the next Seſſions, and that they might charge or diſcharge him at their Diſcretion. *Sid.* 326. *The King* verſus *Hill.*

13. An Order of Seſſions was made for the Maintenance of a Baſtard-Child, and it was quaſhed, for that it was ordered to pay only 2 *d. per Week*, which is unreaſonable, it being too little; and for that 'tis not expreſly ſaid in the Order, that *W. R.* was the reputed Father of the Child. *Sid.* 363. *The King* verſus *Perkas.*

14. An Order was made for the reputed Father to maintain a Baſtard-Child, ſetting forth, that *A. R.* was delivered of a Male Baſtard-Child, her Husband being beyond Sea, and not here at the Time of the Begetting or Birth of the ſaid Child; it was moved to quaſh this Order, becauſe it did not appear to be a Baſtard-Child, for none can be a Baſtard within the Statute 43 *Eliz.* but ſuch as are Baſtards within the Statute 21 *Jac. cap.* 27. of Still-born Children; and this Woman is not within the Statute, for it appears ſhe was married; beſides, the Order is in the Diſjunctive, that the Husband was not here at the Begetting or Birth of the Child, which is in the *Diſjunctive*, and therefore ill; for if he was here at either of theſe Times, 'tis ſufficient; the Order was quaſhed. 5 *Mod.* 419. *Alinſon* verſus *Spence.*

15. *Appeal from an Order of two Juſtices*, by which *Weſton* was adjudged the putative Father of a Baſtard-Child, and ordered to pay weekly ſo much to the Overſeers of the Poor; The Seſſions affirmed the Order, and committed him for not paying the Money; and this Matter being returned upon an *Habeas Corpus*, it was objected, that an Order to pay *ſo much weekly to the Overſeers, &c.* was void; but adjudged, that before the Inſtitution of Overſeers, *&c.* the Juſtices might Order the Money to be paid to two or three of the Principal Inhabitants; and if ſo, then Payment to the Overſeers is good; then it was objected, that the Seſſions ought not to have committed him, but ſhould proceed upon his Recogniſance; but adjudged, that if they proceed on the Statute 3 *Car.* 1. they may commit; if on the 18 *Eliz.* then they muſt proceed on the Recogniſance. 2 *Salk.* 122. *The Queen* verſus *Weſton.*

16. Order made by two Juſtices, for the putative Father to pay 9 *l.* for Maintenance of a Baſtard; upon Sight of the Order adjudged good, for it may be for indemnifying the Pariſh for Money laid out before the Father was found; and by the Statute the Juſtices are to take Order for the Relief of the Pariſh, by Payment of Money weekly, or *other Suſtentation of the Child.* 1 *Salk.* 124. *The Queen* verſus *Odam.*

(C)

Who ſhall be a Baſtard, and where ſettled.

* Antea (B) 8.

1. ORder for the Maintenance of a Baſtard-Child, (*viz.*) that the putative Father ſhould pay 7 *s. per* Week, * *until it ſhould be able to get its own Living*, was held ill; it ſhould be as long as 'tis chargeable to the Pariſh; for the Father may take it and maintain it when he will. 1 *Vent.* 210. *Sherman's* Caſe.

2. So an Order to allow ſo much weekly, *until the Child ſhall be eight Years old*, is ill, becauſe the Statute appoints a weekly Allowance whilſt the Child ſhall be chargeable. 1 *Vent.* 336.

3. Order of Seſſions, that the Father of him who was charged with a Baſtard-Child, ſhould provide for it as the reputed Grandfather; but it was ſet aſide, becauſe the Statute doth not enable them to charge the *Grandfather of a Baſtard*, tho' it doth the *Grandfather of a Legitimate* Child. 1 *Vent.* 330.

4. A Woman being big with a Baſtard-Child, was removed by an Order of two Juſtices from *Waltham* to *Peram*, and there ſhe was delivered before the next Seſſions, and then *Peram* appealed, and the Seſſions reverſed the Order, ſo ſhe was ſent back to *Waltham*; afterwards an Order was made to ſettle the Child at *Peram*, that being the Place of it's Birth; but adjudged, that a Baſtard Child, born in a Pariſh whither the Mother was ſent by an * illegal Order, and pending that Order, ſhall not be ſettled there, but in the Place where the Mother had her Settlement, and ſhall be eſteemed in Law to be born there. 2 *Salk.* 474. *Waltham Pariſh* verſus *Peram.* See *Weſtbury* verſus *Corſham.*

* Poſtea 17.

5. Upon a Motion to quaſh an Order of Baſtardy, *the reputed Father muſt be in Court*; and at another Day he came into Court, and it was objected againſt the Order, that it was not ſaid, that the Child was likely *to become chargeable*; but this was overuled, becauſe 'tis ſelf evident that ſuch Children are likely to be chargeable, *&c.* 2 *Salk.* 475. *The King* v. *Matthews.*

6. An Order of Baſtardy, under the Hands and Seals of more than two Juſtices, is good; for the Statute is not reſtrictive to two only, but there muſt be two at leaſt, and it muſt appear, that

that one of them is of the *Quorum*, and for that Reaſon this Order was quaſhed; but the reputed Father being in Court, was bound to appear at the next Seſſions. 2 *Salk.* 477. *Hatton*'s Caſe.

7. An Order of Baſtardy was quaſhed, by which one *Beard* was adjudged the putative Father, becauſe it appeared, *that the Examination of the Woman was by one Juſtice*, tho' in the ordering Part it appeared to be made by both. 2 *Salk.* 478. *The King* verſus *Beard.*

8. Order of Baſtardy quaſhed, for that the putative Father was order'd to pay 3 *s.* Weekly * *till the Child attain the Age of fourteen Years*, for they have no Authority, but to indemnify the Pariſh, by obliging him to maintain the Child ſo long as it ſhall be chargeable to the Pariſh. 2 *Salk.* 478. *The King* verſus *Barebaker*, and not for any certain determinate Time. 2 *Salk.* 480. *S. P.* 1 *Mod.* 20. *S. P.*

* Antea (B) 8.

9. An Appeal from an Order of Baſtardy may be good, tho' there is a *Seſſions intervening* between the Order and the Appeal, becauſe, by the Statute 1 *H.* 5. and 18 *Eliz.* the Appeal may be to the *firſt Seſſions after the Father hath Notice of the Order*; but then in the Order of Seſſions it muſt appear, that it was the firſt Seſſions after ſuch Notice. 2 *Salk.* 480. *The King* verſus *Brown.*

10. An Order of Baſtardy was diſcharged upon an Appeal to the next *Quarter-Seſſions after Notice*; and now this Order of *Quarter-Seſſions* was quaſhed, becauſe by the Statute the Appeal muſt be to the next *General Seſſions* after Notice, and there may be a *General Seſſions* before a general *Quarter-Seſſions*, as in *London* and *Middleſex* there are four *General Seſſions* in a Year. 2 *Salk.* 482. *The King* verſus *Shaw.*

11. An Order of Baſtardy, reciting, that whereas it appears to us, *&c.* that *Mary Spencer*, Wife of *Jonathan Spencer*, Mariner, was, on the *20th of March*, 1695, delivered of a Male Baſtard-Child, and that *J. S.* her Husband was employed on Board the Ship, called the *Pembroke*, in his Majeſty's Service at *Cales*, *and was not within the King's Dominions, when the ſaid Child was begotten, or born*; and that one *Albertſon* had the carnal Knowledge of her Body, during the Abſence of her ſaid Husband, and that he begat the ſaid Child, we therefore adjudge, *&c.* this Order was quaſhed, becauſe it did not appear, that the Husband was *extra quatuor maria, during all the Time between the Begetting and the Birth*; now, by this Order it was ſaid, that he was not within the King's Dominions when the Child was *Begotten or Born*, which may be very true, and yet he may be here in the Time intervening, between the Begetting and the Birth; and as to the Objection, that the Juſtices have no Power in this Caſe, becauſe the Child was born in *lawfaul Matrimony*, the Court held, that he is a Baſtard, who is born of a Woman, when her Husband, at, and from the Time of the Begetting to the Birth, is *extra quatuor Maria*, and that a Child born in Adultery is born out of the Limits of lawful Matrimony; and if ſuch Child ſhould bring a real Action, the Defendant may plead *general Baſtardy*, and upon a Writ to the Biſhop he will certify him to be a Baſtard; and if he be ſo as to a *Deſcent*, he ſhall be ſo as to all other Intents, and particularly ſo within the Statute 18 *Eliz.* which is a remedial Law; they were directed to make a new Order, and to mend this Fault, and *Albertſon* was bound over to appear at the next Seſſions. 2 *Salk.* 483. *The King* verſus *Albertſon.*

12. An Order of two Juſtices to remove a Woman and her Baſtard-Child from *B.* to *W.* was quaſhed; becauſe it appeared by the Order, that the Child was born at *R.* and then itmuſt be kept by the Pariſh where it was born, and cannot be removed to *W.* 2 *Salk.* 485. *Guildford Pariſh* verſus *Killington.*

13. Upon a Special Order of Seſſions, the Queſtion was, if the Husband is beyond Sea during the whole Time the Wife is got with Child, whether it be a Baſtard within the Statute 18 *Eliz. cap.* 3. and adjudged, that it was; but becauſe it did not appear by the Order, that the Husband was abſent all that Time, the Order was quaſhed. 1 *Salk.* 122. *The Queen* verſus *Murrey.*

14. Upon a Special Order of Seſſions, the Fact ſtated for the Opinion of the Court was, *T. S.* was divorced *à Menſa & Thoro*, and afterwards his Wife lived with *E. E.* in Adultery, and had ſeveral Children by her born in the Pariſh of St. *Giles*, and regiſtred as his Children, and by his Name; adjudged, that they are Baſtards, becauſe the Court will intend a due Obedience to the Sentence of Divorce, unleſs the contrary appear; but if Husband and Wife conſent to live ſeparate, the Children born after ſuch Separation ſhall be taken to be legitimate, becauſe the Acceſs of the Husband ſhall be preſumed; but if a Verdict find there was no Acceſs, then they are Baſtards. 1 *Salk.* 122. *St. George* and *St. Margaret*'s Pariſh *Weſtminſter.*

15. An Order was made thirty Years paſt, that the Pariſh of *Budworth* ſhould maintain a Baſtard-Child, born in the Townſhip of *Dumply* in that Pariſh, which being removed by *Certiorari*; it was adjudged, that an Order of two Juſtices, on the Overſeers of a Pariſh, for raiſing a Sum towards the Maintenance of a Baſtard or poor Perſon, doth not determine the Settlement to be in that Pariſh; becauſe that is not conteſted, but preſumed, that the Statute 13 *&* 14 *Car.* 2. *cap.* 12. *par.* 21. relates only to poor and impotent Perſons in the Townſhips of large Pariſhes in the *North*, and not to Baſtards. 1 *Salk.* 122. *Budworth* verſus *Dumpley.*

16. A Woman big with Child with a Baſtard, was by Order of two Juſtices removed from *H.* to *B.* and was delivered of the Child in the Pariſh of *B.* who appealed, and the Seſſions reverſed the Order of the two Juſtices; adjudged, that the Woman ſhall be ſent back to *H.* the Pariſh from whence ſhe was removed, and ſo ſhall the Child, becauſe the Matter was ſuſpended by the Appeal; and proving to be illegal, the Child born pending ſuch illegal Order, is ſettled in the Pariſh from whence the Mother was removed. 1 *Salk.* 121. *Wood*'s Caſe.

Mod. Caſes 213. 17. A Woman big with Child was removed by Order of two Juſtices from *Weſtbury* to *Corſham*, and before the next Seſſions, ſhe was delivered of a Baſtard-Child at *Corſham*; and upon their Appeal the Order of the two Juſtices was reverſed; adjudged, that by the Reverſal of the Order, it *Antea 4. appears, ſhe was * wrongfully removed, and that Reverſal makes all void *ab initio*; and tho' the Child was *born at Corſham*, it ſhall not be ſettled there, but at *Weſtbury*, where the † Woman was † Note, *It appeared by the Order of the* ſettled, for they ſhall not eaſe themſelves and charge another Pariſh by a wrongful Removal. 2 *Salk.* 532. *Weſtbury* verſus *Corſham*. See *Waltham* verſus *Peram*.

two Juſtices, that her Husband had left her ſeven Years, but it did not appear he was dead. Mod. Caſes 213.

18. An Order was made to remove *Eliz. Sinkwell, late of the Pariſh of Liſley*, ſingle Woman, and *William* her Son, from the Pariſh of *Morton Hampſted* to the ſaid Pariſh of *Liſley*, and the Cauſe aſſigned was, for that by *Fraud and Colluſion of the Pariſh of Liſley*, ſhe was delivered of the ſaid *William*, her Son, a *Baſtard-Child*, in the Pariſh of *Moreton*; it was objected againſt this Order, that where a Baſtard is born, there 'tis ſettled, unleſs ſome other Settlement appears, which it doth not in this Caſe, for it doth not appear, that the Mother was laſt legally ſettled in the Pariſh of *Liſley*; 'tis only ſaid, that ſhe was a ſingle Woman, late of the Pariſh of *Liſley*, which is only a Deſcription of the Perſon, and an Allegation of the Place, but not that ſhe was laſt legally ſettled in that Place, and to this the Court agreed, but would not quaſh the Order, becauſe they had acquieſced under it above nine Years ſince it was made. 5 *Mod.* 204. *The King* verſus *Liſley Inhabitants*.

Bills of Exceptions.

See *Aſſets.* (C) *Statute* 31 *Ed.* 1. *cap.* 31.

(A)

1. ERror of a Judgment in the Grand Seſſions in *Pembroke*, in an *Aſſiſe of Darrein Preſentment*, by *Henry Lort*, againſt the *Biſhop of St. Davids*, and others, for the Church of *Stockpool*; and the Error aſſigned was, for that the Iſſue being, whether *Henry Lort* did preſent *W. R.* the laſt Incumbent, who was inſtituted and inducted upon his ſaid Preſentation; the Plaintiff offered in *Evidence*, the Letters of *Inſtitution* of the ſaid *W. R.* ſealed with the Seal of the *Biſhop of London* in that City, becauſe the Biſhop of *St. Davids* had not his Epiſcopal Seal at *London*; and this Appearing, and likewiſe that the *Letters of Inſtitution* were made out of the *proper Dioceſe*, the Defendant would have demurred upon the Evidence, which was over-ruled by the Court, and that was now aſſigned for Error, (*viz.*) that they ought to have allowed the Demurrer; but adjudged, that the not admitting the Demurrer could not be aſſigned for Error; for when, upon the Evidence, the Matter was over-ruled by the Court, it was proper then to tender a Bill of Exceptions, which is a Remedy provided by the Statute, in order to prevent a haſty Judgment. *Cro. Car.* 249. *Lort* verſus *Biſhop of St. Davids*.

The Form thereof.

2. *In Ejectment*, upon Not guilty pleaded, and a Trial at Bar, there was a *Bill of Exceptions* put in by the Defendant, which was thus:

Poſtea 5. *in* Engliſh. Com. Berks, MEmorand' *quod* 11 *die Nov.* 1678. *exiſten' die præfix' per Juſticiar' Domini Regis de C. B. hic in Cro. Animarum hoc Termino Sancti Michaelis* 1678, *ſupradict' ad triand' exitum inter M. P. quer' & E. C. vid' defend' junct' in placito tranſgr' & ejectionis firmæ Exit' prædict' triat' fuit coram, &c. ad barram Cur' præfat' M. R. per breve & narrationem ſuas ſuppon' quod quidem R. M.* 11 *die Januarii, Anno* 29 *Car.* 2. demiſed; and ſo recite the whole Declaration, Plea, and Iſſue, and then go on thus: *Et modo ad hunc diem ad triationem exitus prædict' præfat' M. R. dedit in Evidentiam quod præfat' R. M. ſeiſit' fuit de præmiſſis in dominico ſuo ut de feodo, & ſic ſeiſit' exiſten' tenementa prædict' præfat' M. R. dimiſit & quod ipſe idem M. R. virtute ejuſdem dimiſſion' in tenementa prædicta intravit & fuit inde poſſeſſionat' quouſque prædict' R. M. illum ejecit prout præfat' M. R. narravit*, and that the Defendant gave in Evidence to prove, that ſhe was not guilty, that the ſaid *R. M.* long before the ſaid Demiſe to the Plaintiff, (*viz.*) 4 *Jan.* 1672, by Indenture, in Conſideration of Money paid to him, did bargain and ſell the Premiſſes to one *E. C.* for 500 Years, and that the ſaid *E. C.* afterwards, (*viz.*) 14 *Feb.* 1673. did make his Will in Writing, and thereof his Brother *I. C.* Executor, and *W. H.* Overſeer; and to prove that he made ſuch Will, ſhe produced *an Inſtrument under the Seal of the Prerogative-Court of Canterbury*, reciting the ſaid Will, (and that the ſaid *I. C.* the Executor, was beyond Sea) *and a Grant of the Adminiſtration to the ſaid W. H.* for ſo long Time as the ſaid *I. C.* the Executor ſhould be beyond Sea: *Dat.* 4 *Septemb.* 1674. that *E. C.* named in the

Will and *in the Probate*, are the ſame Perſon; whereupon the Plaintiff, without any further Proof of the ſaid Will, deſired the ſaid Juſtices, that they would direct the Jury, that the ſaid Writing produced by her was *concluſive Evidence*, that the ſaid *E. C.* made the ſaid Will, and that ſo ſhe was not guilty of the ſaid Treſpaſs, nevertheleſs the ſaid Juſtices did direct the Jury, that the ſaid Writing was only Evidence, upon which they might find, that the ſaid *E. C.* made the ſaid Will, but not that the ſame was concluſive Evidence, and ſo left it indifferently to the Jury, whether the ſaid *E. C.* made a Will, or not, tho' the Plaintiff in the Action offered nothing againſt the ſaid Will; whereupon the Jury found, that the ſaid *E. C.* made no ſuch Will; thereupon Judgment was given for the Plaintiff in the Action, and the Defendant (now Plaintiff) brought a Writ of Error, and aſſigned for Error, the not allowing the Evidence to be concluſive, as in the Bill of Exceptions is alledged; the Court were of Opinion, that this Queſtion, whether the Probate of a Will was concluſive Evidence of Making the Will, had been variouſly determined, but of late it had been adjudged, that it was, and that nothing could be given in Evidence againſt ſuch *Probate*, but that it was forged or obtained by Surprize, but yet the Judgment was affirmed in the Principal Caſe; for tho' the Evidence be concluſive, yet the Jury may hazard an Attaint if they pleaſe, therefore the proper Way had been to demur upon the Evidence. *Raym.* 404. *Chicheſter* verſus *Philips*. See 1 *Roll. Rep.* 226.

3. Caſe by the Plaintiff, an Alderman of *Canterbury*, againſt the Defendant, for procuring a falſe Return to a *Mandamus*; upon Not guilty pleaded, the Cauſe was tried at Bar, and the Defendant produced ſeven Witneſſes, *Freemen of the Corporation of Canterbury*, to prove the Truth of the Return; but the Court refuſing to admit them, there was a Verdict for the Plaintiff, and 300 *l.* Damages, thereupon the Counſel for the Defendant prayed the Court to ſign a Bill of Exceptions, which was done before Judgment; and now it was moved in Arreſt of Judgment upon this Bill of Exceptions, but this was oppoſed, becauſe it was argued a Bill of Exceptions will not lie upon a Trial at Bar, if it would, it ought not to be uſed in Arreſt of Judgment, but only in a *Writ of Error*; beſides, 'tis not entered on Record, but brought hither under the Seals of the Juſtices: But the Court held, that the Witneſſes ought to have been admitted, that it was an apparent Injury to the Defendant to deny their being admitted, that a Bill of Exceptions will lie upon a Trial at Bar; and that upon the Statute *Weſtm.* 2. *cap.* 31. that the Defendant may have Advantage upon this Bill of Exceptions, to Arreſt the Judgment, as upon a Writ of Error, that here is no Occaſion of a *Scire facias ad cognoſcendum ſigillum*, either to confeſs or deny their Seals, becauſe the Judges are of the ſame Court where the Bill was ſign'd; and tho' it may happen, that all but one may be removed, yet if one continues, 'tis ſufficient. 2 *Lev.* 236. *Enfield* verſus *Hills*. Jones 115.

4. In the Caſe of * *Sir Henry Vane*, *Anno* 14 *Car.* 2. it was adjudged, that a Bill of Exceptions doth not lie where Priſoners are indicted at the Suit of the King. *Sid.* 85. But in an Information in the Nature of a *Quo Warranto*, at the Suit of the King, againſt ſome Citizens of *Worceſter*, who claimed to be Aldermen, the Court allowed a Bill of Exceptions to the Defendants. 1 *Vent.* 366. *The King* verſus *Higgins*. * 1 Lev. 68.

The Form of the Bill is thus:

5. *Wilts* ſſ. MEmorandum, that the firſt Day of *Auguſt*, &c. before *I. H.* and *R. E.* Juſtices, &c. for taking Aſſiſes in the County of *W.* aſſigned in a Plea of Treſpaſs and Ejectment, which *W. R.* in the Court of, &c. before themſelves, by Bill, doth proſecute againſt *N. T.* ſuppoſing by the ſaid Bill, that the aforeſaid *N. T.* &c. (Here recite the Subſtance of the Declaration, and the Iſſue, and the Evidence given to the Jury at the Trial) and that the ſaid *W. R.* deſired that a Verdict might be given for him, and that he likewiſe deſired the Judges aforeſaid, that they would inform the ſaid Jury ſo to do; and the ſaid Juſtices did affirm to the ſaid Jurors, &c. for that the aforeſaid Matter to the ſaid Juſtices in Evidence ſhewed, doth not appear ſufficient, &c. did Requeſt the ſaid Juſtices, according to the Form of the Statute in ſuch Caſe made and provided: This preſent Bill, which doth contain in it the Matter aforeſaid, above by him to the Jurors ſhewed, by which the ſaid Juſtices, at the Requeſt of the ſaid *W. R.* this Bill have ſealed: Antea 2.

Nota, *This Bill ought to be allowed in all Courts and Places of Pleading, at any Time before the Jury have given their Verdict.*

6. The Exceptions ought to be in Writing *ſedente curia*, in the Preſence of the Judge who tried the Cauſe, and ſigned by the Counſel on each Side; then the Bill muſt be drawn up, and tendered to the Judge who tried the Cauſe, to be ſealed by him, and when ſigned, there goes out a *Scire facias* to the ſame Judge, *ad cognoſcendum ſcriptum*, and that is made Part of the Record, for that, and the Return of the Judge, with the Bill it ſelf, muſt be entered on the Iſſue-Roll; and if a Writ of Error is brought, it muſt be returned as Part of the Record. *Lilly* 231.

7. Writ of Error on a Judgment in *C. B.* in an Action on the Caſe againſt the Defendant, for the Profits of the Office of *Town-Clerk of Oxford*; upon *Non Aſſumpſit* pleaded, there was a Trial at Bar, and a Verdict for the Plaintiff, but a Bill of Exceptions was tendered to the Court, upon the Evidence given by the Plaintiff, which was ſealed by the Judges, reciting, that the Evidence for him was, that he was choſen Town-Clerk, 16 *April*, 1697, and was then admitted to the Office, *and that after his Admiſſion the Defendant had received the Profits*, &c. (but did not 1 Salk. 284.

not ſay at what Time) that the next Quarter-Seſſions after his Admiſſion was held on Thurſday the 3*d of May*, *Anno* 9 *Will.* 3, before the Mayor, Recorder, and Juſtices, *ad pacem conſervand' necnon ad diverſas felonias perpetrat' audiend' & terminand'*, the Record of which Seſſions was given in Evidence for the Plaintiff, and the Names of thoſe were regiſter'd who had produced Certificates of *receiving the Sacrament*, but the Name of the Plaintiff was not there; that the next Quarter-Seſſions was held by *Adjournment*, *a præfato die Jovis prox' poſt' feſtum Sanctæ Trinitatis*, to the ſecond Day of *July* (but did not ſay in what Year) and this was held before the Mayor, Recorder, and Juſtices, *&c. ad pacem in Civitate prædict' perpetrat' audiend'*; and there it appeared, that the Plaintiff had *taken the Oaths*, the Counſel for the Defendant inſiſting, that theſe Records were not ſufficient Evidence to prove, that the Plaintiff had taken the Oaths the *next Seſſions* after his Admittance to the Office, which being over-ruled by the Court, a Bill of Exceptions was tendered, as aforeſaid, and the Plaintiff had a Verdict, and afterwards the Defendant aſſigned general Errors; and upon *in nullo eſt erratum* pleaded, it was argued for the Defendant, that the Seſſions held on the ſecond Day of *July*, by *Adjournment*, could not be the ſame Seſſions with that which was held the third Day of *May*, becauſe the Stile of the Seſſions in *May* is, *Ad generalem quarterialem Seſſionem Pacis*, *&c.* and the Stile of the Seſſions in *July* is, *Ad generalem Seſſion' Pacis*, leaving out *Quarterial'*; now, if every *Quarter*-Seſſions is a *General*-Seſſions, yet every *General*-Seſſions is not a *Quarter*-Seſſions; now, where-ever any ſubſequent Record hath Reference to a former, they muſt exactly agree, if he who produces thoſe Records would have them to be the ſame: But the Chief Juſtice, without any Conſideration had of this Objection, was of Opinion, that the Bill of Exceptions was Faulty, becauſe it appeared, that the Defendant had received the Profits of the Office after the Plaintiff was admitted, and before the next Seſſions, which he ought not to have done; becauſe by the Admiſſion the Plaintiff was compleat Officer, and had a Title to receive the Profits till he made a Default, to qualify himſelf, which could not be till the next Seſſions, for which Reaſon the Judgment was affirmed. 1 *Lutw.* 905. *Thurſtan* verſus *Slatford.*

8. A Corporation-Book was offered in Evidence at the Aſſiſes, to prove a Member of the Corporation not in Poſſeſſion, but it was refuſed, and no Bill of Exceptions being then tendered, the Cauſe went on to Trial, and the Plaintiff had a Verdict; and in the next Term the Defendant moved for a Bill of Exceptions, for that the Statute appoints no certain Time for reducing the Exceptions into Writing, therefore it may be done as well after as before the Verdict; but adjudged, that the Defendant ought to have ſtood on his Exceptions before the Trial; 'tis true, the Statute appoints no Time, but the Reaſon of the Thing requires, that the Exceptions ſhould be reduced into Writing, when 'tis freſh in Memory of the Judge, and the Thing is tranſacting; 'tis true, it need not then be drawn up in Form, but only the Subſtance of it, becauſe 'tis to be a Record. 1 *Salk.* 288. *Wright* verſus *Sharp.*

Bills of Exchange.

Caſes concerning Bills of Exchange in general. (A)
Caſes concerning the Drawer. (B)
Caſes concerning the Indorſor. (C)
Caſes concerning the Acceptor. (D)
Pleadings in ſuch Caſes, good, and not good. (E)

(A)

Caſes on Bills of Exchange. See *Declaration.* (A) 25.

1. THE Reaſon given in *Milton*'s Caſe, in the Exchequer, why an *Indebitatus Aſſumpſit* would not lie againſt the *Acceptor*, was, becauſe there is no Privity of Contract between him and the Perſon to whom the Bill is made payable. *Hardres* 485. *Milton*'s Caſe. 1 *Mod.* 285. *S. P.*

2. Upon a Motion for a new Trial in an Action on a Bill of Exchange, for that the *Proteſt* was not on the Day the Money became due; it was denied; for if the *Proteſt* be in a Fortnight after the Refuſal of Paying the Bill, that in Law ſhall be accompted a reaſonable Time. 1 *Mod.* 27. *Butler* verſus *Play.*

1 Lev. 298. 1 Mod. 285. 5 Mod. 13. S. P.

3. There hath been a Queſtion, whether an *Indebitatus Aſſumpſit* will lie againſt the *Acceptor of a Bill of Exchange*; it was my *Lord Hale*'s Opinion, that it would not, becauſe the Acceptance created no Duty between the Acceptor and the Perſon to whom the Money is payable, for the *Drawer* is ſtill the Debtor, notwithſtanding ſuch *Acceptance*, for that is no more than a collateral

Poſtea 5. (E) 1.

teral Engagement or Promiſe to pay the Money if the *Drawer* ſhould not, and the Cuſtom of Merchants did not extend to make a Debt, but only to make the *Acceptor* liable, if the *Drawer* doth not pay the Money; 'tis true an *Indebitatus Aſſumpſit* will lie, where the Common Law, or any Particular Cuſtom of a Place, creates a Duty; as where *Toll* is due by Cuſtom, or a certain Sum to a Lord of a Manor by Cuſtom for a Pound-breach, or for a Fine upon an Admittance to a Copyhold, but not upon a Cuſtom amongſt Merchants. 1 *Vent* 152. *Brown* verſus *London. Hard.* 485. *S. P.* 2 *Lutw.* 1589. *Bellaſis* verſus *Heſter.*

4. Bill of Exchange payable to *T. S.* who upon Non-payment *proteſts* the Bill; adjudged, that an Action will not lie againſt the *Drawer*, unleſs *T. S.* give him * *Notice*, that he had proteſted the Bill. 1 *Vent.* 45. 1 *Mod.* 27. * Poſtea (B) 8.

5. Caſe, *&c.* wherein the Plaintiff declared upon the Cuſtom of Merchants, and that *T. S.* drew a Bill of Exchange upon the Defendant, payable to the Plaintiff, which the Defendant *accepted, &c.* and likewiſe a general *Indebitatus Aſſumpſit*, for that he had *accepted it:* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that an *Indebitatus Aſſumpſit* would not lie, but an Action on the Caſe only; and ſo it was adjudged, tho' *Twiſden* held, that the Cuſtom made it a *Debt* by the Acceptor. 1 *Vent.* 152. *Brown* verſus *London.* 1 Lev. 298. Raym. 211. 1 Mod. 285. Hardr. 485. Antea 3.

6. *Caſe, &c.* on a Bill of Exchange, ſetting forth the Cuſtom of Merchants, *&c.* and that one *J. P.* drew a Bill upon the Defendant (but did not ſay *according to the Cuſtom of Merchants*) payable to the Plaintiff, *&c.* Upon *Non Aſſumpſit* pleaded the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Plaintiff had not alledged, that the Bill was drawn by *J. P.* * *ſecundum conſuetudinem mercatorum*; but adjudged, that it ſhall be ſo *intended*, unleſs the contrary appear. 1 *Lutw.* 277. *Mannin* verſus *Cary. Poſtea* Breach of Promiſe. (A) 7. *S. C.* * Poſtea 9. (E) 1.

7. *Debt* upon a Bill of Exchange, ſetting forth the *Cuſtom of Merchants*, and that one *Hughes*, who lived at *Worceſter*, drew a Bill for 200 *l.* upon one *Pardoe in London*, payable to the Defendant *Swift*, or his Order; that *Pardoe* accepted the Bill, and that *Swift endorſed* it to one *Allen*, who endorſed it to the Plaintiff *Claxton*, that the Money not being paid by *Pardoe*, the Plaintiff *Claxton* brought an Action againſt *Hughes the Drawer of the Bill*, and had Judgment againſt him; but did not take out Execution; afterwards he brought an Action againſt *Swift*, who was the *firſt Endorſer*, who pleaded the Recovery againſt *Hughes* in Bar to the Action; and three Judges againſt the Opinion of *Jefferies* Ch. Juſt. held it to be a good Plea, but he was of a contrary Opinion; for if the Drawer fail, the firſt *Endorſor* ſhall be liable, becauſe he had endorſed a bad Bill; and therefore 'tis reaſonable, that the Creditor ſhould reſort to him to make it good. 1 *Lutw.* 871. *Claxton* verſus *Swift*, the Judgment was reverſed for this Reaſon. 3 *Mod.* 86. *S. C.* 3 Mod. 86.

8. *Debt on a Bill of Exchange*, ſetting forth the Cuſtom of Merchants, (*viz.*) that if a Merchant at *Venice* did draw a Bill upon a *Merchant in London*, and it was *accepted*, that then the *Acceptor* became chargeable to the Perſon to whom it was directed; and if he endorſed it to another, then the *Acceptor* was liable to the *Endorſee*, and if *he endorſed* it, then the *Acceptor* is liable to the ſecond Endorſee, and if the *Acceptor* ſhould not pay the Money to him, then if the *ſecond Endorſor* ſhould pay it, the *Acceptor* is liable to him; that *Morelli*, a Merchant in *Venice* drew a Bill of Exchange for 1000 Ducats, upon *Death* the Defendant, payable to *G. E.* which Bill *Death accepted*; that *G. E.* endorſed it to the Plaintiff for Value received; that the Plaintiff endorſed it to *A. C.* who likewiſe endorſed it to *D. B.* that *Death the Acceptor* not paying the Money either to *A. C.* or *D. B.* the Plaintiff, who was the *ſecond Endorſor*, paid it to *A. C.* by Reaſon whereof *Death the Acceptor* became liable to the Plaintiff; there was a frivolous Plea, and upon Demurrer the Plaintiff had Judgment in *B. R.* and upon a Writ of Error brought in the Exchequer-Chamber that Judgment was affirmed; 'tis true, it was objected, that the Cuſtom was unreaſonable, becauſe the *Acceptor* might be charged at the Suit of all the Endorſees; but it was anſwered, and ſo adjudged, that when the firſt Endorſor had ſigned the Bill, the *Acceptor* was no longer chargeable to him; and ſo likewiſe when the *ſecond Endorſor* had ſigned it, until by his paying it to the *Endorſee*, he was again entitled to receive it of the *Acceptor*; ſo that after he had paid the Money none of the *Endorſees* had any Remedy againſt the *Acceptor*, but the Plaintiff alone had the Right of Action againſt him. 1 *Lutw.* 885. *Death* verſus *Serwonters.*

9. *Caſe, &c. upon a Bill of Exchange*, wherein the Plaintiff ſet forth the Cuſtom of Merchants * *& alias perſonas uſitat' & approbat'*, that if a Bill is endorſed and *accepted* by the Perſon upon whom 'tis drawn, if any other Merchant will pay the Money to the Endorſee, for the Honor of the *Endorſor*, then the firſt Drawer of the Bill is chargeable to him; that *F. the Defendant did draw a Bill* upon one *R.* for 100 *l.* payable to *J. D.* that *R.* accepted the ſaid Bill, and *J. D. endorſed* it to *M. L.* and that *Roch* the Plaintiff paid the Money to the ſaid *M. L.* for the Honor of the ſaid *J. D.* the Endorſor, and that thereupon *F. the Drawer* became liable to him, but had not paid the Money, *ad damnum, &c.* the Plaintiff had Judgment by *Nil dicit, &c.* but it was reverſed upon a Writ of Error in the Exchequer-Chamber; becauſe the * Cuſtom was laid too general, for it extended not only to Merchants, but *to all other Perſons.* 1 *Lutw.* 891. *Fairly* verſus *Roch.* * Poſtea (B) 2. * Antea 1. Poſt. (B) 1.

10. Caſe, *&c.* upon a Bill of Exchange, wherein the Plaintiff ſet forth a Cuſtom amongſt Merchants, (*viz.*) that if any Merchant pay a Bill to the *laſt Endorſee*, for the Honor of the *firſt Endorſor*, then he who undertook to pay that Bill for the *Honor of the Drawer*, is liable to the *firſt*

firſt Endorſor. Upon *Non Aſſumpſit* pleaded, the Plaintiff had Judgment, and upon Error brought in the Exchequer-Chamber, it was inſiſted, that the Plaintiff had not brought himſelf within the Cuſtom; becauſe he had not alledged in his Declaration, that the Money was paid to the *laſt Endorſee*; but the Judgment was affirmed, it being after a Verdict which had found the Promiſe to pay the Money, and that could not be, unleſs it had been proved at the Trial, that the Money was paid to the laſt Endorſee. 1 *Lutw.* 896. *Lewin* verſus *Brunetti.*

11. *Indebitatus Aſſumpſit* upon a Bill of Exchange, payable within ten Days after Sight, *&c.* brought againſt the *Acceptor*; one Judge was of Opinion, that the Action of Debt would not lie. 2 *Lutw.* 1589. *In Bellaſiſe* and *Heſter*'s Caſe.

12. The Defendant being a Captain of a Ship, bought Goods of the Plaintiff for the Uſe of the Ship, and gave him a Bill upon *W. R.* for the Money, having firſt taken a Receipt of the Plaintiff for ſo much Money, for Goods ſold and delivered; this Bill was payable in two Months, and the very next Day after the Defendant had bought the Goods, he went to Sea, the Plaintiff endeavoured to get the Money paid by *W. R.* within the Time, but could not, for he broke, and at the Return of the *Captain*, the Plaintiff ſued him: Now it was ruled at the Trial, that tho' the Plaintiff took this Bill drawn on *W. R.* as abſolute Payment of the Money; yet if the Defendant did know that *W. R.* was in a ſinking Condition at that Time, and if he uſed all imaginable Care to receive the Money, but could not, this is a Fraud, and no Payment; but if he (the Plaintiff) had not endeavoured to receive it in Time, it might have been otherwiſe. *Mod. Caſes* 147. *Popley* verſus *Aſhley.*

*Antea 5. 13. *Indebitatus Aſſumpſit* will not lie againſt the *Acceptor* of a Bill of Exchange, becauſe his Acceptance is a collateral Engagement; but it will lie againſt the *Drawer*, for he is actually a * Poſtea 15. * Debtor upon the Receipt of the Money, and Debt will lie againſt him. 1 *Salk.* 23. *Hard*'s Caſe. *See* Ac. Caſe. (K) 38. *S. C.*

14. *T. S.* having a Bill of Exchange upon *W. W.* endorſes *Part of it* payable to *R. R.* who *Antea 7. brought an Action for this Part againſt *T. S.* the * *Endorſor*; and upon Demurrer to the Declaration, it was adjudged ill; becauſe the Contract being intire, cannot be divided; therefore this Action will not lie, unleſs the Plaintiff ſhew how that the other Part is ſatisfied. 1 *Salk.* 65. *Hawkins* verſus *Cardee.*

15. It hath been held, that a general *Indebitatus Aſſumpſit* will not lie on a Bill of Exchange, for Want of a Conſideration, for 'tis no more than an Evidence of a Promiſe to pay, and therefore muſt either bring a Special Action upon the Cuſtom of Merchants, or a general *Indebitatus Aſſumpſit* againſt the *Drawer* for Money by him received to the Plaintiff's Uſe. 1 *Salk.* 125. *In the Caſe of Hodges* verſus *Jackſon, or Hodges* verſus *Steward.*

(B')

Caſes concerning the Drawer. See (A) 4, 7.

1. *Aſſumpſit, &c.* in which the Plaintiff declared on the Cuſtom of Merchants, *&c.* ſets forth, that the Defendant being a *Goldſmith* made a Note, thereby promiſing to pay 100 *l.* to *William Barlow or Bearer*, and that *Barlow* delivered the Note to the Plaintiff to receive for his own Uſe, in Satisfaction of ſo much Money due to him from *Barlow*, and that the Plaintiff ſhewed the Note to the Defendant, and required him to pay the Money, but he refuſed; ſo that by the Cuſtom he became chargeable, and being ſo chargeable, promiſed to pay, *&c.* After a * Antea (A) 9. Verdict for the Plaintiff, it was objected, that this Cuſtom is laid too * general, *(viz.) to pay to W. B. or Bearer*, becauſe 'tis probable, that before Notice the Goldſmith may pay the Money to *W. Barlow* himſelf, as in truth he had done in the Caſe; The Judgment was ſet aſide. 3 *Lev.* 299. *Horton* verſus *Coggs.*

2. Error in the Exchequer-Chamber, on a Judgment in *B. R.* in an Action on the Caſe, *&c.* upon a Bill of Exchange brought againſt the *Drawer*, wherein the Plaintiff declared upon the Cuſtom of Merchants, * *Antea (A) 3, 9. E. 3.* * *& alias perſonas negotiantes & commerciu' habentes, &c.* The Defendant pleaded in Bar, that he is the Son and Heir apparent of *Tho. Witherly, &c.* and that he is not, nor ever was a *Merchant*, or a Perſon *negotiating* by way of Merchandizing, and averred his Plea; to which the Plaintiff demurred, and inſiſted, that this Plea amounted to the general Iſſue, for what the Defendant had pleaded might have been given in Evidence upon *Non Aſſumpſit*; but the Court held, that it was not a general Rule, that a Matter could not be pleaded Specially, which might have been given in *Evidence upon the general Iſſue*; as in an Action of Debt for Rent, upon *Nil debet* pleaded, an Entry and Expulſion may be given in Evidence; but yet that is allowed to be pleaded. *Hob.* 127. But then it was argued for the Plaintiff, that the Plea was ill as to the Matter pleaded; becauſe the *Drawing the Bill is a negotiating in itſelf*, and 'tis a Thing become ſo uſual between all Manner of Perſons, as well as Merchants, to negotiate by Bills of Exchange, that it would be very inconvenient, that thoſe Bills ſhould not have the ſame Effect between them as between Merchants. 2 *Vent.* 293. *Sarsfeild* verſus *Witherly.*

3. Error in the *Exchequer-Chamber*, upon a Judgment in *B. R.* wherein the Plaintiff *Evans* declared upon the Cuſtom of Merchants, * *and other Perſons negotiating, &c.* that if a Merchant *Antea (A) 9 (B) 2. draw a Bill of Exchange directed to another, requiring him to pay the Money in the Bill mentioned

tioned to the Perſon therein named, or his Order, for Value received, *&c.* and if the Bill is *accepted*, and afterwards *endorſed* to another, if the Acceptor refuſes to pay the Money, then the *Drawer*, upon Notice of ſuch Refuſal, is liable, *&c.* the Action was brought againſt the *Drawer*, who being a Merchant in *Newcaſtle*, drew a Bill for 500 *l.* upon one *William Rider*, Merchant in *London*, payable to *Price* for the Uſe of *Felix Calvert*, *&c.* that the Bill was *accepted by Rider*, and afterwards endorſed by *Price* to the Plaintiff *Evans*, who demanded the Money of *Rider*, but he refuſed to pay it, of which *Cramlington* the Drawer had Notice, but denied the Payment, *&c.* The Defendant pleaded, that an *Extent* iſſued againſt the ſaid *Calvert*, at the Suit of the King for 5000 *l.* and upon an Inquiſition taken, the Jury found the Defendant indebted to the ſaid *Calvert* in 500 *l.* by Vertue whereof the Sheriff ſeiſed the ſaid 500 *l.* and the Bill of Exchange into the Hands of the King, all which was returned into the Exchequer, and thereupon the King being intitled to it, there was another Extent iſſued out of the Exchequer, directed to the Sheriff of *Newcaſtle upon Tyne*, to levy the Money, and that before the Action now brought againſt the Defendant, he paid the Money in full diſcharge of the ſaid Extent, and averred the Identity of the Perſon in the Bill, and of the Sum: and upon a Demurrer to this Plea, Judgment was given for the Plaintiff in *B. R.* and the Error now aſſigned was, that the 500 *l.* being to be paid to *Price* for the Uſe of *Calvert*, the Right and Intereſt was veſted in *Calvert*, and by Conſequence it might be ſeiſed for the Debt which he owed to the King; but adjudged, that this was no more than a Truſt, and the Right of the Money was in *Price*; as if Goods had been *given* to *T. P.* for the Uſe of *W. W.* the Property of the Goods is in *T. P.* beſides, the Bill was endorſed to the Plaintiff before any Seiſure, or even before the *Extent* iſſued forth; and the Cuſtom is laid in the Declaration, that an Endorſement might be made, as in this Caſe it was, which Cuſtom is confeſſed by the Demurrer, and that fixes the Intereſt in him, who made the Endorſement, and puts it in the Plaintiff; the Judgment was affirmed. 2 *Vent.* 309. *Cramlington* verſus *Evans.*

4. A Note was drawn thus; *Ss. I promiſe to pay to W. R. or Order, the Sum of* 100 l. *on Account of Wine had from him*; *W. R.* indorſes this Note to *W. W.* who brought an Action againſt the *Drawer*, and declared on the Cuſtom of Merchants, as on a Bill of Exchange, and had a Verdict; and upon a Motion in Arreſt of Judgment, it was objected, upon the Authority of **Clerke and Martin's* Caſe, that theſe *Promiſſory Notes* are not in Nature of *Bills of Exchange*, for the Reaſon of the Cuſtom amongſt Merchants on ſuch Bill, is for Convenience and Expedition of Trade; to which it was anſwered, that this differs from *Clerke and Martin's* Caſe; for there the Action was brought by the *Drawee againſt the Drawer*, but here 'tis brought by the *Endorſee againſt the Drawer*, who by the very Words of the Note intended that it ſhould be Negotiable; for 'tis made payable to *W. R.* or *his Order*, which is a Promiſe to pay it to any Perſon whom the Drawee ſhould appoint, and the *Endorſement* is an Appointment to pay it to the Plaintiff; that theſe Actions are now become Common, as the Trade of the Nation encreaſes; 'tis true, if this had been a *Foreign Bill*, the Action could not have been brought againſt the *Drawer*, without it had been *proteſted* before a Publick Notary, but it being an *Inland-Bill*, there was no Occaſion for a *Proteſt*; that 'tis frequent amongſt Merchants to make ſuch Notes, and that they are accompted amongſt them as Bills of Exchange, and that not only Notes, but Bonds for Money have been endorſed as Bills of *Exchange*. *Mod. Caſes.* 29. *Buller* verſus *Cripps.* * Poſtea (E) 7.

5. Adjudged, that Intereſt on a Bill of Exchange commences from the Time of the Demand made; therefore, if no Demand is made till the Action brought, the Defendant may plead a Tender and Refuſal *& uncore priſt*, and ſo diſcharge himſelf of the Intereſt. *Mod. Caſes* 138.

6. In a Writ of Error upon a Judgment by *Nil dicit* in *C. B.* in an Action brought upon an *Inland Bill* againſt the Drawer, it was objected, that ſince the Statute 9 *Will.* 3. above-mentioned, *Damages* could not be recovered againſt the Drawer, unleſs the Bill had been *proteſted*, and in this Caſe there being no *Proteſt*, the Action would not lie; but adjudged, that the Word *Damages* in the Statute, imports only ſuch *Damages* which the Party had ſuſtained in being longer out of his Money by the Non-Payment of the Drawee, contrary to the Tenor of the Original Bill, and not *Damages* for the Original Debt; for the Statute never intended to deſtroy the Action for want of a *Proteſt*; becauſe that *was ordered to be made for the Benefit of the Drawer*, (viz.) *That no Intereſt or Coſts ſhould be had againſt him, unleſs the Bill was proteſted, and he had Notice of the Proteſt*; for before the Statute there was no Occaſion of proteſting an *Inland Bill*; but if any Prejudice happened to the Drawer, for want of Notice of Non-Payment of the Drawee, to him to whom it was made payable, it was to be born by the Drawer; but now the Party cannot reſort to him for *Intereſt and Coſts*, without Notice of Non-payment by Proteſt. *Mod. Caſes* 80. *Brough* verſus *Perkins.*

7. *Caſe, &c.* on an *Inland Bill* brought by the *Indorſee againſt the Drawer*, theſe Points were reſolved, that a Bill payable *to T. S. or Bearer*, is not * aſſignable, ſo as to enable the Indorſee to bring an Action, if the Drawer refuſe to yay it; becauſe there is no ſuch Authority given by the firſt Contract, for the Effect of it is only to diſcharge the *Drawer*; but where the Bill is payable to *T. S. or Order*, there the Party hath an expreſs Power to *aſſign it*, and by Conſequence the Indorſee may maintain an Action; that tho' a Bill payable to *T. S or Bearer*, and an Aſſignment thereof is not good to charge the *Drawer* with an Action on that Bill, yet 'tis good to charge the Indorſor, becauſe every *Endorſement is a new Bill*; that the very Drawing a Bill of Exchange is a ſufficient Negotiating and Merchandizing without an Averment, that the Defendant is a Merchant. 1 *Salk.* 125. *Hodges* verſus *Steward.* Poſtea 10.

8. *In Aſſumpſit againſt the Drawer*, it was adjudged, that the *Drawer* is ſubject to Payment, if the Drawee refuſes either to accept or pay; but then the Perſon to whom 'tis made payable muſt tender the Bill to him in convenient Time, and afterwards give the Drawer * Notice of the Refuſal to accept or pay by the Drawee; for otherwiſe the Law will imply, that the Bill was paid; becauſe there is a Truſt between the Parties, and it may be injurious to Trade to have a Bill riſe up againſt the Drawer at any Diſtance of Time, when all Accompts may have been adjuſted between them. 1 *Salk.* 127. *Allen* verſus *Dockwray.*

* Antea (A) 4.

9. In an Action againſt the *Drawer*, the Plaintiff declared on the Cuſtom of Merchants, and ſet forth, that the Drawee refuſed to pay, *&c. ratione cujus the Drawer* became chargeable, but laid no *expreſs Promiſe* to pay: After a Judgment for the Plaintiff, and a Writ of Inquiry, it was moved in Arreſt of Judgment, that the Declaration was ill; becauſe *ratione cujus* he became chargeable, is not good, without laying an expreſs Promiſe; but adjudged, that the Cuſtom makes both the Obligation and Promiſe, and the Drawing the Bill is an expreſs Promiſe to pay. 1 *Salk.* 128. *Starkey* verſus *Cheeſeman.*

Antea 7.

10. In an Action upon an *Inland Bill againſt the Drawer*, the Plaintiff had Judgment by *Nil dicit*; and upon a Writ of Error brought in *B. R.* it was objected, that the Declaration was ill, becauſe it did not appear, that the Bill was * *proteſted*; for ſince the Statute 9 & 10 *Will.* 3. an Action will not lie againſt the Drawer, unleſs a *Proteſt is made*; but it was adjudged, that the Statute doth not take away the Action of him *to whom the Bill is made payable* without a Proteſt, neither is it neceſſary to be ſet forth in his Declaration, but to be conſidered at the Trial; for if by his not proteſting the Bill the Drawer ſhould have any Damage by the Neglect or Refuſal of the Acceptor to pay the Money, this Statute ſeems to give a Remedy for ſuch Damages, and to deprive the *Perſon to whom the Bill is payable*, if Damages or Intereſt, if he makes no Proteſt. 1 *Salk.* 131. *Boroughs* verſus *Perkyns.*

* Antea (A) 2, 4.

11. Caſe, *&c.* againſt the *Drawer of a Bill of Exchange*, who lived at *Briſtol*, and drew the Bill there upon one who lived in *London*, where the Bill was tendered and refuſed, and the Action being brought there, it was moved to change the *Venue to Briſtol*, but denied; becauſe the Refuſal at *London* muſt be proved to make the *Drawer liable*; therefore ſince the Evidence to ſupport this Action ariſes in two Counties, the Plaintiff may chooſe either, and the Rule in ſuch Caſe is never to change the *Venue*, if the Plaintiff will be bound to give ſome material Evidence in the County where the Action is laid. 2 *Salk.* 669.

12. By the Statute 9 & 10 *Will.* 3. *cap.* 17. 'tis enacted, that Bills of Exchange, in which *the Value ſhall be expreſſed to be received*, and payable at a certain Day, may after Acceptance in Writing, and the Expiration of three Days after the Bill is due, be * *proteſted by a Notary, &c.* and notified to the Party from whom the Bill was received within fourteen Days after the Proteſt, who upon producing it, muſt repay the ſaid Bill, with *Intereſt* and Charges from the * proteſting, *&c.* And by the Statute 4 & 5 *Annæ cap.* 9. a Promiſſory Note made payable to *W. R.* or Order, or Bearer, may be aſſigned, and the Perſon to whom 'tis * aſſigned, may maintain an Action againſt the Drawer or Endorſer, and recover Damages and Coſts. If the Perſon on whom an *Inland Bill of Exchange* is drawn, ſhall refuſe to *accept* it, the Party to whom 'tis made payable may *proteſt*; the Acceptance muſt be by Under-writing, or endorſing it, the Drawer to pay no Coſts, Damages or Intereſt, unleſs *Proteſt be made for Non-Acceptance, and Notice thereof given to the Party from whom the Bill is received within fourteen Days, either perſonally, or left in Writing at his uſual Place of Abode*; if accepted and not paid within three Days after 'tis due, or if not accepted or not paid, then upon any one *Proteſt* made for *Non-Acceptance or Non-Payment*, and Notice thereof, as aforeſaid, the *Drawer* ſhall be liable to pay Coſts, Damages and *Intereſt*; but no Proteſt is neceſſary, unleſs 'tis expreſſed in the Bill *for Value received*, and it be drawn for 20 *l.* or upwards.

Antea 10.

* *The Form is mentioned in the Act.*

* *And in Default of ſuch Proteſt or due Notice, the Perſon ſo failing ſhall be liable to all Coſts, Damages and Intereſt.*

(C)

Of Indorſements.

1. THE Bill was, pray pay this my firſt Bill of Exchange, *my ſecond and third not being paid*, and the Endorſement was, that the Perſon on whom it was drawn, *was Content to pay the Bill* to the Plaintiff, without ſetting forth in his Declaration, that the Bill was ſubſcribed: Upon the General Iſſue, *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that there was *no Averment, that the ſecond and third Bill was not paid*, which being a Condition precedent, ought to be averred; but adjudged, that ſhall be intended after a Verdict, by which this *Indorſement* is likewiſe aided; for as an Attornment ſhall be ſupplied where the Jury finds *Debet*, ſo ſhall an Indorſement, by their finding *Aſſumpſit.* 1 *Salk.* 130. *Eaſt* verſus *Eſtington.*

2. In *Trover for a Bill of Exchange*, the Caſe was, the Plaintiff had a Bill of Exchange drawn on the Defendant, which he indorſed and delivered to *T. S.* who went to the Defendant to get it accepted, and *T. S.* left it with him, and it was afterwards loſt; thereupon the Plaintiff brought this Action, and the Queſtion being, whether *T. S.* could be a Witneſs for the Plaintiff? adjudged, that he might, becauſe the bare Indorſement, without any other Words but only his Name, did

did not make an Alteration of the Property ; for it might be filled up either with an Aſſignment, or made a Receipt of the Money. 1 *Salk.* 130. *Lucas* verſus *Haines.* *See poſtea pl.* 8. *S. P.*

3. Caſe, *&c.* for 170 *l.* in which the Plaintiff declared againſt the Endorſor of two Bills of Exchange, *&c.* Upon *Non Aſſumpſit* pleaded, the Caſe was, one *Moor* a Goldſmith, ſubſcribed two Bills payable to the Defendant, who on the *19th of Octob.* endorſed them, which with eight more, he gave to one *Zouch*, to whom he was indebted ; *Zouch* on the ſame Day brought theſe Notes to the Plaintiffs, *who accepted them*, and gave *Zouch* other Bills for them, and ſome Money; afterwards, but ſtill in the ſame Day, the Plaintiffs being alſo Goldſmiths, received Money of *Moor* upon other Bills, and might have received the Money on theſe two Bills, but did not, for they did not demand it, and the Night following *Moor* broke, and the Queſtion was, whether the Defendant, who was the *Endorſor*, is liable? adjudged, that by the Acceptance of theſe Bills by the Plaintiffs, the *Endorſor* was not diſcharged ; for while the Bills are in Agitation every Endorſor is as much liable as the firſt Drawer, and cannot be diſcharged without actual Payment of the Money ; but by Cuſtom the *Endorſor* is only liable in Default of the firſt *Drawer* ; 'tis true, he is diſcharged, if there is any Neglect in the Endorſee to receive it in convenient Time, and if within that Time the Drawer becomes inſolvent: Now a * *convenient Time is generally accounted three Days* ; but this muſt be left to a Jury to conſider according to the Uſage of *Traders*, and Circumſtances in particular Caſes, and upon this Direction the Jury found for the Plaintiffs ; afterwards it was objected, that one of theſe Bills was payable to the Defendant, but did not ſay *to his Order* and therefore not * *aſſignable* to the Plaintiffs by this *Endorſement* ; adjudged, that where thoſe Words are omitted, the firſt Drawer is not liable to the Endorſee, but 'tis good between the *Endorſor and the Endorſee*, for to him the Endorſor is chargeable. 1 *Salk.* 132. *Hill & al'* verſus *Lewis.* *Poſtea 5. *Antea 1.

4. Action againſt the *ſecond* * *Endorſor* upon a Promiſſory Note, in which the Plaintiff declared without any Averment, that the Money was demanded of the Drawer or the firſt Endorſor ; this being an Exception in Arreſt of Judgment, it was diſallowed, becauſe every *Endorſor* charges himſelf as the firſt *Drawer.* 1 *Salk.* 133. *Harry* verſus *Petit.* * Antea (A) 2, 12.

5. *Caſe, &c.* by the Endorſee againſt the *Endorſor*, it was ruled, that the Plaintiff need not prove the *Drawer's Hand*, becauſe the *Endorſor is a new Drawer* ; but he muſt prove that he * demanded the Money of the Drawer or the Drawee, or that he ſought and could not find them, and this in a convenient Time, *which is* * *three Days after the Endorſement*, no Allowance to be made for *Sundays and Holydays* ; for if both the Drawer and Drawee ſtand, and are reſponſible a convenient Time after the Endorſement, and no Demand by the Endorſee, and then both fail, he ſhall not reſort to the *Endorſor* ; ruled alſo, that the *Demand muſt be proved after the Endorſement* ; and alſo, if a * Bill is endorſed with the Name only of the Endorſor, it may be filled up by the Endorſee with an Aſſignment to charge the Endorſor, or with an Acquittance ; and ſo it may, if purchaſed at a Diſcompt. 1 *Salk* 127. *Lambert* verſus *Pack.* *Poſtea 7. *Antea 3. *Poſtea 8.

6. Bill payable to *T. S. or Bearer*, was loſt, and being found by a *Stranger*, he, for a valuable Conſideration, endorſed it to *B.* who got a new Bill in his own Name; adjudged, that *T. S.* may have *Trover* againſt him who found the Bill, but not againſt him to whom it was aſſigned, by Reaſon of the Courſe of Trade, which creates a Property in the Aſſignee or Bearer. 1 *Salk.* 126.

7. Bill of Exchange made payable *to T. S. or Order*, who endorſed it to *B. B.* adjudged, that *B. B.* the Endorſee cannot bring an Action againſt the Endorſor, unleſs he endeavour to find out and * demand the Money of the firſt Drawer, which he muſt ſet forth in his Declaration, for the Endorſor is liable only in Default of the Drawer. 1 *Salk.* 126. See *Harry* verſus *Petyt.* *Antea 5.

8. Bill of Exchange payable to *Clerk or Order*, he only endorſed his Name, leaving *a vacant Space above it*, and gave it to *T. S.* who got it *accepted*, and the Money not being paid, *Clerke* brought an *Indebitatus Aſſumpſit* againſt *the Acceptor* ; it was objected in Evidence, that *Clerke* was not intitled to this Action, becauſe, by endorſing his Name he had transferred the Property to *T. S.* but adjudged, that he had not ; becauſe it was in the * Power of *T. S* to act either as Servant or Aſſignee ; for if he filled up the Vacancy, by making it payable to him, that would have been an Evidence, that he received it as Endorſee ; but that not being done, it ſhall be preſumed he intended only to act as Servant to *Clerke*, to write an Acquittance upon Payment of the Money. 1 *Salk.* 126. *Clerke* verſus *Piggott.* See *antea pl.* 2. *S. P.* *Antea 5.

(D)

Of the Acceptor. See (A) pl. 5, 13. (C) 8.

1. ADjudged, that by the Cuſtom of *England*, where there are two Joint-Traders, and one *accepts* a Bill drawn on both, for himſelf and Partner, it binds both, if it concern the joint Trade ; but not, if it concern him only in a different Intereſt. 1 *Salk.* 126. *Pinkney* verſus *Hall.*

2. Action on a Bill of Exchange dated 28 *Octob.* and that the Drawee accepted it on the *31ſt of December* following, and promiſed to pay the Money *ſecundum tenorem Billæ.* After a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that there could not be an Acceptance in

this Caſe to pay the Money *ſecundum tenorem Billæ*, becauſe at that Time, the Time of Payment was elapſed; but adjudged, that the Acceptance is good, and that the Subſtance of the Promiſe is to pay the Money. 1 *Salk.* 129. *Mitford* verſus *Wallicot.* 127. *Jackſon* verſus *Piggot. S. P.*

(E)

Pleadings in Actions on Bills of Exchange, good, and not good.

1. IN Treſpaſs, *&c.* the Plaintiff declared upon the *Cuſtom of Merchants in London*, (viz.) in the *Pariſh of St. Mary le Bow*, that if any Perſon *Reſiding and Trading there*, ſubſcribe a Note for Money payable on Demand, the Subſcriber becomes chargeable to pay the ſame, and that the Defendant ſigned a Note, payable to the Plaintiff for 26 *l.* 10 *s. &c.* The Defendant pleaded, that at the Time of the Note ſubſcribed he *reſided at Brentford in Middleſex*, and traverſed, that he did *reſide and trade in London*; and upon Demurrer, it was objected, that the Plaintiff had not ſet forth *where* the Note was ſubſcribed; but it was anſwered, that he had ſet forth, that the Defendant *apud London*, in the Pariſh aforeſaid, *reſiden' & commerciu' haben' fecit notam*, which muſt be *London*; for the Sentence being entire, it muſt naturally be intended, that all was done at the ſame Time and *Place*: The Chief Juſtice *Treby* declared, that theſe * Bills are now of ſuch general Uſe, that they might be given in Evidence upon an *Indebitatus Aſſumpſit*, and that the Plaintiff need not alledge the Cuſtom of Merchants. 2 *Lutw.* 1583. *Broomwich* verſus *Lloyd.*

* Antea (A) 3, 5.

2. In *Belaſyſe and Heſter*'s Caſe, 2 *Lutw.* 1589. the Objection was, that the Cuſtom of Merchants was not ſet forth by the Plaintiff, but only, that the Defendant and one *Greevſon* were Perſons *negotiantes in Merchandize*, and that the ſaid *Greevſon* drew a Bill upon the Defendant payable to the Plaintiff *ſecundum uſum mercatorum*, and this was held good, and that to ſet forth the * Cuſtom at large, is merely Surpluſage. *See the Caſe.*

* Antea (A) 6.

3. The Plaintiff declared on the Cuſtom of *England*, that if any Perſon ſign a Bill to pay Money at a certain Day, that by the Cuſtom, he ought to pay it upon that Day; and then ſets forth, that the Defendants were * *Reſidentes & Negotiantes infra hoc regnum Angliæ*, and that they had ſigned ſuch a Bill, but did not pay the Money: Upon Demurrer to the Declaration, it was adjudged, that this was an ill way of Declaring, becauſe it excluded all *Conſiderations* which muſt be averred, for every Man is *negotians* in the Kingdom; if he would have brought his Caſe within the Cuſtom of Merchants, it ſhould have been *Commercium habens*; ſo it was in the Caſe of * *Sarsfield & Witherly*; 'tis true in that Caſe it was ſaid, that the Defendant was *reſidens & negotians at London*, without ſaying *Commercium habens*, but that was ſufficiently alledged before in general Words; for the Plaintiff in that Caſe declared upon the Cuſtom of Merchants, and other Perſons negotiating *& Commercium habentes, &c.* and upon the whole Frame of that Declaration it appeared to be upon a Bill of Exchange. 5 *Mod.* 367. *Woolvile* verſus *Young.*

*Poſtea 5.

* Antea (B) 2. Poſtea 5.

4. In Covenant to pay ſo much Money to the Plaintiff, or his Aſſigns, as ſhould be drawn on the Defendant by a Bill of Exchange, and the Breach was aſſigned in Non-payment: The Defendant pleaded, that the Plaintiff *ſecundum legem mercatoriam* did aſſign the Bill to *T. S.* who aſſigned it to *M. G.* to whom the Defendant paid ſo much, Part thereof, and tendered the Reſt; and upon a Demurrer to this Plea, *per Curiam*, 'tis ill, becauſe the Defendant did not ſet forth the Cuſtom of Merchants in particular, without which theſe Aſſignments are not good. 3 *Mod.* 226. *Carter* verſus *Dowrith.*

5. *Caſe, &c.* upon a Note for Payment of ſixty Guineas, when the Defendant ſhould be married to *E. P.* upon which Note the Plaintiff declared, as upon a Bill of Exchange, ſetting forth a Cuſtom in *London* between Merchants *& alias perſonas in eadem Civitate* * *reſidentes, &c.* Upon a Demurrer to this Declaration, it was objected, that the Plaintiff did not aver that he was a Merchant, or that the Note was made *ſecundum conſuetudinem mercatorum*; neither hath he laid any Conſideration. *Et per Holt Chief Juſtice*, if the Note had been given by Way of Commerce, it had been good; but to pay Money upon the Contingency of a Man marrying ſuch a Woman, cannot be called a Trade, and therefore not within the Cuſtom of Merchants. 4 *Mod.* 242. *Pearſon* verſus *Garret.*

* Antea (A) 9. (C) 8. (E) 3.

6. The Plaintiff declared on a Bill of Exchange drawn at *Amſterdam*, payable at *London*, at *double Uſance*, and did not ſhew what *thoſe Uſances* were, for which Reaſon, upon a Demurrer to the Declaration, the Defendant had Judgment. 1 *Salk.* 131. *Buckley* verſus *Cambell.*

7. The Plaintiff brought an Action on a Note for Money payable to the *Plaintiff* * *or Order*, and declared on the *Cuſtom of Merchants*, and laid a general *Indebitatus*; the Defendant pleaded the general Iſſue; there was a Verdict for the Plaintiff, and entire Damages; but the Judgment was arreſted, becauſe a *Promiſſory Note* is not within the Cuſtom of Merchants, and being no Specialty, a general *Indebitatus Aſſumpſit* will not lie. 1 *Salk.* 129. *Clerke* verſus *Martin.*

* *See* Antea (C) pl. 6. (A) 6.

8. Judgment in C. B. upon the like Note, wherein the Plaintiff declared upon a Cuſtom amongſt Merchants in *London*, trading there, that if a Merchant ſigned a Note, promiſing to pay *T. S. or Order*, ſo much, he became bound by the Cuſtom to pay it; this Judgment was by *Nil dicit*, and a Writ of Error being brought in *B. R.* the Counſel would have diſtinguiſhed this from the Caſe laſt mentioned, being laid as a ſpecial Cuſtom in *London*; but adjudged, that a Cuſtom to pay Money without any Conſideration is *nudum pactum*, and void in Law. 1 *Salk.* 129. *Potter* v. *Pearſon.*

Bill of Review. See **Chancery.**

Biſhop. See **King.** (G) 2. **Ordinary.**

Black-Rent. See **Tender.** (A) 2.

Blaſphemy. See **Indictment.**

Bona Notabilia.

(A)

See *Adminiſtration.* (K) per Totum.

1. GOODS or Debts amounting to 5 *l.* or upwards, and which are in any other Dioceſe than where the Perſon *died*, and which are owing to him at the Time of his Death, are called *Bona notabilia*, and in ſuch Caſe the Probate of his Will, or the granting Adminiſtration, if he died Inteſtate, belongs to the *Archbiſhop of the Province* where he died.

2. Where a Man dies in one Dioceſe, *without any Goods*, and leaves to the Value of 5 *l.* in another Dioceſe, the Archbiſhop of that *Province* may grant Adminiſtration, becauſe he hath a general Juriſdiction there; but ſuch Adminiſtration is voidable by Sentence. *Cro. Eliz.* 457. *Bingham* verſus *Smeathwick.* 5 *Rep.* 30. *S. P.* Moor 693.

3. But where a *Biſhop* grants Adminiſtration, and there are *Bona notabilia*, ſuch Adminiſtration is merely void, becauſe he had no Juriſdiction out of his own Dioceſe; 'tis true, ſome Judges were formerly of another Opinion, (*viz.*) that it was not void, becauſe *de mero jure*, the Biſhop is to grant Adminiſtration, and that neither he, or the Adminiſtrator, may know that the Inteſtate had *Bona notabilia.* 5 *Rep.* 30. 2. *Leon.* 156. *Dunn*'s Caſe.

4. Where a Perſon dies, leaving *Bona notabilia* in each *Province of Canterbury and York*, there muſt be ſeveral Adminiſtrations; for one granted *in one Province*, is void as to any other Goods in the other; becauſe they have diſtinct ſupreme Juriſdictions; but then he muſt have *Bona notabilia* in ſeveral Dioceſes in each Province; and ſo it is where a Perſon hath ſeveral Eſtates in *England* and *Ireland.* *Dyer* 305. *Hardr.* 216. *Allenſon* verſus *Dickenſon.* *S. P.* Adminiſtration. (K) 6. *S. C.* 2 *Lev.* 86. *Shaw* verſus *Stoughton.* *S. P.* Adminiſtration. (K) 7. *S. P.*

5. *Scire facias, &c.* by an *Adminiſtratrix* by Vertue of an Adminiſtration granted to her by the Prerogative Court, to ſhew Cauſe *quare executionem non habeat* of a Debt of 624 *l.* obtained on a Judgment by the Inteſtate; it was objected againſt this Declaration, that it was ill, becauſe the Plaintiff had intitled her ſelf by Vertue of a Prerogative Adminiſtration, and did not ſet forth, that the Inteſtate had *Bona Notabilia*; but adjudged, that if he had not *Bona notabilia*, the Adminiſtration is not void, but voidable. 2 *Lutw.* 1264. *Sudall* verſus *Witham.* *Poſtea* Sci. fa. (H) 2. *S. C.*

Bonds.

Conditions of Bonds void in Law. (A)
Conſtruction of Conditions, and of *Memorandums*, and disjunctive Conditions. (B)
Of Bonds and Conditions with inſenſible Words, good. (C)
Of Bonds and Conditions, with inſenſible Words, not good. (D)
What ſhall be a good Performance of a Condition in a Bond, and what not. (E)
Of the Dates of Bonds and Days of Payment. (F)
What ſhall be a good Delivery of a Bond, and what not. (G)
Of joint and ſeveral Bonds. (H)
Where Bonds are void by Raſure, Miſpelling, Interlineation, or Miſcaſting the Sum. (I)
Of Bonds, with Conditions to pay Foreign Money. (K)
Of Bonds, in which the Parties are wrong named. (L)
Of Pleas to Debt on Bond, good, (M)
Of Pleas to Debt on Bond, not good. (N)

(A)

Conditions void in Law. See *Breach of Conditions.* (A) 9.

1. A Condition, that if *B. B.* uſe the *Trade of an Haberdaſher* within the County of *S.* in the Cities of *B.* or *W.* within four Years after the Date of the Bond, then if he pay 20 *l.* upon Requeſt, the Bond ſhall be void; in an Action of Debt this was adjudged a void Condition, and againſt the Law, becauſe 'tis againſt the Liberty of a Freeman. *Owen* 143, *Claygate* verſus *Batchelour.*

Poſtea 5. 2. If an Obligation is made with a Condition, *not to give Evidence againſt a Felon*, 'tis void; but in ſuch Caſe the Defendant muſt plead the Special Matter. 1 *Leon. Jones*'s Caſe.

3. Debt on a Bond, conditioned, that *whereas Suits have been proſecuted between the above-bounden John Phanner and Alice his Wife*, &c. *which Suites are now concluded; if therefore the ſaid John Phanner do not from henceforth commence or proſecute any Suit againſt the ſaid Alice for any precedent Cauſe, &c.* But ſhall from henceforth *uſe and maintain the ſaid Alice as his lawful Wife, then this Obligation to be void, or elſe to ſtand in full Force:* The Defendant pleaded, that he had not commenced any Suit after the Date of the ſaid Bond againſt the ſaid *Alice*, and that ſince ſhe was married to the Defendant, ſhe was married to one *Hawle*, who is ſtill living, ſo that the Defendant could not uſe and maintain her as his lawful Wife; and upon Demurrer the Plea was held good, becauſe the firſt Plea of the Condition was moſt material, (*viz.*) the Proſecution of any Action againſt the Wife, which the Defendant had anſwered, by ſaying, that he had not, and ſo had tendered an Iſſue; and as to the laſt Part of the Condition, (*viz.*) that the Bond ſhall be in Force if he did not uſe and maintain her as his Wife, this made the Bond void; becauſe not to uſe and maintain a Woman as a Wife, after Marriage, is not agreeable to the Law of God. *Moor* 477. *Prat* verſus *Phanner.*

4. Debt upon Bond; the Defendant craved *Oyer* of the Condition, and it was, to pay Money on the 31*ſt Day of September*, when there are not ſo many Days in the Month, and therefore the Defendant pleaded *ſolvit ad diem*, upon which they were at Iſſue, and the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Condition was impoſſible to be performed, and therefore void. *Sed per Curiam*, if the Condition is impoſſible, the Obligation

* Poſtea (B) 5. ſtands * ſingle, and the Money is to be paid preſently. *W. Jones* 140. *Jiggon* verſus *Purchaſe.*

5. Debt upon Bond conditioned, that the Obligor ſhould not give Evidence at the Aſſiſes, to prove two Cows, now in Queſtion, *&c.* to be the Cows of the Obligor, *&c.* The Defendant pleaded, that *onerari non debet*, becauſe one of the Cows was his own, and that *Owen Maſon*, the Plaintiff's Son, ſtole it, and was committed, and the Defendant bound by Recogniſance to proſecute him for the ſaid Felony at the Aſſiſes, and there the Defendant gave Evidence, that the Cow was his (the Defendant's) Cow, *prout ei bene licuit, &c.* and upon Demurrer the Defendant had Judgment, becauſe the Condition of the Bond was againſt Law. 2 *Vent.* 109. *Maſon* verſus *Watkyns.* 1 *Leon.* 203. *Jones*'s Caſe. *S. P.*

6. A Bond in a Penalty, conditioned not to exerciſe a Trade in a particular Place, was formerly held good; ſo is *Broad and Follett*'s Caſe, *poſtea* Trade. (A) 9. but this was contrary to * *Colgate* and *Batchelour*'s Caſe; a Bond with ſuch a Condition was held void, becauſe the whole Pe-

* Owen 143. Cro. Eliz. 872. S. C.

March 191. S. P. Allen 67. 2 Leon. 210. 3 Leon. 217. S. P.

nalty was to be recovered, let the Damages be never ſo ſmall; 'tis true, in 3 *Lev.* 241. there was a contrary Judgment, that the Bond and Condition was good, for *volenti non fit injuria*; but that Judgment was reverſed in a Writ of Error in the Exchequer-Chamber; but a Man may reſtrain himſelf by a Covenant, or a Promiſe in Writing, not to exerciſe a Trade in a particular Place; becauſe in ſuch Caſe Damages being to be recovered, that will fall under the Conſideration of the Jury, and they may give more or leſs, as the Circumſtance of the Caſe ſhall appear to them. *See Noy* 98.

(B)

Conſtruction of Conditions in Bonds and Memorandums, and of diſjunctive Conditions.

1. WHere a Condition doth conſiſt of *two Parts* in the *Diſjunctive*, and both are poſſible to be performed at the Time when the Obligor executed the Bond, and afterwards one of them becomes *impoſſible by the Act of God*, in ſuch Caſe the Obligor is not bound to perform the other; becauſe the Condition is made for his Benefit, and he hath his Election to perform either, in order to ſave the Penalty. 5 *Rep.* 22. *Laughter's* Caſe. *Poph.* 98. *S. P. See* Conditions. (E) 13. *Eaton's* Caſe.

Moor 357. *by the Name of* Eaton's *Caſe.* Cro. Eliz. 398. 3 Mod. 212. Shipley *v.* Chappell.

2. When a Condition of a Bond is of ſeveral Things, and an Action of Debt is brought and Iſſue joined upon one Thing, and found againſt the Plaintiff, he ſhall never put that Bond in Suit again, tho' all the other Parts of the Condition are broken. *Mich.* 21 *Eliz.* 371.

3. Debt on a Bond, the Condition was to perform all Covenants and *Payments* in a Deed Poll, *&c.* the Defendant in his Plea ſet forth the Deed-Poll, which was a Grant of ſeveral Lands to the Defendant for 100 *l.* already paid, and for 200 *l.* hereafter to be paid to the Plaintiff; in which Deed there was a *Proviſo*, that if the Defendant did not pay, to *B. B.* 40 *l.* for the Uſe of the Plaintiff on ſuch a Day, then the Grant ſhould be void, and then pleaded, that he had performed all Covenants compriſed in the Deed; the Plaintiff aſſigned a Breach in Non-Payment of the 40 *l.* according to the Proviſo, and upon Demurrer the Defendant had Judgment; becauſe it was not the Intent of the Parties to make the Condition of the Bond repugnant to the Deed, for the Bond was made to ſtrengthen the Deed, and that required no compulſary Payment of the 40 *l.* but left it freely to the Defendant, either to pay it, or forfeit the Lands; ſo that the Word *Payments*, in the Condition of the Bond, muſt have Relation to ſuch Payments which were Compulſary, and not to the 40 *l.* which was voluntary, and therefore the Condition of the Obligation did not extend to that, and by Conſequence the Breach is not well aſſigned. *Yelv.* 206. *Briſtow* verſus *King*. *Poſtea* Proviſo. (C) 6. *S. C.* 2 Cro. 281.

4. Debt on Bond, conditioned, that the Obligor ſhould not hurt or moleſt the Obligee in his Lands or Goods, *by Reaſon of any Thing whatſoever*; adjudged, that the Intention of thoſe Words is, that he ſhall not *wrongfully* hurt or moleſt him, and ſhall never be reſtrained to a Proſecution for a Crime, or any other juſt Cauſe. *Cro. Eliz.* 705.

5. Debt upon Bond, conditioned to pay Money *cum inde requiſitus fuit:* Upon *Nil debet* pleaded, the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that the Declaration was not good, becauſe of the Variance from the Condition, there being no certain Sum mentioned in the Condition; but adjudged, there being no Sum mentioned, the Bond muſt be * ſingle, without any Condition, and then the Money is to be paid upon Requeſt. 2 *Bulſt.* 156. *Dorrington* verſus *Waller*. * Antea (A) 4.

6. Two Perſons entered into a Recogniſance, with a Defeaſance to make ſuch Aſſurance as the Counſel of the Conuſee ſhould adviſe, *and upon Notice given to them*; afterwards Notice was given *to one* of them, *&c.* and he refuſed; but *no Notice* was given to the other, whereupon he brought an *Audita querela*; but adjudged againſt him; for tho' he might have made the Aſſurance, if he had Notice of it, yet the Recogniſance is forfeited, by the Refuſal of his Companion. *Moor* 555. *Terry & al'* verſus *Redding*.

7. Debt upon Bond conditioned, that the Lands, *&c.* ſhould be ſaved from all Incumbrances, and on the Backſide it was endorſed *Memorandum*, that the Condition ſhall not extend to ſuch a Statute acknowledged by the Obligor, *&c.* afterwards, the Lands being extended, the Obligee brought an Action of Debt on the Bond; the Defendant pleaded the Condition and the *Memorandum*, and upon Demurrer he had Judgment, becauſe the *Memorandum* was an Exception out of the Condition. *Moor* 675. *Brooke* verſus *Smith*.

8. Debt upon Bond, conditioned, that whereas certain Perſons became bound to the *Earl of Holland* in eight ſeveral Bonds, which were aſſigned to his own Uſe; now it was agreed, that he ſhould aſſign them to the Plaintiff to his own Uſe; and the Condition farther was, that the Money ſhould be paid on the ſeveral Days mentioned in the Bonds, *or within eight Days after*; the Breach aſſigned was, that that 50 *l.* payable on *the firſt Day of March*, was not paid, upon which they were at Iſſue, and the Plaintiff had a Verdict; but the Judgment was ſtaid, becauſe the Money might be paid *eight Days after*. *Allen* 60. *Hodſon* verſus *Ingram*.

9. Debt upon Bond, conditioned to pay Money *ſuper viceſimum diem Martii prox' ſequentem.* After a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that this Bond being dated in *March*, the Participle *ſequentem* muſt relate to *diem*, and ſo the Payment muſt be made on the 28*th* Day of the ſame Month of *March*; if it had been *ſequentis*, then it would relate to the Month, and not to the Day of the Month, and ſo it would have been payable in the next Year; but adjudged, that it muſt be underſtood to relate to the ſame Month. 1 *Mod.* 112.

Raym. 61. 10. Debt upon Bond of 200 *l.* conditioned to pay 100 *l. on the tenth Day of January, upon three Months Warning*; but in *Levinz* 'tis, *or upon three Months Warning*, the Queſtion was, who was to give Notice of Payment, either the Obligor or the Obligee; and upon the firſt Argument the Court was of Opinion, that the *Obligee* was to do it; but it being moved again, *Serjeant Levinz* tells us, they held, that the *Obligor was to pay the Money on the tenth of January*, but that he was to give three Months Notice to the Obligee to receive it; becauſe the Words of the Condition are to be taken moſt ſtrongly againſt the Obligor; but *Juſtice Windham* held, that the Obligor was bound to pay the Money on the *tenth of January, after three Months Warning* given by the Obligee, and that the Words of a Condition ought not to be taken ſtrongly againſt the *Obligor*, but are to be expounded for him, becauſe the Condition is made for his Benefit. 1 *Lev.* 85. *Lawſon* verſus *Witherington.*

11. Debt upon Bond, by which *Peter Wade of London* was bound to one *Michael Terry*; conditioned, that the ſaid *Peter Wade* on the *eleventh of March, &c.* ſhould pay to *Michael Terry* 253 l. *giving ten Days Notice, at the Houſe of Peter Wade in Lombard-ſtreet, London*; the Defendant pleaded in Bar, that the Plaintiff *Michael Terry*, did not give him Notice, *&c.* and upon Demurrer the Plaintiff had Judgment; becauſe he was not to give Notice, but the Defendant himſelf was to do it. *Quære.* 1 *Lutw.* 409. *Terry* verſus *Warde.*

12. Debt upon Bond, conditioned to pay 10 *l.* to the Plaintiff *Anne Briggs*, if ſhe ſhall indemnify *Tho. Sheafe from all Coſts and Charges which he ſhall ſuſtain*, for or by Reaſon of her *being with Child*: The Defendant pleaded, that the Plaintiff was with Child, and that ſhe charged the ſaid *Tho. Sheafe* to be the Father thereof, who was thereupon brought before a Juſtice of Peace, and ordered to find Sureties to appear at the next Seſſions, and that he appeared there, and was at the Charge of 5 *l. &c.* the Plaintiff replied, that ſhe was delivered of a Male Baſtard-Child, begotten by the ſaid *Tho. Sheafe*, and that from the Time of the Making the ſaid Bond, *hucuſq; the Defendant had not been damnified, or at any Charge for or towards the maintaining the ſaid Child*; and upon Demurrer to this Replication, it was adjudged, that the Intention of this Condition was to indemnify the ſaid *Tho. Sheafe* from maintaining the Child, and not from any legal Proſecution againſt him for the Fact, for then the Condition had been againſt Law, and by Conſequence the Bond had been void. 1 *Lutw.* 667. *Briggs* verſus *Mond.*

(C)

Bonds and Conditions with inſenſible Words, good.

W. Jon. 366. T. Jones 48. *Quantoginta* for *Quinqueginta*, good. Strange 1. THE Defendant was bound in *Quinginta duabus libris*, conditioned to pay 26 *l.* the Plaintiff declared on a Bond *de Quinquaginta & duabus libris, &c.* and upon *Non eſt factum* pleaded, the Jury found, that the Defendant was bound in *quinginta duabus libris*, and that he delivered the Bond as his Deed; adjudged, that *Quinginta* is the ſame with *Quinquaginta. Cro. Car.* 301, 417. *Down* verſus *Hathwaite.*

v. Greenhill.

2. Debt upon Bond *de viginti nobilis*: Upon Demurrer to the Declaration, and the Dictionary being conſulted, where *Nobilis* is rendered the *Latin* Word for 6 *s.* 8 *d.* the Bond was adjudged good. 2 *Cro.* 203. *Matthews* verſus *Vaughan.*

Yelv. 193. 3. One *Keys* was bound in a Bond to pay *Dobſon* ten Pounds and the Bond was dated *tres viginti dies Januarii*, and ſigned *Bolt Keys*, but he was not bound by his *Chriſtian Name* in the Bond; adjudged, that the Date being only *falſe Latin*, that ſhall not make the Bond void; and the Name of the Obligor ſubſcribed is ſufficient, tho' there is a *Blank for his Chriſtian Name* in the Bond. 2 *Cro.* 261. *Dobſon* verſus *Keyes.*

Hob. 19. 4. Debt on a Bond of 60 *l.* the Sum was in *Italian*, and the Words were, *in Ceſſanta libris*; adjudged good. 2 *Cro.* 208. *Parker* verſus *Keneday.*

5. The Obligor was bound in *Quinquageſſimis libris*, and the Action was brought for *fifty Pounds*; adjudged, that *Quinquageſſima and Quinquaginta*, ſhall be conſtrued to be all one in Senſe. 2 *Cro.* 29 *Ely* verſus *Chard. Hob.* 75. *Vernon* verſus *Onſlow.*

Hob. 18. 6. The Obligor was bound *in trigintate libris*, and in Action of Debt for 30 *l.* on this Bond, the Defendant demurred to the Declaration; but adjudged good. 2 *Cro.* 309, 355. *Biggins* verſus *Tytherton.*

7. A Bill Penal, for the Payment of *Threty* two *Ponds*, was adjudged good for 32 *l.* 10 *Rep. Osborne's* Caſe. 2 *Cro.* 607. *Hobart* verſus *Long. S. P.*

Cro Eliz. 417. Moor. 645. 8. The Obligee was bound in *ſeptuagint' & quinquagint' libris*, and the Action was brought for 750 *l.* and adjudged good upon a Demurrer. *Hob.* 116. *Walter* verſus *Pigot.*

9. Error upon a Judgment in Debt upon a Bond for *ſexaginta libris*, and upon *Oyer* of the Bond, it was *pro ſexinginta libris* ; but the Judgment was affirmed, for the Court held, that *ſexinginta* and *ſexaginta* were all one by Intendment. 2 *Cro.* 338. *Marſhall* verſus *Jollie*. See (D) *pl.* 4. *contra.* See *Osborne*'s Caſe, *Yelv.* 95. 1 Roll. Rep. 47.

10. Debt upon Bond, in which the Plaintiff declared for 50 *l.* but the Boud was, in *Quinquageſimis libris* ; adjudged, that *Quinquageſimis and Quinquaginta* ſhall be taken in a Bond to be of one Senſe and Signification. *Trin.* 9 *Jac.* 12. *Rep.* 29. *Els* verſus *Chards.* *Hob.* 19. *Fitzhughe*'s Caſe. *S. P.* Antea 5. S. C.

11. Theſe inſenſible Words do not make the Bond void,

ſſ. * *Octogeſimo*, *Octigenta*, *Septunginta* } for { *Octoginta*, *Octingenta*, *Septingenta*.

Wiginti, *Quingint'*, *Trigintat* } for { *Viginti*, *Quinquaginta*, *Triginta*.

But then in all theſe Caſes the Condition muſt be to pay Money, for by that Means the Intent of what Sum was in the Bond may be more eaſily known and explained. *Roll. Ab.* 146. * *Moor.* 864.

12. Debt upon Bond, wherein the Obligor was bound *in nongint' & octogeſimis libris*, and the Action was brought for 980 *l.* the Defendant pleaded a Variance between the Declaration and the Bond ; becauſe the one was for 980 *l.* and the Words in the Bond, if they ſignified any Thing, it muſt be *ninety and eightieth Pounds*, the Plaintiff in his Replication inſiſted, that the *Condition* of the Bond might be recorded, which was, that *the Obligor was to pay* 490 *l. with Intereſt* on a certain Day, and then demurred, and had Judgment. 1 *Lutw.* 422. *Roſſell* verſus *Roſſell.*

13. Debt upon Bond, the Condition was, that if the Defendant pay to the Plaintiff 2 *s. per* Week until 7 *l.* 10 *s.* ſhould be paid, (*viz.*) on every *Saturday*, and *if he* * *fail of Payment at any one Day, that then the Bond to be void*; the Defendant pleaded, that he did fail in Payment on ſuch a Day ; and upon Demurrer to this Plea it was adjudged, that the Obligation was ſingle, and the Condition * repugnant and void. *Serjeant Levinz*, who reports this Caſe, tells us, that it was adjudged the Condition ſhould be taken diſtributively, by referring one particular to another, (*viz.*) that if he paid the 7 *l.* 10 *s.* then the Obligation to be void, but if he failed of paying 2 *s. per* Week, it ſhould be in full Force. *Sid.* 105. *Vernon* verſus *Alſop.* Raym. 68. 1 Lev. 77. * Poſtea 15, 16. * 2 Salk. 403. 2 Mod. 285. Sid. 455.

14. Debt upon a Bond made to *John Garnes*, the Action was brought by his Adminiſtrator, and the Defendant craved *Oyer*, *&c. Know* all Men, that I *Philip Gool* do ſtand bound, (but doth not ſay to whom) in 16 *l.* to be paid to the ſaid *John Garnes the Elder's Executors*, *for which Payment I bind my ſelf, my Heirs and Executors*, but doth not ſay *to whom* ; the Condition was long and ſenſeleſs, reciting ſeveral Things, and amongſt the reſt a Deviſe of 8 *l.* by *T. S.* to be paid to *John Garnes the Elder*, then follow theſe Words, (*viz.*) if therefore the ſaid *Philip Goole* ſhall pay to *John Garnes the Elder's Executors*, within one Year after his Death, (but doth not ſay *what Sum*) then the Bond to be void ; and upon Demurrer, it was inſiſted, that this was not the Bond on which the Plaintiff had declared, for that was to *John Garnes*, and this is to *John Garnes the Elder's Executors* ; but adjudged, that a Bond cannot be made to Executors in the Life-time of the Teſtator ; therefore ſince the Bond was executed to *John Garnes*, the Sentence ſhall be disjoined, and be read thus, *To John Garnes* the Elder, and to his Executors, or that the inſenſible Word ſhould be rejected, and then tis, *to John Garnes* only. 3 *Lev.* 21. *Langdon* verſus *Gool.* See * *Goodman* verſus *Knight. S. P.* * Variance (B) 2.

15. Debt upon Bond of 100 *l.* the Defendant demanded *Oyer* of the Condition, which was, whereas the Defendant is truly indebted to the Plaintiff in 50 *l.* now the Condition is ſuch, that if the Defendant *do* * *not pay the ſaid* 50 *l.* then the Bond to be void : The Defendant pleaded, that he did not pay the Money ; and upon Demurrer to this Plea, the Plaintiff had Judgment ; for when a Debt is recited in the Condition, and afterwards ſays, it ſhall not be paid, 'tis repugnant in that Matter. 2 *Salk.* 463. *Wills* verſus *Treguſan.* See *Sid.* 105. 1 *Lev.* 77. *S. P.* * Antea 13. Poſtea 16.

16. Debt upon Bond conditioned, that the Obligor ſhall pay 20 *l.* on four ſeveral Days, *&c.* but if Default ſhall be made of any of the Payments, *&c.* then the ſaid *Obligation to be void* ; the Defendant pleaded, that on ſuch a Day (which was the Day of Payment) he did not pay 5 *l.* and upon a Demurrer to this Plea, *per Curiam*, the firſt Part of the Condition is ſenſible (*viz.*) to pay the Money ; 'tis true, the laſt Part is inſenſible, (*viz.*) if *Default* ſhall be made in Payment, *then the Bond to be void* ; but if ſo, then the Obligation is ſingle, (*viz.*) to pay the Money, and the Condition is repugnant ; ſo the Plaintiff had Judgment. 2 *Mod.* 285. *Wells* verſus *Wright.* *See* Vernon *v.* Alſop. antea 13.

17. In Debt upon Bond, the Plaintiff declared, that whereas *Robert Erlin*, *&c.* was indebted to him (the Plaintiff) in 40 *l. &c.* Upon *Non eſt factum* pleaded, the Jury found, that the Defendant made a Deed in theſe Words, (*viz.*) *In Com. premid de Viginti in quadrans libris*, dated 1 *Julii Anno Regni*, *&c.* and ſigned *Robert Erlwin*, conditioned *to pay* 20 *l. &c.* adjudged, that the Variance between *Erlin* and *Erlwin* is not material, becauſe 'tis *Sealing*, and not ſubſcribing, which is the eſſential Part of a Deed, and the Bond may be a good Deed without Subſcribing ; that the Words *premid in viginti* are inſenſible, and therefore ſhall be rejected ; that the *Quadrans* had likewiſe been inſenſible, if it had not been explained in the Condition, or if the Condition had been collateral ; but ſince it relates to the Condition, they would take it to ſignify 40 *l.* there being ſomething in that Word like *quatuor* and *quadraginta*, and there have been Caſes 5 Mod. 281. Poſtea (F) 15.

adjudged good with as inſenſible Words; as *Hob.* 119. *Quamquegenta* for five *Hundred Pounds*, and *Yelv.* 95. *Cro. Car.* 137. 2 *Cro.* 208. 1 *Brownl.* 62. and in moſt Caſes, where the *Gent* or *Gint*, or the *Sex* or *Sept* are right, the Bonds have been held good. 2 *Salk.* 462. *Cromwell* verſus *Grunſden.* See 2 *Jones* 48. 1 *Cro.* 416, 418. 2 *Cro.* 338. *S. P. Yelv.* 193.

(D)

With inſenſible Words, not good. See Bulſt. 133. Marker *verſus* Croſſe.

1. THE Obligor was bound in *Terrengentate libris*, and the Action was brought for 33 *l.* and upon Demurrer to the Declaration, it was adjudged a void Bond, becauſe the Word was ſo inſenſible, that it could not be taken for 33 *l.* 2 *Cro.* 603. *Hill.* verſus *Cowper.*

2. The Obligor was bound *in viginti liveris*, and the Action was brought for 20 *l.* and held ill; ſo where the Obligor was bound in *ſexgintis* for *ſexcentis libris*, becauſe *ſexgintis* is no *Latin* Word; but where it was *Sexigint'* for *ſexaginta*, or *ſexingent'* for *ſexcent'* there 'tis good. 2 *Bulſt.* 24.

3. Debt upon Bond, for Payment of 50 *l.* and upon *Oyer* it appeared to be *Noverint, &c. me teneri in Quantoginta libris*; the Defendant demurred, and had Judgment, becauſe it was inſenſible. 2 *Lev.* 166. *Strange* verſus *Greenhill.*

4. Debt upon Bond, for Payment of ſix Hundred Pounds, and upon *Oyer* it appeared to be *in ſexaginta libris*; adjudged, that *ſexaginta* can never be taken to be *ſexcenta*, ſo the Defendant had Judgment. *Yel.* 105. *Geery* verſus *Davis.* See (C) *pl.* 9.

Yelv. 65. 2 Cro. 146.

5. The Obligor was bound in *Quinquegintis libris*, and in an Action of Debt brought by the Obligee, there was Judgment againſt the Plaintiff, becauſe this is an inſenſible, and no *Latin* Word; but upon a Writ of Error in the Exchequer-Chamber, moſt of the Judges held the Bond to be good for 500 *l.* but no Judgment was given on the Writ of Error; 'tis thus reported by my *Lord Hobart*; but *Juſtice Crooke* tells us, that it was in *Quemquegentis libris*; and *Juſtice Yelverton* ſays it was, *Quimquegentis libris*; ſo tho' it ended in *Gent*, which always ſignifies an Hundred, yet *Quemque* or *Quimque* being inſenſible, it could not be known in how many Hundred. *Hob.* 119. *Parry* verſus *Dale.*

(E)

What ſhall be a good Performance of the Condition, what not.

1. WHere the Condition of a Bond is for *Payment of Money*, it may be performed by giving any *other Thing in Satisfaction*; becauſe the Value of the Money is certain, and therefore the Party may be ſatisfied by a collateral Thing, if he accepts it as ſuch; but where the Condition is to do a *collateral Thing*, there 'tis otherwiſe; for where a Man is bound to do a *collateral Thing*, and he pays Money for it, 'tis no good Satisfaction; ſo if a Man is bound to pay Money, or to do a collateral Thing, if he doth the Act by the Conſent of the Obligee, 'tis a good Performance of Condition. 3 *Bulſt.* 148. *Moorwood* verſus *Dickens.*

2. Debt upon Bond, the Condition was to pay all ſuch Sums of Money which the *Lord Chancellor ſhould aſſeſs* for Coſts and other Dues, who referred the ſame to one of the Maſters in Chancery, and he reported 170 *l.* to be due; which Report was confirmed by the *Lord Chancellor* thus; ſſ. *Let Coſts be taxed according to the Report*; adjudged, a good Aſſeſſment of Coſts according to the Condition. *Bendl.* 132. *Harris* verſus *Perks.*

3. The Covenantor was bound in a Covenant, and in a Bond to perform Covenants to pay to the three Daughters of *W. R.* 10 *l.* apiece *at their ſeveral Ages of twenty-four Years*, and being very ſick, he made his Will and deviſed to each of the ſaid Daughters 10 *l.* a-piece in Performance of his Covenant, to be paid *at their ſeveral Ages of twenty-one Years*; and upon a Libel by one of the Daughters againſt the Executor for her Legacy, he ſuggeſted for a Prohibition, that he was bound to pay it at her Age of twenty-four Years, and not before, and that if he ſhould pay it at twenty-one, he might be twice charged; and that it was the Intent of the Teſtator, that his Executor ſhould have the Election to pay it at which of thoſe Times he would; and ſo it was adjudged, and a Prohibition was granted. *Moor* 246. *Margery Davies*'s Caſe.

2 And. 55. S. C.

4. *A Cuſtom-houſe-Officer* made a Deputy, and covenanted with him to ſurrender his Patent, and to procure a new Patent for him, *&c.* and if the Deputy ſhould die before the Patent was procured, then to pay to his Executors 300 *l.* and gave *Bond* for Performance of Covenants: Now, tho' Part of this Covenant is good, yet the other Part being void upon the Statute 5 *&* 6 *Ed.* 6. *c.* 16. made againſt Buying and Selling Offices; the whole * Bond is void for that Reaſon. *Cro Eliz.* 529. *Lee* verſus *Colſhill.*

* *Becauſe 'tis the entire Act of the Party.* 2 And. 207. 3 Rep. 82. *cited.*

(F)

Of Dates of Bonds, and Days of Payment. See *Deeds.* (B) per totum. Antea (C) 3.

1. IF an Action of Debt is brought on a Bond dated 1 *Aug.* and upon *Non eſt factum* pleaded, the Jury find, that the Bond was *delivered upon another Day*, either before or after the Day ſet forth in the Declaration, yet the Plaintiff ſhall have Judgment, becauſe the *Date* is not material, and the Defendant cannot be twice charged. 5 *Rep. Goddard*'s Caſe.

2. The Bond was dated 13 *Octob.* 31. The Condition was, to pay 8 *l.* in the Year 1599, *or upon the 13th Day of October next enſuing the Date*; it was the better Opinion, that the Payment ſhould be in the Year 1599; for where a Certainty appears, and afterwards an Uncertainty, the Certainty muſt ſtand. *Goldſ.* 187. *Sharples* verſus *Hankinſon.*

3. Debt upon Bond conditioned to pay Money, but no Time of Payment was mentioned in the Condition; adjudged, that the Money is payable upon Demand. 1 *Brownl.* 53. *Rayſon* verſus *Windar.* 1 *Leon.* 320. *Frond* verſus *Batts. S. P.* Poſtea 11.

4. In Debt on a Bond, the Defendant pleaded Payment at the Day, and at the Trial gave Evidence of Payment at another Day, and before the Day mentioned in the Condition; and upon a Special Verdict adjudged, that Payment * before the Day is Payment at the Day. *Owen* 45. *Bond* verſus *Richardſon.* 1 And. 198. Moor 267. *Poſtea 7.

5. Debt upon Bond, the Defendant pleaded, *quod factum præd'* was made and delivered without *any Date*, and that afterwards the Plaintiff put *a Date to it, & ſic non eſt factum*; adjudged an ill Plea, becauſe he firſt confeſſed it to be his Deed; by Pleading, that *factum præd'* was made, *&c.* and then concludes, that it was not his Deed; he ſhould have pleaded *Non eſt factum* generally. *Hill.* 30 *Eliz. Croſsby* verſus *Tanner. Cro. Eliz.* 800. *Moor* 28. *S. C.*

6. The Bond was dated 1 *May, &c.* the Condition was, to pay 150 *l.* on the 15*th Day of May* next enſuing; adjudged, that it ſhall relate to the 15*th Day* of the ſame Month of *May* wherein the Bond was dated. 2 *Cro.* 647. *Preſcot*'s Caſe, and 677. *Buckley* verſus *Gallant.*

7. Error to reverſe a Judgment in Debt on a Bond conditioned to pay Money on the 25*th of June*; the Defendant pleaded, he paid the Money on the 20*th of June*, which the Plaintiff denied, and ſo they were at Iſſue, and the Jury found, that he did not pay it on the 20*th of June*; adjudged, that this was a void Iſſue, having no Relation, but quite out of the Condition of the Bond; for it may be, that he did not pay it on the 20*th of June*, and yet might pay it *on the* 25*th*, according to the Condition; but if the Jury had found, that he paid it on the 20*th of June*, it had been good, for Payment * before the Day is a good Payment at the Day; but Non-payment at any Day, before the true Day of Payment mentioned in the Condition, is not a Payment at the Day. 2 *Cro.* 434. *Holmes* verſus *Brocket.* *Antea 4. Poſtea (M)

8. Debt againſt the Defendant, wherein the Plaintiff declared againſt him, being a Merchant in *London*, that by a Bill under his Hand he acknowledged himſelf to be indebted to the Plaintiff in 303 *l. &c.* to be paid on the Feaſt of the Purification, called *Candlemas-Day* next following, and averred, that the ſaid Feaſt of the *Purification*, next after the Making the Bill, was *ſecundum uſum mercatorum*; *the ſecond Day of Feb.* 1598. the Defendant pleaded *Non eſt factum*, and the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that *Candlemas-Day* was not a Day known in the Law, but adjudged, that this was helped by the Averment, that Payment on a *Candlemas-Day* was known amongſt *Merchants* to be the *ſecond Day of February*, and the Court is to take Notice of the Uſage amongſt Merchants, for the Support of Traffick. *Mich. 6 Jac. Telv.* 135. *Peirſon* verſus *Poultney.*

9. Debt upon Bond, dated 15 *Novemb.* 25 *Eliz.* upon *Non eſt factum* pleaded, the Jury found a Bond dated 15 *Novemb.* 23 *Eliz.* but not ſealed till 18 *Novemb.* 26 *Eliz.* now, notwithſtanding this * Variance, the Plaintiff had Judgment; for tho' it was dated at another Time, yet they found it to be the Defendant's Deed. 2 *Cro.* 136. *Lane* verſus *Pleydall.* * Cro. Eliz. 603.

10. Adjudged, that where a Releaſe was of all Things *uſque diem datus, &c.* that a Bond dated on the ſame Day on which the Releaſe was made, was not diſcharged. 2 *Roll. Rep.* 255. *Green* verſus *Wilcox.*

11. If *no Day of Payment is limited* on a Bond, the Money is payable preſently, but 'tis otherwiſe upon a *Statute-Merchant*, for that is void, and ſo is the Execution upon it, if the Day of Payment is not expreſſed. *Hutton* 42. *Davis*'s Caſe, *Bridgman* 19. *Meskyn* verſus *Hickford contra, viz.* that the Statute is good. Antea 3.

12. Debt upon a Bill, bearing Date at the Pariſh of *St. Mary le Bow, London*, and upon *Oyer* of the Deed it appeared to be dated at *Hamborough*, the Plaintiff declared in the *Detinet* only; and upon the General Iſſue pleaded, had a Verdict; it was inſiſted for the Defendant in Arreſt of Judgment, that *Hamborough* cannot be ſaid to be in *England*, and that the Plaintiff ought to have brought his Action in the *Debet & Detinet*; but adjudged, as to the firſt Objection, that if the Date of this Bill had been at *Hamborough in partibus tranſmarinis*, it could not be ſued here, but being at *Hamborough* generally, it ſhall be intended in *England*; and as to the other Objection, this Action is well brought in the *Detinet* only, becauſe 'tis not brought for a certain Sum, but for ſix Pounds *Hamborough Money*, which in our Coin is 40*s.* and no more; therefore the Value Poſtea (K) per totum.

of that Money being known unto us, it ſhall be demanded in the *Detinet* only. *Paſch.* 1 *Car. Latch* 4. 77. *Ward's* Caſe.

2 Salk. 462. Antea (C) 17. * 1 Bro'nl. 110. Yel. 193. Dobſon v. Keys. † *The Year of our Lord being Right, the Plaintiff had Judgment.* ** 2 Cro. 136.

13. Debt upon Bond, dated 1 *Julii, Anno Regni Regis Caroli Secundi* 1674, which is impoſſible, the Year of the Lord being applied to the Year of the King's Reign; but adjudged, tho' the *Date is impoſſible*, or if there had been no Date at all, yet that doth not conclude the Jury from finding the Truth; as where a Bond was dated * *Tres viginti die Octobris Anno Regni Reginæ Domini Jacobi Angliæ ſexto & Scotiæ ſexto, & de Anglia quadrageſimo ſecundo* † 1608; upon Demurrer the Plaintiff had Judgment, for the Parties and the Sum being ſufficiently expreſſed, tho' there was no 42d Year of the Reign of that King over *England*, or *6th* over *Scotland*, yet that was not material; yet the Plaintiff may ſuggeſt a Date where there is none, and if the Deed is good, 'tis that, and not the ** Date which the Defendant muſt anſwer. 5 *Mod.* 282. *Cromwell* verſus *Gunſden.*

14. Debt upon Bond, in which the Plaintiff declared, that the Defendant became bound to him in *Port St. David in the Eaſt-Indies, apud London, &c.* and upon Demurrer to the Declaration it was held ill, becauſe the Plaintiff having declared on a Bond ſealed and delivered at *Port St. David in the Eaſt-Indies*; the Date made it local, and for that Reaſon he ſhould declare on a Bond made at *Port St. David in the Eaſt-Indies, apud Iſlington in Com' Middleſex*, or in ſuch a Ward or Pariſh in *London. Mod. Caſes* 228. *Robert* verſus *Harnage.*

(G)

What ſhall be a good Delivery of a Bond, what not.

1. DEBT upon a Bond, and on *Non eſt factum* pleaded, the Jury found, that the Defendant ſigned and ſealed the Bond, and threw it on the Table, and the Plaintiff took it away without any other Delivery; adjudged, that if no Words were ſpoken, or any other Thing amounting to a Delivery, then the Defendant ſhall not be charged with the Bond; but if he had thrown it on the Table, and ſaid, that ſhall be ſufficient, then it had been good. 1 *Leon.* 140. *Chamberlaine* verſus *Stanton.*

2. The Obligor wrote a Bond on the Leaf of a Book, and ſealed it, and afterwards delivered the Book as his Deed; and adjudged good, for that Leaf which compriſeth the Bond was delivered, and the reſt was but Surpluſage. *Cro. Eliz.* 613. *Fox's* Caſe.

(H)

Of joint and ſeveral Bonds.

* Poſtea 14. 9 Rep. 53.

1. IN Debt upon a Bond, the Words were, *obligamus nos vel * quemlibet noſtrum*; the Queſtion was, whether it was joint or ſeveral, it was inſiſted, that the Action ought to have been brought *againſt both*, for the Word *Vel* can never be taken for the Copulative *Et*, and at the moſt the Plaintiff had only his Election, to ſue one or both, and that he had already made his Election by ſuing one of them, who pleaded, and avered, that the Bond was made by *two jointly*; but adjudged, that the Words *Vel* and *Et* are ſynonymous. *Mich.* 11 *Jac.* 1 *Brownl.* 121. *Hankinſon* verſus *Sandiland. Plow. Com.* 286. *S. P.*

2. The Words of the Obligation were, *obligamus nos & utrumque noſtrum*; it was objected, that the Bond was not *ſeveral*, becauſe *utrumque* refers to the three Perſons which were bound; but adjudged, that *utrumque noſtrum* makes it *ſeveral* as well as *quemlibet noſtrum. Trin.* 28 *H.* 8. *Dyer* 19. 310. or as well as *alter eorum. Dyer* 16. *Eliz. Cook's* Caſe. See 5 *Rep. Slingſby's* Caſe. See *Matthewſon's* Caſe. 5 *Rep.* 23. 2 *Cro.* 45. *Hargrave* verſus *Rogers. S. P.*

3. *Two were bound* in a Penal Bill, *one died*, and in an Action of Debt brought againſt the Survivor, he pleaded, that he ought not to be charged, for that the other had in his Life-time paid Part of the Money to the Plaintiff at *L.* and that at another Time he himſelf had paid the Reſidue, which the Plaintiff accepted in full Satisfaction, and had delivered up the Bill to him *in the Name of an Acquittance of the Debt*, by Vertue whereof the Bill had loſt its Force and Effect, and that afterwards the Plaintiff had forcibly retaken the Bill from him the ſaid Defendant, and ſo the ſaid Bill *Non eſt factum ſuum*, adjudged an ill Plea; becauſe the Redelivery of the Bill to the Defendant could not be an *Acquittance of the Debt*, and a Bill obligatory cannot be diſcharged, but by a Deed of as high a Nature. *Mich.* 33 *H.* 8. *Dyer* 51. *Cotterel's* Caſe.

4. Where the Obligation is *joint* and not *ſeveral*, there the Action muſt be brought againſt all thoſe who are bound; this is the ſecond Reſolution in * *Hickmott's* Caſe, where an Action of Debt was brought againſt one, who pleaded a Releaſe; which was, that the Plaintiff had acknowledged himſelf to be ſatisfied of all Bonds, *&c.* except one, in which the Defendant and two others ſtood bound to him; and in the Replication the Plaintiff averred, that the Bond excepted, and that on which the Action was brought, was the ſame, which could not be; becauſe, upon his

his own Confeſſion, the Bond excepted was a *joint Bond*, and he had brought his Action againſt one alone. 9 *Rep.* 53. *Hickmot's* Caſe.

5. But in ſome Caſes the Word *Uterque* ſhall be taken *collective*, as where the Condition of a Bond was to perform an Award between the Plaintiff of the one Part, and *B.* and *B.* of the other Part, ſo that the ſame be made and delivered *utrique partium, &c.* here 'tis not ſufficient, that the Award ſhould be delivered to one alone, becauſe both are ſubject to the Penalty; and therefore the Award muſt be delivered to both, ſo that the Word *Uterque* in this Place muſt be taken collectively. 5 *Rep.* 103. *Hungate's* Caſe. *Antea* Arbitrament. (N) 7. *S. C.*

6. Where two are jointly bound, and one of them is ſued, he cannot plead *Non eſt factum*, becauſe he hath actually ſealed the Bond; therefore, if one appeareth, and the other maketh Default, he who appeared ſhall be charged with the Whole. 5 *Rep.* 119. *Whelpdale's* Caſe.

7. Debt upon Bond againſt Husband and Wife as Heireſs to her Father; they pleaded *Non eſt factum* of the Father, upon which they were at Iſſue, and the Jury found that the Bond was made to the *Plaintiff and another*, whereas in Truth, the Plaintiff declared on a *Bond made to himſelf* only, without mentioning the other Obligee, and he, as Survivor, brought the Action; adjudged, that he ought to have declared ſpecially, as the Caſe was: Like 10 *Eliz.* * *Dyer* 279. where † *W. S.* was bound by the Name of *I. S.* and an Action being brought againſt him by the Name of *W. S.* he pleaded *Non eſt factum*; and the Special Matter being found by the Jury, it was adjudged againſt the Plaintiff, he ought to have ſued the Defendant by the Name by which he was bound, and then if he appear and plead *Non eſt factum*, he ſhall be concluded by the Bond. *Mich.* 31 *Eliz.* 1 *Leon.* 322. *Dennis* verſus *St. John.* See *Poſtea* (L) 2.

* Owen 48. S. C.
† Poſtea (L) 1.

8. If a Bond is made to *Three, to pay Money to one of the Three*, they muſt all *join in the Action*, for they are but as *one Obligee*; and if he to whom the Money is payable *dieth*, the other Two who ſurvive ought to ſue for the Money, tho' they have no Intereſt in it. *Yelv.* 177. *Rolls* verſus *Yates.*

9. One entered into a Bond to *Cullom Betts* and *another*, and in an Action of Debt brought on this Bond, the Defendant pleaded, that *Betts*, one of the Obligees, had forfeited to the Queen 600 *l.* for not coming to Church, and ſet forth the Statute 28 *Eliz. cap.* 8. by which the *Queen* may ſeiſe, take, and enjoy *all his Goods*, and two Parts of his Land; and the 600 *l.* not being paid, the Queen had aſſigned this Bond to another; and upon a Demurrer to this Plea, the better Opinion was, that the Queen cannot aſſign this Bond before Seiſure, but that the joint Bond is forfeited. 1 *Roll. Rep.* 7. *Cullom & al'* verſus *Sherman.*

10. Debt upon Bond, the Caſe was, *Banks, and Two more, were jointly and ſeverally bound* in a Bond, and one joint Original, but ſeveral *Præcipes* was brought againſt all Three of the Obligors, and ſeveral Declarations againſt them, and ſeveral Judgments were entered, omitting the Words *Unica tantum fiat executio*; and upon a Writ of Error brought, this was aſſigned for Error, but the Judgments were affirmed, becauſe theſe Words are only Matter of Form and Direction to the Clerks, for the Plaintiff may ſtill have ſeveral *Capias's*, and if he is ſatisfied by one, the other may have an *Audita querela.* 1 *Roll. Rep.* 44. *Banks* verſus *Chamberlaine.*

11. If a Man Promiſes to be bound in a Bond with *T. S.* and *I. H.* to *M. G.* payable at ſuch a Time, as two Strangers ſhall appoint, who appoint, that the Bond ſhall be joint *and ſeveral*, the Party is not bound to ſeal it; becauſe, by the Promiſe, a *joint Bond* was only intended. 1 *Roll. Rep.* 71. *Malcot* verſus *Dean.*

2 Bulſt. 287. S. C.

12. *Two were* bound with *B. B.* as his Sureties, one of them was ſued, and he exhibited his Bill in the Court of Requeſts againſt the other for *Contribution*, but a Prohibition was granted; becauſe, by giving the Bond, it became the Debt of any of them, and the Obligee had his Election to ſue which of them he would. *Godb.* 243. *Wormleighton* verſus *Hunter.*

13. Debt upon Bond, the Defendant pleaded, that the now Plaintiff had brought an Action of Debt upon the ſame Bond, in the King's Court at *B.* againſt *W. R.* who was *jointly and ſeverally* bound in that Bond with the Defendant, and had Judgment and Execution againſt him, and that the Gaoler voluntarily ſuffered him to eſcape; upon Demurrer to this Plea, adjudged, that it was ill, both as to the Form and Matter, becauſe the Defendant did not ſhew, that the Court of *B.* being a private Court, had Power to hold Plea, and that it was ill in Subſtance; for tho' the Gaoler ſuffered him to *Eſcape*, yet that is not a Diſcharge of the Debt, therefore the Action is well brought againſt the Defendant, who was bound with him that made the Eſcape. *Hill.* 16 *Jac.* 2 *Cro.* 531. *Pendarvis* verſus *Kenſham.* See *Blomfeild's* Caſe.

14. *Three were bound jointly* in a Bond, one of them *died*, and an Action of Debt was brought againſt his Executor, without taking Notice, that the other Two were living; and upon a Demurrer to the Declaration, the Queſtion was, whether the Defendant ought to have pleaded, that the other Two were living, but 'tis clear, that if he had been Plaintiff, he muſt have ſet forth in his Declaration, that one was dead, to entitle himſelf to the Action againſt the Survivors. *Sid.* 238, and 272. *Osborne* verſus *Croſland.*

15. Three were bound in a Bond by theſe Words, *obligamus nos &* * *quemlibet noſtrum conjunctim*; and in an Action of Debt brought againſt one alone, it was adjudged, that it would not lie, for the Word *Conjunctim* made it a joint Bond, and the Word *Quemlibet* will not make it ſeveral, for that only ſhews the Intent of the Parties, that every one of them ſhould be bound. *Paſch.* 30 *Eliz. Moor* 260.

* Antea 1, 2, 14.

16. Three acknowledged a *Statute* before the *Mayor of Lincoln*, of which there ought to be two Parts, one to remain with the *Mayor*, and the other with the Clerk, at the Statute-Office;

Moor 405. Gouldsb. *Aſcue*, 190.

Aſcue, who was one of the Cogniſees, ſealed only one Part, ſo the Mayor had none, for which Reaſon it was void as a Statute; but then the Queſtion was, whether it was not good as a *Bond*; and this was in an Action brought againſt *Aſcue* alone, who pleaded, that he and two other Perſons were jointly bound, and averred, that *they were living, and not named, &c.* and upon Demurrer, *Juſtice Croke* tells us, that the Plaintiff had Judgment, becauſe this Recognizance had never any Effect as a Recognizance, therefore it muſt be a Bond; but this Judgment was reverſed in *B. R.* becauſe this could not be a Bond, for there was no Proof that it was delivered as ſuch; beſides, *Three were jointly bound*, and the Action of Debt was brought againſt *one alone*, ſo that upon the Plaintiff's Own Shewing, the Writ muſt abate. *Cro. Eliz.* 319. * *Aſcue* verſus *Hollingworth.* 544.

* Recognizance. (A) 1.

1 Lev. 17. 17. The Caſe upon the Pleadings was, there were *Two joint Obligees*, one of them became a *Bankrupt*, and the Commiſſioners aſſigned the Debt to the other, to the Uſe of the Creditors; and the Queſtion was, whether this was a good Aſſignment; it was inſiſted for the Plaintiff, that it was, becauſe this cannot be properly a Debt due to both, for an Intereſt cannot be joint and ſeveral; and ſo is *Slingsby*'s Caſe, therefore they are both entituled, *per my & per tout*, and one of them being a Bankrupt, the Commiſſioners muſt aſſign the *whole Debt*; becauſe, by the Statute 1 *Jac.* the Aſſignee is to have the ſame Action as the Bankrupt, and he may have Action in his own Name alone; whereas, if the Bond had been aſſigned to a Stranger, it muſt be brought in the Name of both, which could not be after the Aſſignment made by the Commiſſioners. *Raym.* 6. *Boylſtone* verſus *Radcliffe.*

1 Saund. 291. 18. But as to this Matter, it hath been ſince adjudged, that where *Two, or more, are bound*, and the Action is brought againſt *one alone*, and he craves *Oyer* of the Bond, and then *demurs to the Declaration*, Judgment ſhall be given againſt him; for tho' it appears that Two are named in the Bond, yet upon *craving Oyer*, it doth not appear that it was *ſealed and delivered* by them; ſo that if they will take any Advantage, where more are bound with him, and the Action is brought againſt him alone, he muſt not * demur to the Declaration, but plead in Abatement, that Two more *ſealed* the Bond, and aver, that they are living, and ſo pray Judgment *de Billa. Sid.* 420.

* Poſtea 18.

* Antea 14. 19. *Two were jointly bound* in a Bond, and in an Action of Debt brought againſt *one of them*, he demurred to the Declaration, but the Plaintiff had Judgment, becauſe the Defendant cannot * demur in ſuch Caſe, for there muſt be an Averment, that the other Obligor is living, and that he ſealed and delivered the Bond; ſo if one is bound to Two, there one of the Obligees cannot maintain the Action, unleſs he avers, that the other is dead. 1 *Vent.* 34. *Cabell* verſus *Vaughan*, and 135. *Putt* verſus *Noſworthy. S. P.* 1 *Saund.* 291. *S. P.*

20. One was bound to Two, and both of them brought an Action of Debt upon the Bond; the Defendant pleaded the *Releaſe* of one of them, of all Actions, *&c.* which *he* had, *&c.* againſt the Defendant *upon his own Accompt*; and this appearing to be ſo upon *Oyer* of the Releaſe, the Plaintiffs replied, that this Bond was not taken *upon his own Accompt*, upon which they were at Iſſue, and a Verdict for the Plaintiffs; it was moved in Arreſt of Judgment, that this was an immaterial Iſſue, and that the Releaſe of one Obligee diſcharged the Bond; but adjudged, that the Obligee who gave the Releaſe might take the Bond as a Security for a Debt with which he was entruſted for another. 1 *Vent.* 35. *Nokes*'s Caſe. 1 *Lev.* 100, 272. *S. C.*

21. Debt upon Bond, for Performance of an Award, which was, to pay Money to Two, and one of them brought the Action; adjudged, that where an Obligor is bound to pay Money to two Obligees, that the Payment to one of them is good, becauſe a Man cannot pay the ſame Sum to ſeveral Perſons at the ſame Time. 2 *Sid.* 41. *Abbot* verſus *Biſhop.*

22. Debt upon a Penal Bill, by which the Defendant promiſed, that as ſoon as a Grant was made to him of ſuch an Office, he would execute a Bond to *Katherine*, for the Payment of an Annuity of 50 *l. per Annum* to her, during the joint Lives of her and the ſaid Defendant; and *Katherine* being now married to the Plaintiff, the Action was brought by him and his Wife, ſetting forth this Matter, and that a new Grant was made to the Defendant, of the Office, *&c.* but that he had not ſealed a Bond to the Wife *dum ſola*, nor to the Husband and Wife *jointly after the Marriage, &c.* upon Demurrer to this Declaration the Defendant had Judgment; for tho' he had not ſealed the Bond to the Wife whilſt ſole, nor to the Husband and Wife *jointly after the Marriage*, yet he might execute it *to her alone after the Marriage*, and therefore the Plaintiff ſhould have alledged, that he did not ſeal and deliver a Bond *to her alone after the Marriage.* 1 *Lutw.* 413. *Tonſtall & Ux'* verſus *Williamſon.*

23. Debt upon Bond, the Defendant craved *Oyer*, and it appeared to be thus: *Noverint, &c. Nos, W. R. L. R.* and *H. S. Teneri, &c. W. W.* in *Centum libris, &c. Ad quam quidem ſolutionem Obligo Me, Hæredes, &c.* and then pleaded in Abatement, that two other Perſons were jointly bound with him, and not named, but did not aver, that they were *both living*; and upon Demurrer it was inſiſted for the Plaintiff, that this Bond was ſeveral as well as joint, and ſo the Action is well brought againſt one alone; for by thoſe Words *Obligo me*, every one muſt be intended, who was bound; and this is the more reaſonable, becauſe it doth not appear that the other Two are living; but the better Opinion was, that the Bond was joint, for 'tis ſo in the Beginning, (*viz.*) *Noverint, &c. Nos teneri*, and 'tis ſo at the End, (*viz.*) *Ad quam quidem ſolutionem Obligo me, Hæredes, &c.* now, if the Word *Hæredes* ſhould not be taken diſtributively, then the Heirs of one of them are only bound, but certainly it was the Intention, that the Heirs of all of them ſhould be bound, therefore the Bond is joint. 1 *Lutw.* 695. *Sayer* verſus *Chator.*

(I)

Of Bonds made void or not by Raſure, Interlineation, &c. and Miſpelling and Miſcaſting. See *Deeds*. (C) per Totum.

1. THE Obligee was Sheriff of *Oxon*, and a Bond was made to him thus: *ſſ. Noverint &c. me teneri B. W. Armigero in ſexaginta libris*, and after the Bond was executed, the Words *Vicecomiti Oxon* were interlined between *Armigero* and *ſexaginta*, without the Privity of *B. W.* adjudged, that the Interlineation being in a Place not material, the Bond is good, and reſolved, that when a Deed is made void by *Raſure*, the Obligor may plead *Non eſt factum*, and give the Special Matter in Evidence, that at the Time of the Plea pleaded, it was not his Deed. (2.) That when a Deed is altered in a Place material, 'tis void; but if a Stranger, without the Privity of the Parties, alter the Deed by Raſure, Interlineation, *&c.* in a Place not material, it ſhall not make it void. 11 *Rep. Pigott's* Caſe. *Moor* 835. *S. C. pl.* 1125. *there.* Moor 835. 1 Roll. Rep. 39.

2. Adjudged, that if a Bond or Deed is *raſed* in the *Date* after the Delivery of it, the ſame makes the whole Bond void. *Hill.* 39 *Eliz.* 5 *Rep. In Matthewſon's* Caſe.

3. One *Markham* entered into a Recogniſance with Sir *Fra. Willoughby*, and for the Debt of *Sir Francis*, and he together with one *Fox*, entered into a Bond to *Markam* to ſave him harmleſs; in the Condition of which Bond the Recogniſance was recited, but the *Chriſtian Name*, and *the Place of Abode* of *Tracy* the Cogniſee was left out, which was afterwards interlined and filled up by one *Gomaſton*; after the Bond was ſealed, *Markham* brought an Action of Debt againſt *Fox* upon this Bond, and upon *Non eſt factum* pleaded, this Matter being proved at the Trial, *Markham* was nonſuited; afterwards he brought another Action of Debt againſt *Fox* upon this Bond, who pleaded, as before, this Special Matter, and concluded *& ſic non eſt factum*; the Plaintiff replied, that the Blanks were filled up by the *Conſent of Sir Francis and Fox*, and upon a Demurrer to this Replication, the Plaintiff had Judgment. *Moor* 547. *Markham* verſus *Gomaſton*. *See* Ac. Caſe. (H) 9. *S. C.*

4. The Bond was thus, *ſſ.* I do owe to *Oliver* 26 *l.* to be paid ſuch a Sum at *Michaelmas*, and ſuch a Sum at *Lady-day*, when in Truth both thoſe Sums did not amount to 26 *l.* in an Action of Debt brought upon this Bond, it was objected, that this was not a good Bond for 26 *l.* for the Reaſon before-mentioned. *Sed per Curiam*, this being a good Bond for 26 *l.* by the precedent Words, the Miſcaſting the particular Sums afterwards ſhall not make it void. 2 *Roll. Rep.* 104. *Olliver's* Caſe.

5. Debt upon Bond, the Defendant pleaded, that at the Time he executed it, there was a Space left, wherein the Name of *T. S.* was afterwards inſerted, who then likewiſe executed it; adjudged, that the adding another Obligor was not a material Alteration to avoid the Bond, and that it was ſtill the ſame as to the Defendant. 1 *Vent.* 185. *Zouch* verſus *Clay*. 2 Lev. 35.

6. Debt upon a Bill Penal, whereby the Defendant promiſed to pay the Plaintiff 20 *l.* after he married the Widow *Sarmin*; The Defendant craved *Oyer* of the Bill, which was, *if he pay within two Months*, &c. *after he marry the Widow Sarmine*, and then demurred for the Variance between *Sarmin* and *Sarmine*; but the Plaintiff had Judgment, for miſpelling will not vitiate a Bond, where the Intent ſo plainly appears, 3 *Lev.* 66. *Cull & Ux'* verſus *Sarmin*.

7. The Obligee having made a material Raſure in a Bond, brought an Action of Debt; the Defendant craved *Oyer*, and the Bond being in Court, and the Raſure diſcovered, he pleaded *Non eſt factum*, and Notice being given of Trial, the Plaintiff underſtanding that this Matter was diſcovered, countermanded the Notice; then the Defendant moved upon *Affidavits* of the Fact, that the Bond might remain in the Hands of the Officer of the Court till the Plaintiff ſhould try this Cauſe, for otherwiſe the Obligee might ſtay till the Defendant's Witneſſes were dead, and then put this forged Bond in Suit again; but the Defendant was directed to bring on the Cauſe by Proviſo; and that if the Plaintiff would ſuffer himſelf to be nonſuited, then the Suit would be at an End, and then the Plaintiff might take his Bond out of Court, but that Nonſuit would be good Evidence againſt him in another Action to be brought on the Bond; or the Defendant might get his Witneſſes Teſtimony perpetuated in Chancery; but his Counſel choſe to bring an Action againſt the now Plaintiff, for ſuing him (the Defendant) upon a forged Deed, and that a Verdict in ſuch Action would be Evidence for him in any other between the ſame Parties. *Mod. Caſes* 233. *Selby* verſus *Green*.

(K)

Of Bonds, with Conditions to pay Foreign Money. See (F) 12.

1. DEBT upon Bond in which the Plaintiff declared for 47 *l.* 8 *s.* 8 *d. moneta Flandriæ attingen' ad valentiam* 42 *l.* 6 *s.* 2 *d. of Engliſh Money*, and becauſe the Value of the *Flemiſh Money* was not aſcertained by the Verdict, or by any Writ of Enquiry, the Judgment for the Plaintiff was reverſed. *Mich.* 39 *Eliz. Cro. Eliz.* 536. *Bagſhaw* verſus *Playnes*. Moor 704. Latch 5.

2. Debt

2. Debt upon a Bill, bearing Date in the Pariſh of *St. Mary le Bow, London*, which upon *Oyer* appeared to be dated at *Hamborough*, and the Plaintiff declared in the *Detinet* only, for ſix Pounds *Hamborough* Money; it was objected againſt this Declaration, that the Action ought to be brought in *Debet* and *Detinet*; but adjudged 'tis well brought in the *Detinet*, becauſe 'tis not for a certain Sum, but for ſix Pounds *Hamborough* Money, which in our Coin is 40 *s. Value*, and no more, and well known amongſt us to be of that Value. *Latch* 4. *Ward*'s Caſe. *Antea* (F) 12. *S. C.*

Antea (F) 12.

3. Debt upon Bond, in which the Plaintiff declared for ſo much *Engliſh* Money, when the Bond was to pay *Flemiſh Money*; and this being an Exception to the Declaration, yet it was ruled well. *Moor* 775. *Raſtall* verſus *Draper.*

4. Adjudged, That Lands in the Plantations, tho' they are Inheritance, yet being in a Foreign Country, ſhall be taken as teſtamentary Things, or perſonal Aſſets or Chattels in Reſpect to Creditors. 1 *Lutw.* 623. *Bringley* verſus *Burgh.*

Antea (H) 14.

5. Covenant to pay Money within a Year after one *Nokes* ſhould be admitted to the Office of Secretary to the Governor of *Barbadoes*; the Defendant pleads, that this Office concerned the Adminiſtration of Juſtice, and that this Covenant was made upon a corrupt Agreement, and therefore void; the Plaintiff replies, that *Barbadoes* is *extra quatuor Maria*, out of the Allegiance of the Kings of *England* till *Car.* 1. and was governed by Laws made by that King, and not by the Laws of *England*; the Defendant rejoins, that *Barbadoes* was governed by the Laws of *England*, ſo that the Statute of Buying Offices extends to it. *Adjournatur.* 2 *Mod.* 45. *Daws* verſus *Pindar.*

(L)

Of Bonds, where the Obligee and Obligor are wrong named.

1. THE Town of *Lynn* was incorporated by the Name of Mayor and Burgeſſes *Burgi Domini Regis, &c.* and that they ſhould be called by that Name and no other; afterwards a Bond was made to them by the Name of Mayor and Burgeſſes of *Lynn*, leaving out *Burgi Domini Regis*, and yet adjudged, that the Bond was good; for 'tis not neceſſary, that the Names of Corporations ſhould be the ſame *verbis & ſyllabis*, 'tis ſufficient, if they are the ſame *Re & ſenſu*; beſides, if in pleading, or if a Jury find, or it ſhall appear to the Court, that the true Name of the Corporation, and that in the Bond is the ſame in effect, that will be ſufficient, tho' there is ſome Variance in the Words. *Mich.* 10 *Jac.* 10 *Rep. Mayor and Burgeſſes of Lynn*'s Caſe.

2. *W. R.* was bound in a Bond by the Name of *R. R.* and in an Action of Debt brought on this Bond, the Plaintiff declared againſt him by the Name of *W. R. alias dict' R. R. &c.* the Defendant pleaded *Non eſt factum*, upon which they were at Iſſue, and the Plaintiff had a Verdict, but could not have Judgment, becauſe he ſhould have declared againſt him as *R. R.* named in the Bond, *nuper dictus W. R.* and then if he had appeared and pleaded *Non eſt factum*, he ſhould be concluded by the Bond. *Mich.* 11 *Eliz. Dyer* 280. *Shotbolt*'s Caſe. *Antea H.* 7. *Owen* 48. *S. C.*

3. Debt upon a Bond againſt *Edmund Sheppard*; upon *Oyer* of the Bond it appeared that *Edward* was bound, and that he ſubſcribed his Name by the Name of *Edmund*, which was his true Name; upon *Non eſt factum* pleaded, the Jury found it to be the Deed of *Edmund*; but adjudged, that tho' the Bond was ſubſcribed *Edmund*, yet that was no Part of the Obligation, ſo that the Plaintiff cannot have Judgment, and the Jury finding it to be the Deed of *Edmund*, will not help. *Trin.* 20 *Jac.* 2 *Cro.* 558, 640. *Mayby* verſus *Sheppard. Dyer* 279. *S. P.* 2 *Brownl.* 48. *Sir Edward Aſhfield*'s Caſe. *S. P.* 1 *Mod.* 107. *S. P.*

4. Debt was brought by the Adminiſtrator of *Eleanor Doncaſtle* upon a Bond made to the Inteſtate; the Defendant pleaded, that *Eleanor* in her Life-time by the Name of *Ellen*, gave him a Releaſe of all Demands; the Plaintiff replied, *Non eſt factum Elianoræ*, upon which they were at Iſſue, and the Jury found *Non eſt factum*; it was moved in Arreſt of Judgment, that it was Matter of Law, whether the Deed executed by the Name of *Ellen* was the Deed of *Eleanor*, tho' in Truth it was actually ſealed by *Eleanor*, which ought not to be put in Iſſue, and therefore the Iſſue was misjoined, but adjudged, that a Perſon cannot make a Writing by a wrong *Chriſtian Name*, and that in the Principal Caſe, *Non eſt factum* was a proper Iſſue, and that the Jury had found according to Law. *Moor* 879, *Panton* verſus *Chowles.*

5. *James Winlow* was bound by the Name of *John*, and the Condition of the Bond was, that *James* ſhould pay the Money, and an Action of Debt was brought upon this Bond, wherein the Plaintiff declared againſt *James*, for that he *per nomen Johannis* became bound; and upon Demurrer to the Declaration, the Defendant had Judgment, becauſe *James* could not be *John. Cro. Eliz.* 897.

6. Debt on a Bond, and upon a Special Verdict found, the Caſe was, *Sir Robert Clerke* became bound by the Name of *John Clerke*, but the Condition of the Bond was, that *Robert Clerke* ſhould pay the Money, and the Action was brought againſt *Sir Robert*, in which the Plaintiff declared, that he *per nomen of John Clerke* became bound; and upon *Non eſt*

factum pleaded, the Jury found all this Matter; but that at the Time when the Bond was ſealed, the true Name of the Defendant was *Robert Clerke*, and upon arguing this Special Verdict the Plaintiff had Judgment; but it was reverſed upon a Writ of Error in the Exchequer-Chamber, upon the Authorities beforementioned. 1 *Lutw.* 894. *Clarke* verſus *Iſted.*

(M)

Pleas to Debt on Bond, good. See (N) 23.

1. DEBT upon Bond conditioned that the Obligor ſhould ſurrender certain Copyholds to the Obligee, and ſhould afterwards ſuffer him and his Heirs quietly to enjoy the ſame without any Interruption; the Defendant pleaded Performance, and that the Plaintiff continued peaceably in Poſſeſſion, *&c.* according to the Condition; but that afterwards the Rent being arrear, the Lord of the Manor entered for a Forfeiture according to the Cuſtom; adjudged a good Plea, becauſe the Forfeiture incurred by the Negligence of the Plaintiff himſelf. *Hill.* 28 *H.* 8. *Dyer* 30.

2. Debt on a Bond conditioned for Payment of 200 *l.* the Defendant pleaded, that after he entered into the ſaid Bond, the Plaintiff *covenanted* in a certain Indenture, that if the Defendant ſhould at ſuch a Day pay the 200 *l.* the Bond ſhould be void, and alledged, that he had paid the Money accordingly; and upon Demurrer to this Plea it was objected, that the *Covenant could not be pleaded in Bar to the Bond*, but that the Defendant ought to bring an Action of Covenant and aſſign the Breach, *&c.* but adjudged, that the Plea was good, and ſo that it was allowed to avoid Circuity of Action. *Cro. Eliz.* 623. *Hodges* verſus *Smith.*

3. In Debt againſt an Executor, who pleaded, that his Teſtator was indebted to another upon a Statute in ſuch a Sum, beyond which he had no *Aſſets*; the Plaintiff replied, that the Statute was acknowledged *by Fraud*, and this Replication was held good, without ſhewing the Special Matter. 1 *Brownl.* 41. *Brokesby* verſus *Treſham.*

4. Debt upon Bond, the Defendant pleaded Payment according to the Condition, upon which they were at Iſſue, and at the Trial he proved, that he paid the Money before the Day of Payment mentioned in the Condition, and that the Plaintiff had accepted it; adjudged, that Payment before the Day was a ſufficient Diſcharge of the Bond, if it had been pleaded Specially; but it would not prove this Iſſue. *Mich.* 24 *Eliz. Godb.* 10. 2 *Cro. Holmes* verſus *Brockett. S. P.* Antea (F) 7.

5. Debt on Bond, conditioned, for the Defendant and *T.* and their *Aſſigns*, to perform all Covenants, Conditions, *Articles* and Agreements in an Indenture; the Defendant pleaded, that he and *T.* had performed all *Covenants, Conditions and Agreements*; and upon Demurrer it was objected, that the Plea was ill, becauſe he had pleaded, that he and *T.* had performed, *&c.* and did not ſay their *Aſſignes* had performed, *&c.* beſides the Defendant pleaded Performance of all *Conditions, Covenants and Agreements*, and did not ſay *all Articles*; but adjudged a good Plea, for it doth not appear that there was any *Aſſignee*, and it ſhall not be intended there was one, but it muſt be ſhewn Specially; and as to the other Exception, the Word *Agreements* is the ſame with *Articles*, and where ſeveral Words ſignify the ſame Thing, if he anſwers to them in Subſtance, 'tis ſufficient. *Cro. Eliz.* 255. *Elmott* verſus *Cole.*

6. Debt on a Bond conditioned to pay 70 *l. viz.* 35. at one Day, and 35 *l.* at another Day; the Defendant pleaded Payment of the 70 *l.* at ſuch a Place and Day, * *ſecundum formam & effectum Conditionis*; adjudged in Error, that the Plea was good, and that he need not plead the ſeveral Payments on the ſeveral Days; for having pleaded Payment *ſecundum formam Conditionis*, 'tis as well *reddendo ſingula ſingulis*, as if he had pleaded ſeveral Payments. *Cro. Eliz.* 281. *Fox* verſus *Lea.*

7. Debt upon Bond againſt the Defendant, as Heir to the Obligor, who pleaded, that the Obligor died Inteſtate, and that *W. R. adminiſtred*, and had given the Plaintiff * *another Bond* in full Satisfaction of the former, *&c.* upon which they were at Iſſue, and the Defendant had a Verdict; it was objected, that *one* * *Bond cannot be given in Satisfaction of another*; which is very true, if the *ſecond Bond* had been given *by the Obligor himſelf*, but here 'tis given by his *Adminiſtrator*, which hath made the Plaintiff's Security better, becauſe the Adminiſtrator is now chargeable *de Bonis propriis*, otherwiſe the Adminiſtrator and Heir would both be anſwerable; the Defendant had Judgment. 1 *Mod.* 221, 225. *Blithe* verſus *Hill.*

2 Mod. 136. *Dyer 29. * Hob. 68, 69. Cro. Eliz. 623, 697, 716.

8. Debt upon Bond conditioned, that the Obligor ſhall pay *from Time to Time the Moiety of all ſuch Money, as he ſhall receive, &c.* the Defendant pleaded, that he *paid a Moiety*; and upon a Demurrer, this was adjudged a good Plea, without ſhewing the Payment of particular Sums, and if the Plaintiff would take any Advantage, he ought to reply, that the Defendant had received ſuch a Sum, and had not paid the Moiety. *Sid.* 334. *Church* verſus *Brownwick.*

(N)

Pleas to Debt on Bond, not good. See *Antea* (H) 6. *Debt.* (F) per Totum.

1. THE Condition of a Bond was, that whereas the Obligee was poſſeſſed of an Eſtate for Life, *&c.* by a Leaſe made of *W. R.* if the Obligor and his Heirs do at all Times *ratify and confirm* the ſaid Leaſe, and ſuffer the Obligee to enjoy the Premiſſes, *&c.* that then, *&c.* in an Action of Debt brought on this Bond, the Defendant pleaded, that at all Times after the making the Bond he hath *ratified and confirmed* the ſaid Leaſe, *&c.* and upon Demurrer this was adjudged an ill Plea; for he ought to have pleaded the *Confirmation by a Deed in Writing. Trin. 6 Eliz. Dyer* 229.

2. Debt upon a Bill Penal, the Defendant pleaded, that he paid the Money, but did not ſet forth any *Acquittance*; adjudged, that Payment without Acquittance is an ill Plea to an Action of Debt upon a ſingle Bill; but 'tis otherwiſe upon a Bond with a *Condition.* 28 *H.* 8. *Dyer* 25.

3. Debt on a Bond brought by an *Executor*, in which he declared on an Obligation made 12 *January*; the Defendant pleaded, that on the *firſt Day of May*, he cauſed a Deed to be written, which he delivered as his Deed to *W. R.* to be delivered to the Teſtator, who offered it to him, but the Teſtator refuſed to accept it, and ſo *Non eſt factum*; and upon a Demurrer to this Plea, the Plaintiff had Judgment, for it cannot be the ſame Bond upon which the Action was brought, neither did the Refuſal to accept it make it to be *no Deed*, becauſe at another Time he might accept it; therefore the Defendant ought to have pleaded the Special Matter in Bar to the Action. *Trin.* 1 *Eliz. Dyer Towe's* Caſe.

4. Debt upon Bond, for Performance of Covenants brought by the High Sheriff againſt the Under-Sheriff; one Covenant was, that the Under-Sheriff ſhall keep all Priſoners committed to his Charge, ſafe, until they be delivered by Law; and alſo, ſhall ſave the Plaintiff harmleſs of and from all Eſcapes; the Defendant pleaded Performance of all Covenants; and upon Demurrer to this Plea, it was adjudged ill, becauſe, tho' theſe Covenants were in the *Affirmative*, there were ſome in the ſame Deed in the *Negative*; therefore he ought to have pleaded *Non damnificatus. Mich.* 40 *Eliz. Goldsb.* 157. *Peyton'* Caſe.

5. Debt upon Bond, conditioned to pay 10 *l.* on ſuch a Day, the Defendant pleaded, that before that Day, he at the Inſtance of the Plaintiff, paid him 5 *l.* which he *accepted in full Satisfaction*; adjudged, that Payment of a *Leſs Sum before the Day* mentioned in the Condition, cannot be a Satisfaction of the *Greater Sum*; but the Gift of an Horſe or other Thing may be a Satisfaction; but *Payment and Acceptance* of a *Leſſer Sum* before the Day, is a good Satisfaction for a *Greater Sum*; but then he muſt not plead generally, that the Plaintiff *accepted it* in Satisfaction, but he muſt likewiſe plead, that he *paid it* in full Satisfaction; for the Manner of Payment is to be made by him who pays the Money, and not by him who accepts it. 5 *Rep.* 117. *Pinnell's* Caſe. *Dyer* 150. *S. C.*

6. Debt on a Bond conditioned, that if the Defendant ſerved the Cure at *B.* and if he ſhould make a Leaſe of the Parſonage to the Plaintiff, and did no Act by which ſuch Leaſe may be avoided, that then, *&c.* the Defendant pleaded, that the Rectory of *B.* was a Benefice with Cure, and recites the Statute 13 *Eliz.* that a Leaſe of ſuch a Benefice ſhall continue no longer than the Parſon ſhall be *Reſident* upon it, without abſenting more than *eighty Days in a Year*, and recited the Statute 14 *Eliz.* that all Bonds made to permit any one to enjoy ſuch Leaſes, ſhall be of the ſame Effect as the Leaſe it ſelf; then he alledged, that the Bond was made for the Enjoyment of the Leaſe, but did not alledge that the Plaintiff was Abſent, for otherwiſe neither the Bond or Leaſe are void. *Cro Eliz.* 490. *Lincoln Earl* verſus *Hoskins.*

7. Debt on a Bond conditioned to *ſave the Plaintiff harmleſs* of and from an Obligation in which the Plaintiff, as Surety with the Defendant, ſtood bound to *B. B.* the Defendant pleaded in Bar, that the Obligation made to *B. B.* by him and the Plaintiff, was upon a Corrupt and Uſurious Bargain, and pleaded, the Statute of Uſury, and ſo *Non damnificatus*; and upon Demurrer adjudged, that the Plea was ill; becauſe the Condition being to ſave harmleſs, the Defendant ought to have pleaded generally *non damnificatus*, and not to have pleaded the Statute of Uſury, *Et ſic non damnificatus. Goldſ.* 174. *Robinſon* verſus *May. Mich.* 40 *Eliz. Cro. Eliz.* 588. *S. C.* and 643. *Batton* verſus *Downham. S. P.*

8. Debt on a Bond, the Defendant pleaded, that in Regard the Plaintiff's Cattle had done ſome Treſpaſs on the Defendant's Lands, the Plaintiff gave him a longer Day of Payment of the Money, than limited on the Bond, which Day was not yet come; adjudged no good Plea, becauſe a Parol Agreement cannot diſpenſe with a Bond. *Cro. Eliz.* 697. *Hayford* verſus *Andrews.*

9. Debt on a Bond for 8 *l.* the Defendant pleaded, that after the Sealing and Delivery of that Bond, he entered into another of the Penalty of 14 l. for the Payment of 7 *l.* on a certain Day, which the Plaintiff accepted in Diſcharge of the Bond for 8 *l.* adjudged no good Plea. *Cro. Eliz.* 716. *Manwood* verſus *Crick.* See *Preſton* verſus *Peirton. Poſtea* Judgment. (D) 5. *S. P.*

10. Debt on a Bond, the Condition was, that whereas *B. B.* had commenced ſeveral Suits in the King's Bench againſt *W. H.* if the ſaid *B. B.* ſhall appear by his Attorney to anſwer the ſame without Delay, that then, *&c.* the Defendant pleaded, that on ſuch a Day *W. H.* did appear, but that there was not any Action then depending; adjudged no good Plea, becauſe 'tis recited in the Condition of the Bond, that there were Suits then depending, which eſtops him to ſay they were not. *Cro. Eliz.* 756. *Willoughby* verſus *Brooks.*

11. In Debt on a Bond, the Plaintiff declared, that it was made *Nov.* 15. *Anno* 25 *Eliz.* and upon *Non eſt factum* pleaded, the Jury found, that it was dated as in the Declaration, but not ſealed or delivered till 28 *Nov.* 26 *Eliz.* ſo not the Bond on which the Plaintiff had declared; but adjudged for the Plaintiff, for the Iſſue being generally *Non eſt factum*, it appears to be his Deed by this Verdict, but by ſpecial Pleading he might have helped himſelf. 2 *Cro.* 136. *Platt* verſus *Pleydall.*

12. Debt on a Bond, conditioned to ſave the Plaintiff harmleſs, of, and from an Obligation, in which the Plaintiff, at the Requeſt of the Defendant, ſtood bound with him for the Payment of 11 *l. on the fifteenth Day of May*, long before the Date of the Obligation; the Defendant pleaded Payment of the 11 *l. ſecundum formam & effectum Conditionis*; upon Demurrer adjudged no good Plea, and that he ought to have pleaded * *Non damnificatus. Goldſ.* 158. *Allen* verſus *Abraham. March* 121. *S. P.* See *pl.* 12, 20. *Antea 7. Poſtea 13, 19.

13. Debt on a Bond, conditioned to acquit, diſcharge, and ſave the Plaintiff harmleſs from all Bargains, Incumbrances, Statutes, and Charges, *&c.* The Defendant pleaded, that he ſaved the Plaintiff harmleſs, as in the Condition; adjudged an ill Plea, becauſe he did not ſhew how he diſcharged him, for he ought to ſhew that in particular. 2 *Cro.* 165. *Allington* verſus *Yearkner. March* 121. *S. P.*

14. Debt on a Bond, the Defendant pleaded, that the Plaintiff brought a former Action againſt him in *London*, upon the ſame Bond; and upon *Non eſt factum* pleaded, the Jury found, that it was not his Deed; and in *London* the Entry on this Verdict was, that the Defendant ſhould recover Damages againſt the Plaintiff, and that he ſhould go *ſine die*, but there was no Entry, that the Plaintiff *ſhould take nothing by his Writ*, therefore there was no Judgment to bar him in another Suit, therefore this was only a Trial and no Judgment, and ſo the Plea was ill. 1 *Brownl.* 81. *Lovell* verſus *Hall.* 2 Cro. 284. 2 Mod. 294. *cited.*

15. Debt on Bond, the Condition was, to pay Children's Portions when they are married, or came to full Age; the Defendant pleaded he paid the ſame, *when, and as ſoon* as they came to their full Age, generally without ſhewing how; adjudged, if there had been a *Day certain* ſet down in the Condition to pay the Money, then to plead Payment * *ſecundum formam & effectum Conditionis*, had been good, but in this Condition the *Time was incertain*, therefore he ought to have ſet forth in his Plea, the Time when the Children came of Age, and when, and where he paid the Money, that Iſſue might be taken upon it. 2 *Bulſt.* 266. *Halſey* verſus *Carpenter.* See *pl.* 12, 22. 2 Cro. 359. * Poſtea 22.

16. Debt upon Bond conditioned, that the Obligee ſhould, on the 18*th Day of Auguſt*, 4 *Jac.* go from *Aldgate in London*, to the Pariſh Church of *Stow-Market in Suffolk*, within twenty-four Hours; and the Plaintiff ſhewed, that he went from *Aldgate* to that Place within the Time; and becauſe he did not ſet forth *in what Ward Aldgate* was, it was adjudged, that the Declaration was not good. *Mich.* 7 *Jac. Godb.* 160. *Croſſe* verſus *Caſon.*

17. Debt upon Bond, the Defendant pleaded, that a Schedule was annexed to the Bond, concerning ſeveral Covenants, which Schedule was now torn off *& ſic non eſt factum*; and upon a Demurrer to this Plea, it was adjudged ill concluded, for he ſhould have concluded with the Special Matter, and in Bar to the Action; for having confeſſed that it was his Deed, he ſhall never afterwards ſay, *Non eſt factum. Moor* 43.

18. Adjudged, that where a Deed of a *Stranger* was ſet forth, and the Defendant pleaded *Non eſt factum*; and upon a Motion made for a new Iſſue, for that the *Seal* of the Deed was melted by Accident, this was no Cauſe to alter the Iſſue; but yet they held, that this ſpecial *Non eſt factum* is not a good Plea by a Stranger to the Deed, and that he ought to plead, that nothing paſſed by it. 1 *Roll. Rep.* 188. *Moor* verſus *Waldron.*

19. Debt upon Bond to *ſave the Plaintiff harmleſs, &c.* the Defendant pleaded in Bar, that he had *ſaved him harmleſs* generally; and upon Demurrer the Plea was adjudged ill, for the Defendant ſhould have pleaded the Matter ſpecially, or *Non damnificatus*, becauſe he may ſave the Plaintiff *harmleſs* in many Things, and yet he may be damnified in ſomething, in which the Defendant was bound to ſave him harmleſs. *Style* 16. *Wroth* verſus *Elſey*, and 353. *Bord* verſus *Martin. S. P.* Antea 7, 12.

20. Debt againſt an *Executor*, upon a Bond of his Teſtator; the Defendant confeſſed the Bond, but pleaded, that he gave a another Bond to the ſame Obligee in Satisfaction of that Bond, for which he now brought the Action, which Bond he accepted; and upon Demurrer to this Plea it was adjudged againſt the Defendant, becauſe one Thing in Action (for ſo is a Bond till the Debt is recovered) cannot be given or accepted in Satisfaction of another Thing in Action. *Style* 339. *Brock* verſus *Vernon.* Acceptance. (E) 12. *S. P.*

21. Debt upon a Bill, *&c.* the Defendant pleaded, that *after the Money became due*, he and the Plaintiff ſubmitted themſelves by Parol to an Award, which was made by the Arbitrator, who awarded, *&c.* the Plaintiff demurred, and for Cauſe ſhewed, that the Defendant had pleaded a

Submiſſion by Parol, *after the Money was due upon the Bill*, which cannot be good to diſcharge a Debt upon a Specialty, and ſo it was adjudged. *Style* 350. *Luddington* verſus *White*.

22. Debt upon Bond, conditioned to ſave the Plaintiff harmleſs, who was bound for the Defendant, being a Collector of the Rents of the Governor and Company of the *New-River Water*, that he ſhould pay the Money collected unto the Treaſurer of the ſaid Company, *within a Month after he ſhould receive it*; the Defendant pleaded *Non damnificatus*; the Plaintiff replied, that the Defendant had received 1300 *l. &c.* and that he had not at any Time hitherto paid it to the Treaſurer, *ſecundum formam & effectum Conditionis, &c.* and upon Demurrer to this Replication it was objected, that the Breach was not well aſſigned, becauſe it did not appear, that the Defendant had received the 1300 *l. within a Month* before the Action brought; for 'tis not ſufficient to ſay, that it was not paid hitherto *ſecundum* * *formam Conditionis*, he ſhould have alledged, that the Defendant received the Money by the Space of a Month before the Action brought, and had not paid it; for ſuch a general Allegation, that he had not paid it *ſecundum formam & effectum Conditionis*, is not good, where the Condition is Special, as this is; 'tis true, it was held otherwiſe in * *Fox* and *Leas*, but that was after a Verdict. 1 *Lutw.* 470. *Ball* verſus *Richards*. Arbitrament. (N) 7. 1 *Lev.* 145. *S. P.* See *pl.* 12, 15. *See* Debt. (F) 18.

* Antea 15.

* Antea Bonds. (M)

23. Debt on a Bond *ſolvend'* ſo much Money to the *Plaintiff himſelf*, his Attorney or Aſſigns, and upon *Oyer* of this Bond it appeared to be *ſolvendum* to his Attorney *or Aſſigns*, without mentioning *to himſelf*; and on Demurrer to this Declaration it was objected, that this was a *material Variance* between the Bond on which the Plaintiff had declared, and the Bond it ſelf ſet forth, upon the craving *Oyer*, but adjudged, that the Declaration need not be according to the Letter of the Bond, but according to the Operation of Law upon it; as where *A.* gives a Bond to *B. ſolvendum*, to ſuch a Perſon as he ſhall appoint; if *B.* the Obligee, appoints no Body to receive it, then it ſhall be paid to himſelf, but if he appoint one, then Payment to him is a good Payment to the Obligee himſelf. *Mod. Caſes* 228. *Roberts* verſus *Harnage*.

Borough Engliſh.

(A)

This is a Cuſtomary Deſcent **of Lands to the** youngeſt Son, **or if the Perſon dying had no Iſſue, then to his** youngeſt Brother.

1. THE Father being ſeiſed in Fee of Lands in *Borough Engliſh*, made a Feoffment in Fee to the Uſe of himſelf and the Heirs Males of his Body, *according to the Courſe of Common Law*, and afterwards died ſeiſed, leaving Iſſue two Sons; adjudged, that the youngeſt Son ſhall have the Lands by Deſcent, by Vertue of the Cuſtom, notwithſtanding thoſe Words. *Paſch.* 2 *Eliz. Dyer* 179.

2. Where a Feoffment is made of *Borough Engliſh* Lands, upon a Condition to be performed, which was not done, the Heir at Common Law ſhall take the Advantage of the Non-performance of ſuch Condition, but the youngeſt Son ſhall be entituled to all Actions in Right of the Land, as to a Writ of Error to reverſe a Judgment, by which the Lands are affected on Attaint, *&c. Mich.* 20 *Eliz.*

3. Feoffment in Fee was made of Land in *Borough Engliſh* to *the Uſe* of the Feoffor and his Heirs Males, according to the Courſe of the Common Law; he had ſeveral *Brothers*, adjudged, that the *youngeſt* ſhall inherit. 32 *H.* 8. *Dyer* 41. *6 Ed.* 6. *Dyer* 72. 2 *Eliz. Dyer* 179.

4. In Replevin, the Caſe was, the Teſtator being ſeiſed of Lands held in *Borough Engliſh*, deviſed the ſame to his Son *in Tail*, and died, afterwards the Son died ſeiſed of the Eſtate-tail, leaving Iſſue two Sons; adjudged, that the youngeſt Son ſhould inherit the Eſtate-tail; and it was likewiſe ſaid, that all the Sons ſhall inherit an Eſtate-tail of *Gavelkind Lands*. *Noy* 106. *Weeks* verſus *Carvell*.

W. Jones 361. 5. In Treſpaſs, the Caſe was, *Copyholder in Fee*, in Nature of *Borough Engliſh*, had *three Sons*, and he ſurrendered the Copyhold to the Uſe of himſelf and his Wife, *and his Heirs*, who were admitted accordingly; the Father died ſeiſed of the Reverſion, which deſcended to his youngeſt Son; the Wife entered, and was poſſeſſed of an Eſtate for her Life, afterwards the youngeſt Son died without Iſſue in the Life-time of his Mother, and then ſhe died; the Queſtion was, that this being a Reverſion in the youngeſt Son, expectant upon the Eſtate for the Life of his Mother, and he dying without Iſſue in her Life-time, ſo that *he was never ſeiſed of the Lands in Poſſeſſion*, whether his next *Brother*, who was now the Youngeſt, might claim by the Cuſtom, or whether the elder Brother ſhould have it as Heir at Common Law; it was inſiſted for the Heir at Law, that the next Brother could not have it as Brother and Heir to him who was dead, becauſe the Cuſtom doth not * extend *amongſt Brothers*, but only to the *youngeſt Son*, and without a ſpecial Cuſtom

* Poſtea 7.

Cuſtom for that Purpoſe, the Law will not permit it to deſcend to the *younger Brother*, for Cuſtoms ought to be taken ſtrictly: But two Judges were of Opinion, that the *younger Brother* ſhould have it, becauſe, by the Death of his Brother, he was now the *youngeſt Son* of his Father; but the other two Judges were of the contrary Opinion, for he was not *youngeſt Son* when his Father died, and none can have it by Vertue of the Cuſtom, but he who was youngeſt Son at the Time of the Death of the Father. *Cro. Car.* 297, 410. *Reeve* verſus *Malſter*. *Noy* 41. *S. C.*

6. The Father having the *impropriate Tithes* ariſing out of the Manor of *W.* which is *Borough Engliſh*, had Iſſue *two Sons*, and died; the Queſtion was, which of the Sons ſhould have the *Tithes*; adjudged, that the eldeſt Son ſhall have them, becauſe Tithes do not ariſe *naturally* from the Land, but by the Labour and Induſtry of Man; beſides, of common Right, Tithes are not *Inheritances deſcendable* to an Heir, but come in *Succeſſion* from one Clergy-man to another; 'tis true, by the Statute of Diſſolution of Monaſteries, they are made deſcendable to Heirs, but that being within Time of Memory, the *Cuſtom of Borough Engliſh* will not prevail in ſuch Caſe. *Mich.* 10 *Jac.*

7. The *middle Son* purchaſed Lands in *Borough Engliſh*, and died without Iſſue, his elder Brother ſhall have the Lands, and not the Youngeſt, becauſe the Cuſtom extends to Sons only, and not to * Brothers, and it ſhall be taken ſtrictly. 2 *Roll. Rep.* 368. *Chapman*'s Caſe. *Antea 5.

8. In Ejectment, a Special Verdict was found, that one ſeiſed in Fee of *Borough Engliſh* Lands, granted them to *T. S.* and his Heirs, for the Life of *G. D.* afterwards the Grantee died, leaving two Sons; it was inſiſted, that the Lands ſhall go to the eldeſt Son, becauſe 'tis not a Diſcent to him, but he takes by Purchaſe, by this ſpecial Limitation; but adjudged, that he takes in this Caſe as *Heir*, and ſo 'tis a deſcendable Freehold, and ſhall go to the Heir by Cuſtom, which runs with the Land, and guides the Deſcent to the youngeſt Son. 2 *Lev.* 138. *Baxter* verſus *Dowſwell*. See *Semain*'s Caſe.

9. *W. R.* having a *Copyhold* in *Borough Engliſh*, ſurrendered the ſame to the Uſe of *W. W.* and his Heirs, who died before he was admitted; it was held, that the Right would deſcend to the Youngeſt, according to the Cuſtom. 1 *Mod.* 102. See *Barker* verſus *Denham*.

10. In a Special Verdict in Ejectment, the Caſe was, the Father had Iſſue *five Sons*, the youngeſt of them died in the Life-time of the Father, leaving Iſſue *one Daughter*, then the Father purchaſed Lands of the Nature of *Borough Engliſh*, which by Cuſtom are deſcendable to the *youngeſt Son and his Heirs*, afterwards the Father died ſeiſed, and the fourth Son entered; the Queſtion was, whether he or the *Daughter of the fifth Son* had the beſt Title, and adjudged, that the *Daughter* ſhall inherit *jure repreſentationis*; becauſe by this Cuſtom the youngeſt Son is put in the Place of the eldeſt Son, and at Common Law the Iſſue of the eldeſt is preferred *jure repreſentationis*. 1 *Salk.* 243. *Clements* verſus *Scudamore*. Mod. Caſes 120.

Breach of Conditions.

(A)

Where not broken, not well aſſigned, and where Performance is not well pleaded, and where 'tis well pleaded. See *Conditions*. (G) per totum.

1. THE Leſſor made a Leaſe for Years to *W. R.* upon Condition, that he ſhould grant over his Eſtate by *his Will*, or otherwiſe; afterwards he deviſed the ſame to *R. B.* whom he made Executor, and died; the ſaid *R. B.* entered as Executor, and not as Deviſee; adjudged a Breach of the Condition, becauſe he had done as much as he could in Law to deviſe the Land. 31 *H.* 8. *Dyer* 45. *Parry* verſus *Herbert*. 4 Leon. 5. S. C.

2. Debt upon Bond conditioned, that if the Obligor paid to the Obligee 15 *l.* *at Michaelmas* next following, until he be advanced to a Benefice, then the Bond to be void; the Defendant pleaded, that the Plaintiff was advanced to a Benefice *before Michaelmas*, *&c.* and adjudged an ill Plea, for tho' he was ſo advanced, yet the Obligor muſt pay the firſt 15 *l.* for the Limitation, *until he was advanced*, goes only to the ſubſequent Time after *Michaelmas*, *&c.* *Cro. Eliz.* 549. *Counteſs of Warwick* verſus *Biſhop of Coventry*. 2 And. 65. *Poſt.* Condition. (E) 7. S. C.

3. Debt upon Bond conditioned, that the Defendant ſhould at all Times, *upon Requeſt*, deliver to the Plaintiff, the Fat and Tallow of all Beaſts, which he, his Servants or Agents ſhould kill or dreſs before ſuch Day, and the Breach was aſſigned in the Negative; the Defendant pleaded in the Affirmative, that upon every Requeſt made to him, he did deliver to the Plaintiff the Fat and Tallow of all Beaſts which were killed by him, or his Servants or Agents, before ſuch a Day; and upon Demurrer to this Plea it was objected, that it was too general, but adjudged a good Plea; for when the Matter to be pleaded tends to Multiplicity, the Law allows ſuch general Pleading

Pleading in the Affirmative, and in ſuch Pleas the Defendant may alledge a general Performance of the Condition. *Cro. Eliz.* 719. *Mints* verſus *Bethell.*

4. Debt upon Bond, conditioned to *ſave the Plaintiff harmleſs* from all Obligations wherein he became bound for the Defendant, who pleaded *quod exoneravit & indempnem conſervavit* the Plaintiff from *all the ſaid Obligations*, but did not ſhew from what Obligations in particular; adjudged, as to that Matter, the Plea was good, it being in the Affirmative, and to avoid Prolixity; but becauſe he did not ſhew *Quo modo exoneravit*, it was held to be ill. *Cro. Eliz.* 916. *Brabant* verſus *Bacon.*

Hutton 49. S.C. 5. The Condition of a Bond was, that if the Defendant ſhall by any Means be aiding or aſſiſting *B. B.* in any Action to be had or proſecuted againſt the Plaintiff, then, *&c.* and in an Action of Debt brought on this Bond, the Plaintiff aſſigned a Breach, that he brought an Action againſt the ſaid *B. B.* and againſt the Defendant, and had Judgment againſt both; and that the Defendant joined with *B. B.* in a Writ of Error, and ſo hindered the Plaintiff to have Execution upon the Judgment; and upon Demurrer adjudged, that this was not a Breach of the Condition, for the Senſe of it is, that the Defendant ſhall not maintain *B. B.* in his proper Suit againſt the Plaintiff, but ſhall not be barred from defending himſelf againſt any unjuſt Proceedings of the Plaintiff againſt him, by joining with *B. B.* in a Writ of Error; for if the Plaintiff after Judgment had releaſed it, and yet taken out Execution againſt both, in ſuch Caſe the Defendant might have joined with *B. B.* in an *Audita Querela*, becauſe 'tis in his own Defence. *Hob.* 304. *Lamb* verſus *Thompſon.*

6. Debt on Bond, conditioned to ſave the Plaintiff harmleſs, from the Payment of all Legacies, and the Breach aſſigned was, that there was a Suit in Chancery againſt him for a Legacy, *&c.* adjudged, that this Allegation was too general, and that he ought to have ſet forth, that ſuch a Legacy was deviſed to him, and that he had not ſaved him harmleſs from the Payment, and alſo he ought to have ſet forth in what Place the Chancery was held. 2 *Bulſt.* 19. *Dowty* verſus *Fawnes.*

Hob. 35. 7. Error in the *Exchequer-Chamber*, upon a Judgment in Debt on a Bond, conditioned, that the Plaintiff ſhould quietly enjoy ſuch Lands without Eviction; and he aſſigned the Breach, upon a Recovery by Verdict in Ejectment, upon a Leaſe made by *W. R.* and the Error aſſigned was, for that the Plaintiff did not ſhew what Title *W. R.* had to make the Leaſe, he only alledged, that he had a good Title, and it might be, that he derived that Title under the Plaintiff himſelf, after the Bond made, therefore he ought to ſhew, that *W. R.* had a good Title before he made the Leaſe, and ſo it was * adjudged. 2 *Cro.* 315. *Kirby* verſus *Hanſaker.* *Poſtea* Replication. (B) 8. *S. C.* See 1 *Vent.* 184. 2 *Lev.* 37. *Proctor* verſus *Newton.* See 3 *Lev.* 325. *Buckley* verſus *Williams* contra.

* 3 Mod. 135. Moſſe *v.* Archer.

Moor 682. Yelv. 44. Cro. Eliz. 371. 8. Debt upon Bond, conditioned to do any reaſonable Act before *Michaelmas*, *for aſſuring* the Manor of *H.* to *W. R.* and his Heirs; the Defendant pleaded, that the Plaintiff did not require him before *Michaelmas*, *&c.* to do any reaſonable Act for the *Aſſuring* the ſaid Manor, *&c.* the Plaintiff replied, that on the 21ſt Day of *Auguſt*, *&c.* before *Michaelmas*, *&c.* he required the Defendant *to convey and aſſure* to him, *the Manor of H. according to the Tenor of the ſaid Condition*, which he had not done, upon this they were at Iſſue, and the Plaintiff had a Verdict; and it was objected in Arreſt of Judgment, that here was no Breach of the Condition, for that the Plaintiff ought to have ſet forth, that he required the Defendant to make a *certain Aſſurance* of the Manor, and not to make an Aſſurance according to the Tenor of the Condition; but adjudged, that the Condition was broken, for if the Plaintiff had required the Defendant to make an Aſſurance by Fine, Recovery, Feoffment, or Bargain and Sale, he ought to make them all, or any one, which the Plaintiff ſhould require. 1 *Brownl.* 84. *Pudſey* verſus *Newſam.*

9. Debt upon Bond, the Defendant pleaded, that it was made upon Condition, that if he paid 10 *l.* to him, whom the *Obligee ſhould Name*, in and by his Laſt Will, that then, *&c.* and ſaid, that the Obligee did make his Laſt Will, and appointed Executors, but *did not Name any Perſon certain*, who was to have the 10 *l.* adjudged, that the Executor who brought the Action ſhould not have it, for tho' he was named in the Will, yet he is not an * Aſſignee for that Purpoſe, therefore the Teſtator ſhould have expreſly named ſome Perſon to take the 10 *l.* otherwiſe the Bond is not forfeited. *Trin.* 10 *Jac. Godb.* 192. *Mead*'s Caſe. *Hob.* 9. *S. C.* reported by the Name of *Peaſe* and *Mead*. *Moor* 855. *S. C.* The Condition is now impoſſible to be performed.

* *See* Allen *v.* Wedgwood. S.P.

10. Error of a Judgment in an Action of Debt on a Bond, for Performance of Covenants in an Indenture, which was, that if the Plaintiff *paid the Defendant* 100 *l. at Michaelmas next*, then the Defendant would pay to the Plaintiff 10 *l. yearly*, during his Life; and the Breach aſſigned was, that the Defendant *had not paid the* 10 *l.* yearly, *the Defendant pleaded Performance*, *&c.* upon which they were at Iſſue, and a Verdict againſt him, and Judgment; and now Error was brought, and the Error aſſigned was, that the Plaintiff did not alledge, that *he paid the* 100 *l. to the Defendant* at *Michaelmas*, for if that was not paid, then the Defendant ought not to pay the 10 *l. yearly*; but the Judgment was affirmed, becauſe the Defendant having pleaded Performance, *&c.* after the Plaintiff had aſſigned the Breach, had by that Means confeſſed the Payment of the 100 *l.* or if it had not, then it was incumbent on the Defendant, to ſhew that it was not paid, and not on the Plaintiff to ſhew that it was. *Moor* 365. *Goodwin* verſus *Iſham.*

11. Debt on a Bond conditioned, that whereas the Defendant was about to *marry* ſuch a Widow, who was poſſeſſed of ſeveral Goods, which were the Goods of her firſt Husband, and his Children, that he would not medd'e with them, but ſuffer her and the Children to *enjoy them without any Diſturbance from him*, *&c.* the Defendant pleaded *Performance*; the Plaintiff aſſigned

a Breach, that the firſt Husband was poſſeſſed of ſo many *Oxen*, and that the Wife was poſſeſſed after his Death, and before her ſecond Marriage, but that afterwards the Defendant *took and detained them*; it was moved in Arreſt of Judgment, that the Breach was not well aſſigned, becauſe the Plaintiff did not ſhew, that the Deſendant did *diſturb the Wife in the Enjoyment*, *&c.* but adjudged, that by the Allegation of Taking the Goods into his Poſſeſſion, and *detaining them*, that is a ſufficient *Diſturbance*, and Denying them to the Wife, and an unjuſt Taking contrary to the Condition of the Bond. *Cro. Car.* 148. *Crowle* verſus *Dawſon.*

12. Debt on a Bond, conditioned to pay, perform, and keep all *Rents*, Covenants, Grants, *&c.* the Defendant pleaded Performance of *all Covenants*; the Plaintiff, in his Replication, aſſigned a Breach for Non-payment of *Rent*, *&c.* but did not ſhew that it was * *demanded*; and upon Demurrer adjudged for the Plaintiff, which Judgment was affirmed in the *Exchequer-Chamber*, for by Pleading *Performance of Covenants* generally, it ſhall be intended he had paid the *Rent*, and when the Plaintiff replied, that he had not paid it, he needs not alledge a Demand, and the Defendant cannot rejoin, that it was not demanded, for that had been a Departure from his Plea. *Cro. Car.* 54. *Chapman* verſus *Chapman.* * Palm. 490.

13. Debt upon Bond conditioned, that whereas he was *High Sheriff of Surrey*, and had made one *Cornelius Trapp* his Bailiff of the *Hundred of Brixto*, if he ſhould well execute his Office, and make true Returns of all Warrants, *&c.* then, *&c.* the Defendant, upon *Oyer*, *&c.* pleads *Performance generally*; the Plaintiff replied, and ſet forth, that Proceſs was directed to him *to levy Iſſues upon W. R.* and that he made his *Warrant to Trapp* to execute the ſame, which he did not return, *&c.* and upon Demurrer to this Replication it was adjudged ill, becauſe the Plaintiff did not ſhew, that the *Iſſues were to be levied in the Hundred of Brixto*; for tho' the Condition was general, to make a Return of all Warrants, yet it muſt be intended only of ſuch as were to be executed in that Hundred. *Allen* 9. *Stoughton* verſus *Day.*

14. Debt on Bond, conditioned to give an Accompt of Goods, *&c.* and to make equal Dividend of Money; the Defendant pleaded, that neither Goods or Money came to his Hands; the Plaintiff replied, that a ſilver Bowl came to the Poſſeſſion of the Defendant, *& hoc paratus eſt verificare*; and upon Demurrer to this Replication, it was held ill, becauſe the Plaintiff did not ſet forth any Breach of the Condition; 'tis true, he averred, that the Defendant had a *ſilver Bowl*, but that is not ſufficient, for he ought to have alledged in the Negative, *that he did not make any Dividend*; and if no Breach is alledged, the Plaintiff can have no Cauſe of Action. 1 *Saund* 102.

15. Debt upon Bond, for the Payment of 1000 *l.* the Defendant craved *Oyer* of the Condition, which was, to deliver ſuch Briefs at all *Churches and Chapels*, *&c.* before ſuch a Time, and to deliver the Money collected, *&c.* then he pleaded Performance generally; and upon Demurrer this was adjudged an ill Plea, for he ought to have pleaded particularly, what Sums he had received, that he might give Accompt thereof; ſo where a Condition of a Bond *conſiſts of ſeveral Parts*, the Defendant in pleading muſt ſhew, that he performed the ſeveral Matters contained in that Condition; but 'tis not ſo *in Covenant*, for where a *Covenant conſiſts of ſeveral Parts in the Affirmative*, their Performance generally is a good Plea. *Sid.* 215. *Woodcock* verſus *Cole.*

16. Debt upon a *Bottomree Bond*, the Defendant craved *Oyer* of the Condition, which was that if ſuch a Ship returned within ten Weeks, and the Maſter gave an Accompt, *&c.* of the Profits, then, *&c.* The Defendant pleaded, that the Ship was loſt, and did not return; the Plaintiff replied, *the Ship was not loſt*, and concluded to the Country, and upon Demurrer to the Replication, it was objected, that the Plaintiff had not aſſigned any Breach in this Replication, and therefore could not maintain this Action according to 1 *Saund.* 102. But adjudged, that where the Defendant (as in this Caſe) pleads any Special Matter, that admits a Non-performance, and excuſes it, there the Plaintiff need not ſhew what the Defendant hath admitted; but if the Defendant pleads Performance of the Condition, tho' his Plea happens to be ill, and the Performance not well pleaded, yet the Plaintiff in his Replication muſt aſſign a Breach, for without it he hath no Cauſe of Action; 'tis true, 'tis otherwiſe in the Caſe of a *Bond for Performance of an Award*, for there, if the Defendant pleads any Matter by which he admits a *Non-performance*, and excuſes it, the Plaintiff in his Replication muſt ſhew the Award, and aſſign the Breach; becauſe an Award may be void in Part or in Whole; now he muſt ſet forth the Award, becauſe the Court may ſee, that there was one made, and he muſt aſſign a Non-performance, becauſe the Court may judge, whether it was of a good Part of the Award; for if it ſhould be of a void Part thereof, then it need not be performed. 1 *Salk.* 138. *Meredith* verſus *Allen.* *Hayman's* Caſe in *Sanders*, 102. denied to be Law. Iſſue joined. (A) 29. *S. C.* *See* 2 Cro. 472.

Breach of Covenant.

Where not well aſſigned. (A)

Where well aſſigned, and well anſwered. (B)

(A)

Where not well aſſigned. See (B) 13, 21.

1. IN Ejectment, on a Leaſe made of the Manor of *L.* the Defendant pleaded, that before the Leſſor of the Plaintiff had any Thing in the ſaid Manor, the Biſhop of *R.* was ſeiſed thereof, and made a Leaſe to the Defendant; the Plaintiff replied, that true it is, the Biſhop made ſuch a Leaſe, but that the Leſſee covenanted he would not diſturb or put out *any of the Tenants dwelling in the Manor out of their Tenancies, doing their Duties according to the Cuſtom, &c.* and then ſhewed, that the Defendant put out one *W. R.* a *Tenant, dwelling in a Tenement, Parcell of the Manor*, and that the Biſhop entered for a Condition broken, and made a Leaſe to the Plaintiff; and upon Demurrer to this Replication, it was adjudged, that the Breach was not well aſſigned; for it was, that he had put out one *W. R. a Tenant dwelling in a Tenement, Parcel of the Manor*, which might be a *Tenant at Will*, and the Covenant reſpects only thoſe who were actually *Copyhold Tenements*; therefore, for want of an Averment, that he who was to put out was actually a *Tenant de facto*; Judgment was given for the Defendant. 1 *Leon.* 244. *Thomas* verſus *Ward. Poſtea* Condition. (A) 4.

Cro. Eliz. 43. 2. Covenant, *&c.* that the Tenements aſſigned to the Plaintiff for her *Dower*, then were and always ſhould be of the yearly Value of 753 *l. &c. notwithſtanding any Act done or cauſed to be done by the Covenantor*; the Breach aſſigned was, that the Tenements, *&c. did not then nor yet exceed the yearly Value of* 722 *l.* there was an ill Plea, and a Demurrer, and the Defendant had Judgment, becauſe the Breach was not well aſſigned by the Plaintiff, for the Covenant was not, that the Tenements ſhall be of the Value of 753 *l.* abſolutely; but that they be of that yearly Value, *notwithſtanding* any Act done by him (the Defendant). 1 *And.* 134. *Rich* verſus *Rich.*

3. The Father covenanted to pay all ſuch Sums as his Son (who was his Apprentice) ſhould imbezil, within three Months after *Requeſt*, and *due Proof made*, and in an Action brought, the Breach aſſigned was, that the Defendant had imbeziled ſo much, *&c.* and that he did not pay it within *three Months after Requeſt*; this was held ill after a Verdict. *Hob.* 217. *Crookhay* verſus *Woodward.*

4. The Covenant was for *quiet Enjoyment*, and in Debt brought, *&c.* the Plaintiff aſſigned the Breach, that the Defendant had forbid the Tenant to pay any Rent to the Plaintiff, adjudged, no good Breach, unleſs there had been ſome other Act; for the Defendant pleaded, that tho' he forbid the Tenant to pay any Rent, yet he ſtill paid it to the Plaintiff. 1 *Brownl.* 81. *Whitchcot* verſus *Lindſey.*

Hob. 34, 35. S. C. Moor 861. S. C. 3 Bulſt. 204. S. C. 1 Roll. Rep. 397. S. C. 5. The Defendant did *covenant, promiſe and agree*, that the Plaintiff ſhould quietly enjoy; and the Breach aſſigned was, that a *Stranger* entered upon the Land, but the Plaintiff did not ſhew that he entered upon a * *lawful Title*, and for that Reaſon the Breach was held ill. 1 *Brownl.* 23. *Tiſdale* verſus *Eſſex. Poſtea* Entry. (B) 14. *Hammond* verſus *Dod. S. P.*

* *See* Covenant. (F) 3, 20, 21.

6. In an Action of Covenant brought in *London*, the Plaintiff alledged, that the Defendant by a Leaſe made by him to the Plaintiff, did at the *Pariſh of St. Mary Bow in London*, demiſe a Meſſuage to him in *D.* in the County of *S.* and covenanted to *repair*, and then alledged, that *at London*, in the Pariſh aforeſaid, he ſuffered the Houſe to decay; the Defendant pleaded an ill Bar; and upon Demurrer to it, the Objection was againſt the Declaration, that the Breach was not well aſſigned, becauſe it was of a Matter Local and not Tranſitory; and ſo it was adjudged. 2 *Cro.* 456. *Shiers* verſus *Bretton.*

2 Cro. 281. 7. Debt upon Bond conditioned to perform all Covenants, *Payments* and Agreements contained *in a Deed-Poll* of the ſame Date of the Bond, and between the ſame Parties; the Defendant in his Plea ſet forth the Deed-Poll, which recites a Conveyance made by Bargain and Sale of Lands by the Plaintiff to the Defendant, in Conſideration of 100 *l.* then paid, and of 200 *l.* more to be paid at ſuch a Time; Proviſo, that if the Defendant did not *pay to W. R.* 40 *l. and to M. M.* 40 *l.* on ſuch a Day, for the Uſe of the Plaintiff, then *the Bargain and Sale ſhould be void*; and then pleads, that he had performed all Covenants and Payments, *&c.* compriſed in the ſaid Deed; the

Plaintiff replied, and aſſigned a Breach in not Paying 40 *l.* at ſuch a Day, according to the *Proviſo*, and upon Demurrer to this Replication, it was adjudged for the Defendant, becauſe the Condition of the Bond doth not bind him to any other Payments than ſuch as he was bound to perform by the Deed, and the Deed requires no compulſory Payment to be made; but it was left free to him, either to pay the Money, or that the Bargain and Sale ſhould be void; ſo that the Word (*Payments*) in the Condition of the Bond, muſt relate to ſuch Payments as are mentioned in the Deed; eſpecially, becauſe the Bond was made to ſtrengthen the Deed, therefore it ſhall never be taken to be Compulſory in the Bond, and Voluntary in the Deed; for that would be to make one repugnant to the other. *Trin.* 9 *Jac. Yelv.* 206. *Priſtoe* verſus *King.* 2 *Cro.* 281. *S. C.* by the Name of *Briſcoe* verſus *King.*

8. Leaſe for ſix Years, in which the Leſſor covenanted with the Leſſee, that *after the Expiration of that Term*, the Leſſee ſhould have the Refuſal thereof, if the Leſſor ſhould be diſpoſed to *let it again after the End of the Term*; he let it within the ſix Years to another, and in an Action of Covenant brought by the Leſſee, after the ſix Years, this was aſſigned for a Breach: *Sed per Curiam*, 'tis not well aſſigned, for tho' he was reſtrained to let it after the Term to any one unleſs the Leſſee had refuſed to take it, yet he might let it during the Term. 2 *Roll. Rep.* 333. *Walter* verſus *Mountague.* 2 Roll. Rep. 347. Godb. 335. S. C.

9. Debt upon Bond, for Performance of Covenants in an Indenture; the Breach aſſigned was, that the Defendant diſturbed the Plaintiff in *the Poſſeſſion of certain Lands excepted out of the Leaſe*; and upon a Demurrer it was adjudged for the Defendant; becauſe this would be no Breach of any Covenant, it being *excepted out of the Demiſe*; but it might be otherwiſe, where a Way, or Common, or Eſtovers, or any Profit apprender, had been excepted. *Moor* 553. *Ruſſell* verſus *Gullwell.* Cro. Eliz. 657. 11 Rep. 50. (B)

10. *Articles* were made between the Plaintiff and Defendant, that he the ſaid Defendant, upon Payment of 110 *l.* to him by the Plaintiff, ſhould give an Acquittance, and enter into a Bond of 400 *l.* to the Plaintiff, to ſave him harmleſs from all Claims to ſuch Lands, *&c.* the Plaintiff tendered the Money, at the Day, and the Defendant refuſed to receive it, or to enter into the Bond, whereupon the Plaintiff brought an Action of Covenant, and aſſigned the Breach, that he tendered the Money, and that the Defendant refuſed to accept it; adjudged, that the Breach was not well aſſigned, becauſe the Articles are, that upon the *Receipt* of the Money, the Defendant ſhould give the Acquittance, *&c.* and enter into the Bond, ſo that it was at his Election, whether he would take or refuſe it; and therefore the Breach is not well aſſigned, that he tendered the Money, *&c. Style* 481. *London* verſus *Craven.*

11. *Covenant* brought on Articles; the *Memorandum* was, *de placito Conventionis fract'*; the Declaration was, *quod cum per factum Indentatum teſtatur'*, (as 'tis in an Action on the Caſe) *quod defendens conceſſit*, and concludes, *& ſic infregit conventionem:* After the Breach aſſigned, and a Demurrer, *Per Curiam*, this is an Action of Covenant, and that 'tis not neceſſary to ſay *De placito quod teneat ei conventionem*, nor to conclude *& ſic infregit conventionem*; the Covenant in the Principal Caſe was, that the Defendant would not releaſe a Debt aſſigned to the Plaintiff, *without his Leave*, and the Breach aſſigned was, that he did Releaſe, but did not ſay it was *without his Leave*; *& per Curiam*, 'tis not well aſſigned. *T. Jones* 229. *Copping* verſus *Slaymaker.*

12. Debt upon the Penalty of a *Charter-Party*, wherein the Defendant covenanted to pay the Plaintiff 3 *l. per Tun*, for Goods imported, *&c.* and the Breach aſſigned was, in not paying, *&c.* for *ſo many Tuns, and one Hogſhead*; and upon a Demurrer to this Declaration, it was adjudged ill, for the Covenant was to pay ſo much *per Tun*, and the Breach aſſigned, was for Non-payment *for a Hogſhead*; otherwiſe, if it had been to pay *ſecundum ratam, &c.* 2 *Lev.* 124. *Rea* verſus *Barnes.*

13. Covenant on a Penalty of certain Articles, wherein the Defendant had agreed to pay ſo much *per* Chaldron for all Coals laden on ſuch a Ship in *Newcaſtle*, or in the *River Tyne*, and brought to *London*; the Breach aſſigned was for Non-payment of ſo much, for ſo many Chaldron, *&c.* laden, *&c. infra Portum de Tinmouth*, (viz.) at *North-Sheilds*, and brought to *London*; and upon a Demurrer to this Declaration, it was adjudged, that the Breach was not well aſſigned, becauſe it did not appear, that the Port of *Tinmouth* was in the River *Tyne.* 5 *Mod.* 352. *Toddard* verſus *Middleton.*

(B)

What is a Breach of Covenant, where well aſſigned and well anſwered.

1. LEaſe for Years, in which the Leſſee covenanted, that if he or *his Executors*, or Aſſigns, did alien, that it ſhould be lawful for the Leſſor to enter; he afterwards made his Wife Executrix, and died; ſhe married again, and the Husband being poſſeſſed of the Term in Right of his Wife, who was Executrix, as aforeſaid, aliened the ſaid Term; adjudged, that the ſecond Husband was an Aſſignee in Law of the firſt, and that the Condition was broken by his Alienation. *Paſch.* 28 *H.* 8. *Dyer* 7.

2. Debt on Bond for Performance of Covenants, *&c.* the Plaintiff, covenanted, that the Defendant's Brother ſhould enjoy ſuch Lands till *Michaelmas* following, rendring Rent; and the Defendant covenanted, that his Brother ſhould quietly ſurrender the Lands to the Plaintiff, and

that in the mean Time the Defendant would permit the Plaintiff to have Egreſs and Regreſs into and from ſuch of the ſaid Lands as by the Cuſtom of the Country ſhould lie freſh; and the Breach was aſſigned, that he had not free Egreſs and Regreſs, *&c.* the Defendant pleaded, that *he did permit* the Plaintiff to have free Egreſs and Regreſs into ſuch Lands, as by the Cuſtom of the Country did then lie freſh; and upon Demurrer Exception was taken to this Plea; for that the Defendant did not ſhew which Lands did lie freſh; but adjudged, that where a certain Act is to be done in Purſuance of a Covenant for that Purpoſe, there, if *Performance of that Act is pleaded, it muſt be ſhewed ſpecially how*, and in what Manner it was performed; but in the Principal Caſe no Act was to be done by the Defendant; for by this Covenant he was only *to permit* the Plaintiff to have free Ingreſs and Regreſs, *&c.* and in ſuch Caſe *permiſit* is a good Plea, and it ought to come on the Plaintiff's Part to ſhew into what Lands the Defendant *non permiſit* him to have free Ingreſs and Regreſs, *&c.* 1 *Leon.* 136. *Littleton* verſus *Pernes.*

3. Leaſe of a Meſſuage for Years, in which the Leſſor covenanted, that he was *lawfully ſeiſed in Fee*, and upon an Action of Covenant brought, the Plaintiff aſſigned for Breach, that the *Leſſor was not ſeiſed in Fee*, and had a Verdict; it was moved in Arreſt of Judgment, that the Breach was * too general, becauſe he did not ſhew that any other Perſon was ſeiſed in Fee, nor any Cauſe why the Leſſor was not ſeiſed; but adjudged, that the Covenant being general, that he was ſeiſed in Fee at the Time of the Leaſe made, the Breach may be aſſigned generally; eſpecially ſince in this Caſe the Defendant had pleaded *Non. eſt factum*, which is an implicite Confeſſion of the Breach, if it had been his Deed. 2 *Cro.* 369. * *Mujcot* verſus *Ballet* * *Bradſhaw*'s Caſe. *S. P.*

* Poſtea 22,26,30.

* Covenant. (F) 2.

4. *Articles, &c.* that the Plaintiff ſhould deliver to the Defendant 20 *l.* within a Year, for the Benefit of *C.* his youngeſt Daughter, and that after the Receipt thereof the Defendant ſhould pay Intereſt yearly to the Plaintiff, after the Rate of 10 *l. per Cent.* till the Daughter ſhould be eighteen Years old, and if ſhe died before that Time, then he ſhould pay the 20 *l.* to the Plaintiff within ſix Weeks after her Death; in an Action of Debt, *&c.* the Defendant pleaded Performance, the Plaintiff replied, and aſſigned the Breach in not paying 40 *s.* Intereſt for the ſaid 20 *l.* according to the Articles; and upon Demurrer to this Replication, it was objected, that the Breach was not well aſſigned, becauſe *Uſury* is forbidden and unlawful; but adjudged a ſufficient Breach for Payment of Intereſt after the Rate of 10 *l. per Cent.* is not againſt Law, but tolerated, and when 'tis to be paid *after the Rate* of 10 *l. per Cent.* the Court knows, that 'tis 40 *s.* for a Year for 20 *l.* Principal. 2 *Cro.* 378. *Williamſon* verſus *Hunt.*

* Covenant. (E) 1.

5. The Leſſor granted a Leaſe, and the Leſſee aſſigned it to another, and then an Indenture was made between the Leſſor, Leſſee and *Aſſignee*, of the one Part, and the Plaintiff of the other Part, in which there was a Covenant, that they, or one of them, was lawfully poſſeſſed, *&c.* and that the Plaintiff ſhould quietly enjoy, freed and diſcharged from all Incumbrances made by any of them; and in an Action of Covenant brought, the Plaintiff aſſigned the Breach, that the *Aſſignee* of the Leaſe who had the Eſtate, had not * *ſealed* the Conveyance to the Plaintiff, and ſo he was damnified; and this was adjudged a good Breach. 1 *Brownl.* 21. *Lamb* verſus *Treſham.*

* *See* Act 12. Baker v. Bulſtrode.

6. The Defendant covenanted, that whereas the Plaintiff had ſold to him all his Copyhold Lands in *H.* that if the ſame did exceed eight Acres, to be *meaſured according to* * *ſixteen Foot and an Half by the Pole*, that he would pay for every Acre over and above eight Acres, ſo to be *meaſured*, according to the Rate of 4 *l. per* Acre; in an Action of Covenant brought, the Plaintiff alledged in Fact, that the ſaid Copyhold Lands were twelve Acres, *according to the ſaid Meaſure*, and that the Defendant had not paid 16 *l.* for the ſaid four Acres over and above the aforeſaid eight Acres; the Defendant pleaded, that the Lands did not contain twelve Acres, according to the ſaid Meaſure, upon which they were at Iſſue, and the Jury found for the Plaintiff; and it was objected in Arreſt of Judgment, that the Breach was not well aſſigned, becauſe it was not alledged that *the Lands were meaſured*, and till then the Over-plus cannot be known; but adjudged, that the Breach was well aſſigned, for the Plaintiff might meaſure it privately, and the Iſſue being found, that the Lands contained twelve Acres, that makes the Declaration good. 2 *Cro.* 472. *Barwell* verſus *Wood.*

Ac. Caſe. (v) 46. 2 Roll. Rep. 22. * 4 Leon. 248. *Sir* Baptiſt Hicks *v.* Fleetwood and Gott.

7. Debt upon Bond, for Performance of Covenants in a Leaſe made by *Tenant in Tail*, in which there was a Covenant, that the Leſſor might enter to view the Reparations; the Defendant pleaded, that the *Iſſue in Tail entered* before any Covenant was broken; the Plaintiff replied the Iſſue in Tail came with him (the Plaintiff) on the Lands to view the Reparations, and traverſed, that he entered *modo & forma*, as the Defendant had pleaded; the Plaintiff had a Verdict upon an Iſſue taken on this Traverſe; and upon a Writ of Error brought, it was objected, that he had not aſſigned any Breach in his Replication; and adjudged, that he ought not, becauſe the Defendant had offered *a Special Iſſue* in his Plea, (*viz.*) that the Iſſue in Tail made an Entry on him before any Covenant broken, which obliged the Plaintiff to make a Special Replication. *Yelv.* 78.

2 And. 18. 5 Rep. 20.

8. Leaſe for Years, rendring Rent, in which the Leſſee covenanted, that from Time to Time during his Life, upon a new Leaſe made to him, and offered by the Leſſor, that he would ſurrender the old Leaſe, and ſeal and deliver the new Leaſe, *&c.* afterwards the Leſſee, before any Requeſt made by the Leſſor, and before any Offer of a new Leaſe, levied a Fine, with a Grant

and Render for eighty Years, and thereupon the Leſſor brought an Action of Debt upon a Bond made for Performance of Covenants, and upon Demurrer had Judgment in the Common Pleas, which was affirmed in Error in *B. R.* becauſe the Fine and Render were a Breach of the Covenant, without any Requeſt or Offer of a new Leaſe, for that would be in vain now, becauſe he diſabled himſelf. *Moor* 452. *Maine* verſus *Scott.* *Antea* Act. 3. *S. C.*

9. Tenant for Life of a Park made a Leaſe thereof, with all Profits, *&c.* of the Deer for five Years, in which Leaſe the Defendant covenanted to repair the Park, and to leave it well repaired at the End of the Term; and he alſo covenanted yearly, *& in quolibet dictorum annorum*, to deliver to the Leſſor ſo many Deer; and in an Action of Covenant brought by the Leſſor, after the End of the Term, the Breach aſſigned was, that the Defendant did not repair, *ſed fecit vaſtum*, (viz.) *in permittendo* the Park Pales to be in Decay, *&c.* it was objected, that this Breach was not well aſſigned; becauſe there was an Inſtant of Time in which it could not be properly ſaid, that *fecit Vaſtum*; *Sed per Curiam*, Waſte cannot happen *permittendo in fine Termini*, ſo that there is a Difference between doing a Thing, and permitting a Thing to be done; another Breach was, that the Leſſee had not delivered the Number of Deer mentioned in the Covenant, *after the five Years*; but *per Curiam*, thoſe Words, *in quolibet dictorum annorum*, relate only to the five Years, and not to the Life of the Leſſor. 2 *Roll. Rep.* 38. *Talbot* verſus *Leviſon.* 2 Roll. Rep. 86.

10. Debt upon Bond, conditioned for Performance of Covenants in a Leaſe; the Defendant pleads Performance; the Plaintiff replied and aſſigned a Breach in Non-payment of Rent on ſuch a Day, *ſecundum formam & effectum conditionis Obligationis præd'*; the Defendant *rejoins*, and ſets forth *an Entry made by the Plaintiff* on the Lands leaſed, before the Rent was due, and that he kept Poſſeſſion till it became due, upon which they were at Iſſue, and the Plaintiff had a Vedict; it was moved in Arreſt of Judgment, that the Breach was not well aſſigned, it being, that the Defendant did not pay the Rent reſerved on the Leaſe, at ſuch a Day, *ſecundum formam & effectum conditionis of the Bond*, when there is no Mention of Payment of Rent in the Condition of the Bond, but in the Leaſe only; 'tis true, *ſecundum formam & effectum Indenturæ*, had been better; but adjudged, that 'tis well enough as it is, becauſe *ſecundum formam & effectum conditionis, &c.* comprehends all which is contained in the Leaſe; and it might have been ill upon a Demurrer, but 'tis not after a Verdict; eſpecially ſince the Defendant by his Rejoinder confeſſed, that ſuch a Rent was in arrear, and waived the taking Iſſue upon it, but upon the Entry. *Hardr.* 319.

11. In Debt upon *a Deed*, in which there were ſeveral Covenants, and the Defendant bound himſelf by that Deed in a Penalty of 40 *l.* for the Performance, and the Plaintiff in his Declaration ſet forth, that the Defendant had broke the Covenant: Upon *Non eſt factum* pleaded, the Plaintiff had a Verdict; and it was inſiſted in Arreſt of Judgment, that the Declaration was ill, for there was * no particular Breach aſſigned of any one Covenant; adjudged, that this had been ill upon Demurrer, but 'tis cured by the Verdict. 1 *Vent.* 114, 126. *Barnard* verſus *Michell.* *Antea 5.

12. In Debt upon Bond for Performance of Covenants, which was, that the Defendant (being a Sheriff's Officer) ſhould not let any Perſon arreſted by him go at large, without the ſpecial Licence or Warrant from the Sheriff; and the Breach aſſigned was, that he did let at large *at Weſtminſter*, without any Warrant, *&c. ſuch a Perſon who was arreſted*; it was objected, that this Declaration was ill, becauſe the Plaintiff did not ſet forth the *Place or the Time* when the Perſon was arreſted; but adjudged good, the *Letting at large* was the material Part of the Covenant, and that is alledged to be at *Weſtminſter.* *Sid.* 30. *Jenkins* verſus *Hancock.*

13. In Covenant, the Caſe was, the Defendant covenanted *to cauſe a Statute to be cancelled*, upon Payment of 10 *l. before ſuch a Day*, afterwards he took out Execution, but at the Day appointed he tendered the Statute to be vacated; and the Queſtion was, whether the Taking out Execution before the Day, was a Breach of the Covenant, on which an Action of Covenant might be brought; and adjudged, that it was, but the better Way had been to bring an Action on the Caſe. *Sid.* 48. *Robinſon* verſus *Aunts.*

14. Error of a Judgment in an Action of Covenant in a Leaſe for Years, paying yearly 20 *l. at Michaelmas and Lady-Day*, by equal Portions; and the Breach aſſigned was, that he *did not pay the Rent due at the aforeſaid ſeveral Feaſts, during the Term*; and the Error was, that this Breach was aſſigned too * general, it ought to have been more particular; but adjudged, that it was well aſſigned for he may have never paid any Rent at all. 1 *Lev.* 78. *Coniers* verſus *Smith.* * Pl. 3, 18, 26, 30.

15. Covenant, in which the Plaintiff declared, that the Defendant covenanted to build him an Houſe according to the Rules preſcribed *per Statutum*, for rebuilding *London*, and aſſigned the Breach, that he did not cover the Cantilivers with Lead, *according to the Rules preſcribed per Statutum præd'*; there was Judgment by Default, and a Writ of Enquiry, and 15 *l.* Damages, it was objected, that the Breach was ill aſſigned, becauſe *he did not alledge in Fact, that they ought to be covered with Lead*; but adjudged, that he alledging they were not covered, *&c.* according to the Rules preſcribed by the Statute, is a ſufficient Averment, that the Statute preſcribed they ſhould be ſo covered. 2 *Lev.* 85. *Dive* verſus *Jenman.*

16. Debt upon Bond for Performance of Covenants and Conditions in an Indenture of Mortgage, in which there was a Proviſo, that if the Mortgagor paid the Money at the Day, that the Mortgage ſhould be void, and aſſigned the Breach in Non-payment of the Money; the Defendant demurred to the Declaration, and it was inſiſted for him, that this was not a Forfeiture of the Bond, becauſe the Proviſo for the Payment of the Money was a Condition annexed to the Eſtate, and for the Benefit of the Mortgagor, that he might have it again upon Payment of the Money,

but not to oblige him to pay it; but adjudged, that the Bond is forfeited. 2 *Lev.* 116. *Tombes* verſus *Chandler.* See 2 *Cro.* 281. *Yelv.* 206.

17. In Covenant, the Plaintiff declared, that the Defendant demiſed to him (the Plaintiff) a Meſſuage, together *with a Garden*, and an Houſe of Office at the upper End thereof, and covenanted, that the Plaintiff ſhould enjoy the Premiſſes ſo demiſed, and aſſigns a Breach, that the Defendant had built an Houſe on *Part of the Garden*, whereby he (the Plaintiff) could not have the Uſe of the Garden, *according to the Form and Effect of the Demiſe*; the Defendant pleaded, that notwithſtanding the Building, *&c.* the Plaintiff could have the Uſe of the Garden, *according to the true Intent of the Demiſe*, and traverſed, that the Building did hinder him from the Uſe thereof, *according to the true Intent, &c.* And upon Demurrer it was adjudged, that the Uſe of the Garden is the Uſe of the whole Garden, and not only ſo much as leads to the Houſe of Office; and the *Traverſe* is of more than alledged in the Breach, for that is, that the Plaintiff could not have the Uſe of the Garden, *according to the Form and Effect of the Demiſe*; and the Traverſe is, that the Building did hinder him from the Uſe, *&c. according to the true Intent of the Indenture*, and the Court cannot underſtand what is intended by the Indenture, other than by the Words thereof. 3 *Lev.* 167. *Kidder* verſus *Weſt.*

3 Mod. 69. * Pl. 3, 26, 30. Covenant. (P) 9. Aſtell *v.* Mills contra *denied to be Law.* 3 Mod. 69.

18. An *Apprentice* brought an Action of Covenant againſt his Maſter, in which he declared, that he was put Apprentice to the Defendant, who covenanted to inſtruct him (the Plaintiff) in the Trade of a *Woollen-Draper*, and to find him in Meat, Drink, Lodging, and Apparel, *and other Neceſſaries*, and aſſigns the Breach, that the Defendant, *&c.* departed from his Houſe, and did not inſtruct the Plaintiff in his Trade, nor find him Meat, Drink, Lodging, Apparel, *and other Neceſſaries*; and upon a Demurrer to this Declaration it was inſiſted, that the Breach was not well aſſigned, for *other Neceſſaries* is* too general and incertain; but adjudged, that it being aſſigned in the very Words of the Covenant, 'tis well enough. 3 *Lev.* 170. *Proctor* verſus *Burdett.*

19. In Covenant, *&c.* the Plaintiff declared, that the Defendant had covenanted for her ſelf, her Executors, Adminiſtrators, and *Aſſigns, that ſhe would permit the Plaintiff to make a Drain, &c.* and the Breach aſſigned was, that ſhe leaſed the Lands where the *Drain* ſhould be made, to one *Tomlinſon*, who would not *permit* the Plaintiff to make the Drain; there was a Plea and Replication, and Demurrer, and it was objected againſt this Declaration, that it was ill, becauſe the Covenant was for the Defendant, *&c. or her Aſſigns, to permit, &c.* and the Breach aſſigned was, that *Tomlinſon*, the Leſſee, did not *permit*, when it appeared, that the Leaſe made to him was before the Demiſe made to the Plaintiff, and upon which he had declared, ſo that the Covenant in that Demiſe, to *permit* the Plaintiff to make a Drain, extends only to the Aſſigns of the Defendant after the Leaſe made to the Plaintiff; beſides, to ſay *Non permiſit*, is ill, for he ought to ſhew ſome ſpecial Diſturbance, and to ſet it forth in a particular Manner, that the Court may judge of it. 2 *Vent.* 278. *Targett* verſus *Lloyd.*

20. A Mortgage was made, and the Mortgagor entered into a Recognizance, at the ſame Time conditioned, that if he paid the Money on the *24th of June*, 1660, that then the Recognizance ſhould be void, and that the Conuſee ſhould deliver it up to be cancelled; the Plaintiff now brings an Action of Covenant, and Aſſigns for Breach, that the Conuſee had proſecuted an Extent upon the Recognizance, *on* 21 *Octob.* 1659, which was above ſix Months before the Money became due and payable; the Defendant pleaded, that he did not proſecute an Extent upon this Recognizance, upon which they were at Iſſue, and the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that here was only an *implied Breach*, for the Recognizance might be delivered up, and yet be proſecuted; but adjudged, that here is a preſent Breach, for when the Defendant extends, the Plaintiff ſhall not be obliged to ſtay till the Money would become due, and to bring his Action then, but he may do it immediately. *Raym.* 25. *Robinſon* verſus *Amps.*

T. Jones 191.

21. In Covenant, *&c.* upon Articles of Agreement, wherein the Defendant covenanted, that the Plaintiff ſhould have, for ſeven Years next following the Date of the Articles, the ſeventh Part of *all Grains made in the Defendant's Brewhouſe*, and the Plaintiff aſſigns a Breach, that the Defendant, with an Intention to deceive him (the Plaintiff) did *put divers Quantities of Hops into the Malt, of which the Grains were made*, by Reaſon whereof they were ſpoiled, and became unprofitable to him; after a Verdict for the Plaintiff, and Damages 100 *l.* it was moved in Arreſt of Judgment, that the Breach aſſigned, (*viz.*) *The putting the Hops into the Malt, &c.* was out of the Articles, for it was not ſo much as mentioned therein, or any Thing like it, and Damages being entire, the Plaintiff ought not to have Judgment, but notwithſtanding this Objection he had Judgment; becauſe in all Contracts the Intention of the Parties is chiefly to be conſidered, and 'tis plain by this Agreement, that it was the Intent of the Parties, that the Plaintiff ſhould have the Grains for the *Uſe of his Cattle*, which they will not eat, when the Hops are put to the Malt; ſo where Leſſee for Years covenants to leave all the Timber on the Land, which was growing there at the Time of the Leaſe, *&c.* and he cuts down the Trees, but leaves the Timber on the Land at the End of his Leaſe, this is a Breach of the Covenant; ſo where there was a Grant of an Annuity to *T. P.* until he purchaſe 5 *l. per Annum* Rent, and the Grantee purchaſes 5 *l. per Annum* jointly with another, this is no Performance of the Condition; becauſe the Intention was, that the Grantee ſhould purchaſe ſo much for his own Benefit, and not jointly with another. *Raym.* 464. *Griffith* verſus *Goodhand.*

See Dyer 15. *a.*

22. In Covenant, the Plaintiff declared on a Covenant to *repair* all the Pales in a Garden, demiſed, (except the Pales on the *Weſt-ſide*) and aſſigned the Breach in not repairing the Pales *contra formam*

formam conventionis, &c. but did not ſhew what Want there was of Repairing the Pales, not excepted; the Defendant pleaded, that he did repair the Pales *ſecundum conventionem*, &c. upon which they were at Iſſue, and the Plaintiff had a Verdict; it was objected, that the Breach was not well aſſigned, becauſe the Plaintiff did not ſhew, that the Pales, not excepted, were out of repair: *Sed per Curiam*, it ſhall be intended after a Verdict, that the Jury gave Damages, for that they were out of repair. *T. Jones* 125. *Anonymus.*

23. Covenant in a Charter-Party, wherein it was mutually covenanted between the Maſter of the Ship and the Factor, that the Maſter (who was the Plaintiff) ſhould pay two Parts of the Port Charges, and the Factor (who was the Defendant) ſhould pay the third Part thro' *the whole Voyage*, and the Maſter ſets forth, that the Ship ſailed from *London* to *Cadiz*, and that he paid two Parts of the Port-Charges for himſelf, and the third Part for the Defendant; there was Judgment by Default, and a Writ of Enquiry brought, and it was objected, that the Defendant was not bound by this Covenant to pay the third Part to the Plaintiff, but to the Collector at each Port, therefore the Plaintiff ought to ſhew, that the Defendant had not paid the third Part to the Collector: *Sed per Curiam*, the Plaintiff having averred, that he paid the third Part, it ſhall be intended, that the Defendant had not; and tho' it was not ſaid, that they were paid in this * *Voyage*, yet it ſhall be intended ſo to be. *T. Jones* 186. *Bellamy* verſus *Ruſſell.* * Griffith v. Goodhand, placit. 21.

where the Breach was well aſſigned, tho' not directly within the Words of the Covenant. Antea

24. Covenant, &c. the Plaintiff declared on an Indenture, in which the Defendant covenanted, that he was ſeiſed in Fee, and that he would diſcharge the Lands from Incumbrances; and he covenanted likewiſe for quiet Enjoyment; and the Breach aſſigned was, an Entry and Eviction by *T. S.* and concludes *Et ſic conventionem fregit* in the ſingular Number; and upon a Demurrer to this Declaration it was objected, that the Breach did relate to all the three Covenants, and therefore the Concluſion was ill to one: *Sed per Curiam, Conventio is nomen collectivum*, and if twenty Breaches had been aſſigned, the Declaration begins *de placito quod teneat ei conventionem.* 2 *Mod.* 311. *After* verſus *Mazeen.*

25. Covenant, &c. wherein the Caſe was thus: ff. *Thomas Lucke* being poſſeſſed of a perſonal Eſtate to the Value of 795 *l.* 7 *s.* 6 *d.* died Inteſtate, leaving a Widow, one Brother, two Siſters, and a Nephew of *the whole Blood*; who being entituled to one Moiety of this perſonal Eſtate, and the Widow to the other Moiety; they, the ſaid *two Siſters, and their Huſbands, and the Nephew*, by a Deed reciting the Premiſſes, and that they had received of the Plaintiff (the Widow) 387 *l.* 13 *s.* 9 *d.* &c. covenanted for themſelves and their Heirs, to indemnify the Plaintiff from all Perſons claiming any Share of the ſame; the Breach aſſigned was, that *E. C.* Siſter by the *Father's Side*, only of the ſaid *Tho. Luck*, claimed a Share in the ſaid Moiety, and libelled for it in the *Eccleſiaſtical Court held at Wadhurſt*, and thereupon *taliter proceſſum fuit in eadem Curia*, (but did not ſay where that Court was held) that he obtained Sentence for 43 *l.* 1 *s.* 6 *d.* of which the Defendants had Notice, but did not ſave the Plaintiff harmleſs; there was a Judgment by Default, and it was moved in Arreſt of Judgment, that the Plaintiff was no Party to the Deed, and yet the Defendants had covenanted to ſave her harmleſs; but this Objection was diſallowed; then it was objected, that the Plaintiff did not alledge *any Place* where the Spiritual Court was held; 'tis true, he alledged, that the Court was held at *Wadhurſt*, but yet after the *Taliter proceſſum fuit* he ſhould ſhew where thoſe Proceedings were, and 'tis not enough to ſay *in eadem Curia*, becauſe that may be the ſame in Juriſdiction, and yet not held in the ſame Place, and for this Reaſon the Judgment was arreſted. 1 *Lutw.* 302. *Luck* verſus *Luck.* *Poſtea* Covenant. (B) 21. *S. C.*

26. Covenant, &c. on a Leaſe of an Houſe for Years, wherein the Defendant covenanted to *repair* it at his own Charge, and all *Gates*, *Ditches*, *Bridges* and *Fences*, with *banking*, cleanſing, and fencing, during the Term; the Breach aſſigned was, that the Houſe and *twenty Perches of Bank*, ten *Bridges*, and *forty Perches of Fence*, *were broken, pulled up, beat down and ſpoiled*; and upon Demurrer to this Declaration it was objected, that the Breach was aſſigned * *too general*; but adjudged well enough, becauſe aſſigned according to the † *Words of the Covenant.* 1 *Lutw.* 326. *Lee* verſus *Johnſon.* See *Boſcowen & al'* verſus *Cooke.* *Antea 3. † 1 Mod. 223. S. P.

27. Writ of Error in the *Exchequer-Chamber*, upon a Judgment in *B. R.* in an Action brought upon Articles of Copartnerſhip, one of which was, that the Defendant *ſhould not ſolicite or intercede* with any of the Plaintiff's Cuſtomers for their Work; and the Breach aſſigned was, that he had *ſolicited* ſeveral of his Cuſtomers, &c. the Defendant pleaded, that he did *not ſolicite* any Perſon, &c. *prout* in the Breach, but did not ſay *intercede*; and upon Demurrer the Defendant had Judgment, which was affirmed in Error; for tho' the Word *intercede* was omitted, yet the other Word *Solicite* implies *Interceding*, and more. 1 *Lutw.* 865. *Hodges* verſus *Nicholas.*

28. The Plaintiff declared, that the Defendant covenanted to pay yearly during the Plaintiff's Life 3 *l.* 6 *s.* 8 *d.* at the two Feaſts of *Michaelmas and Lady-Day*, by equal Portions, and aſſigned for Breach, that 3 *l.* 6 *s.* 8 *d.* for a Year *at Lady-Day, was in arrear and unpaid*; and upon Demurrer to this Declaration, it was objected, that the Breach was not well aſſigned, becauſe the Plaintiff did not ſhew *when the Money was due*, for it might be *in arrear at Lady-Day*, and yet due at *Michaelmas*, &c. before; but adjudged well enough upon a general Demurrer. 1 *Salk.* 139. *Stagg* verſus *Hind.*

29. Debt upon Articles of Agreement, by which the Defendant was to tender a Conveyance, &c. *to the Plaintiff, his Heirs or Aſſigns*; and the Breach aſſigned was, that the Defendant did not tender a Conveyance *To the Plaintiff*; after a Verdict for the Plaintiff in *C. B.* and a Writ of Er- 5 Mod. 133.

Error brought in *B. R.* it was objected, that this Breach was not purſuant to the Covenant, for it ought to be in the Disjunctive, that he did tender a Conveyance to the Plaintiff, *or to his Heirs or Aſſigns*, which is very true, if the Covenant had been, that a Tender ſhould be made *by the Plaintiff, and not to the Plaintiff, his Heirs or Aſſigns*; but it being to be done *To the Plaintiff, or his Aſſigns*, 'tis ſufficient to ſhew it was not done to himſelf; for if he had aſſigned his Intereſt that ought to be ſhewed on the other Side. 1 *Salk.* 139. *Smith* verſus *Sharp.*

30. The Apprentice covenanted with his Maſter, not to buy or ſell without his Leave, *&c.* within two Years, *&c.* and in an Action of Covenant brought by the Maſter, the Breach aſſigned was, that the Defendant *diverſis diebus & vicibus, between ſuch a Day and ſuch a Day*, ſold to *T. S.* and other Perſons unknown, Goods to ſuch a Value, upon this they were at Iſſue, and the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Breach was incertain, both as to the Time and Perſons; but adjudged, that in an Action of Covenant, 'tis ſufficient to aſſign a * general Breach; but in Debt for Performance of Covenants, the Plaintiff muſt ſhew a certain Breach. 1 *Salk.* 139. *Farrow* verſus *Chevelier.* See 3 *Cro.* 916. 2 *Cro.* 567. *Raym.* 8, 9, 10. *Style* 420, 428.

* Antea 3, 8, 14, 20.

31. Before the Statute 8 *&* 9 *Will.* 3. *cap.* 10. made for preventing frivolous and vexatious Suits, if an Action of Debt had been brought *upon a Bond for Performance of Covenants*, the Plaintiff was to aſſign but *one Breach*, becauſe, if one was proved, that had been a ſufficient Forfeiture of the Bond: But where the Plaintiff brought an *Action of Covenant*, he might aſſign as many Breaches as he would, becauſe he might have a particular Damage upon each Covenant which is broken, and a ſeveral Iſſue muſt be taken upon every Breach.

But now by that Statute 'tis enacted, that where an Action is brought upon a *Bond for Performance of Covenants*, the Plaintiff may likewiſe aſſign as *many Breaches as he will*, and the Jury ſhall aſſeſs Damages for ſuch Covenants which he ſhall prove to be broken.

So where Judgment ſhall be given for the Plaintiff in ſuch Action on a *Demurrer* or *Nil dicit*, he may ſuggeſt on the Roll as many Breaches as he ſhall think fit, upon which a Writ of Enquiry ſhall go, *&c.* and if before Execution executed, the Defendant ſhall bring the Coſts and Damages into Court, Execution ſhall be ſtayed; but if Execution ſhall be executed, then the Plaintiff ſhall acknowledge Satisfaction on Record.

But the Judgment ſhall ſtill ſtand as a Security to anſwer the future Breach of any Covenant in the Deed, for which the Plaintiff, or his Executors, *&c.* may have a *Scire facias* upon ſuch Judgment againſt the Defendant, his Heirs, Tertenants, Executors or Adminiſtrators, ſuggeſting ſuch other Breaches, *&c.* and to ſummon them or him to ſhew Cauſe why Execution ſhould not be had upon the ſaid Judgment, *&c.*

Breach of Promiſes.

(A)

Breach of Promiſes, where well and not well aſſigned.

1. *Aſſumpſit, &c.* where the Defendant promiſed to do ſeveral Things, and the Plaintiff alledged *two Breaches*, whereof one was inſufficient; and upon *Non Aſſumpſit* pleaded, the Jury gave Damages generally; adjudged, that it ſhall be intended they gave Damages for both the Breaches; and the Plaintiff having no Cauſe of Damage for that Breach which was inſufficient, and for which he ought not to ſue the Defendant, therefore he ſhall have none for the other. 5 *Rep.* 108. *Bedell's* Caſe.

2. *Aſſumpſit, &c.* that the Plaintiff ſhould quietly enjoy without the Let or Incumbrance of any Perſon, and ſhewed, that the Land was extended for a Debt due to the King by *Proceſs out of the Exchequer*, and ſo it was incumbred; it was objected, that the Breach was not well aſſigned, for the Plaintiff did not ſhew for whoſe Debt, nor when, nor from whom it was due, and it might be extended for the proper Debt of the Plaintiff himſelf, for which it was adjudged for the Defendant; for the Plaintiff ought to ſhew a *lawful* Incumbrance. 2 *Cro.* 425. 435. *Brocking* verſus *Cham.*

3. *Aſſumpſit*, in Conſideration the Plaintiff would marry the Defendant's Siſter, he would give him 300 *l.* upon his Marriage with her; there was a Verdict for the Plaintiff, and upon a Motion in Arreſt of Judgment it was objected, that the Breach was not well aſſigned, for the Plaintiff declared on a Promiſe made to him, to give him 300 *l.* in Marriage with his Siſter, and the Breach aſſigned was, in not paying the 300 *l.* to him, and ſo doth not anſwer the Promiſe, for if the Money be paid to the Wife, the Promiſe is not broken; but adjudged, that ſince the Husband is to give the Acquittance, the Money muſt be paid to him, and the Verdict found, that it was not paid to him, ſo the Plaintiff had Judgment. *Style* 393. *Bedwell* verſus *Fenwick.*

4. *Aſſumpſit, &c.* upon a Promiſe made to *return certain Horſes* by ſuch a Day, *in as good Plight* as they were at the Landing, *or to pay* 10 *l. for every Horſe that was damnified*; and the Breach aſſigned was, that one of the Horſes was not returned till after that Time, and the other not *returned at all*; and this was adjudged no good Aſſignment, becauſe it did not purſue the whole Promiſe; for tho' the Horſe was *not returned*, yet, if the 10 *l. was paid*, the Plaintiff had no Cauſe of Action. *Sid.* 440. *Wright* verſus *Johnſon.* 1 Vent. 64.

5. *Aſſumpſit*, in Conſideration the Plaintiff would deliver ſo many Veſſels of Ale to *W. R.* he the Defendant promiſed, that *he would Warrant* to the Plaintiff all that *W. R.* ſhould owe for the ſame: After a Verdict for the Plaintiff in the *Marſhal's-Court*, and a Writ of Error brought, it was aſſigned for Error, that the Plaintiff had laid the Breach for Non-payment of the Money, when it ſhould be, for not warranting; but adjudged, that the Breach is well aſſigned. *Sid.* 178. *Baxter* verſus *Jackſon.*

6. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would teach and preach to the People of ſuch a Pariſh, he (the Defendant) would give him 3 *l. per Annum*, and he ſets forth, that he was *Vicar* there for three Years, and aſſigned the Breach in Non-payment for five Years; he alſo declared, upon another Agreement to give him 40 *s. per Annum* from the *30th of May*, for two Years, and aſſigned the Breach of two Years, ending on the *31ſt of May*; and upon a Demurrer to this Declaration, the Plaintiff had Judgment; for tho' he was Vicar, he was not bound to Preach, and tho' the Agreement was for two Years, and the Breach aſſigned was for two Years and a Day, 'tis good; for if the two Years ended on the thirtieth of *May*, they were at an End on the thirty-firſt of *May*. *Sid.* 409. *Tayler* verſus *Gay.*

7. *Caſe, &c.* in which the Plaintiff declared upon a Promiſe, to redeliver to him ſome Rings, *or to pay* 18 *l.* and aſſigned the Breach, that the Defendant had not redelivered the Rings, but did not ſet forth, that *he had not paid the* 18 *l.* and this was held ill after a Verdict for the Plaintiff, for the 18 *l.* might be paid; and if ſo, then the Plaintiff hath no Cauſe of Action. *Hardr.* 320.

8. *Caſe, &c.* on a Bill of Exchange, wherein the Plaintiff ſet forth the Cuſtom of Merchants, *&c.* and that one *J. P.* drew a Bill upon the Defendant, payable to the Plaintiff, that the Bill was preſented to the Defendant, who accepted it upon Condition to pay it by a Bank Bill, to which the Plaintiff agreed; then he ſets forth, that the Defendant, in Conſideration thereof, promiſed to pay the Money in a *Bank Bill, which ſhould be of good and old Date*, and aſſigns the Breach, in giving him a *Bank Bill, payable to one Phillips or Bearer*, in which the Defendant had no Manner of Intereſt; ſo that the Plaintiff could not receive the Money: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Breach was not well aſſigned, for it ought to be aſſigned in the ſame Manner as the Promiſe was laid, (*viz.*) that he did not pay the Money *in a Bank Bill of good and old Date.* 1 *Lutw.* 277. *Mannin* verſus *Cary.*

9. *Caſe, &c.* for that the Defendant, in Conſideration of 20 *l. &c.* promiſed to deliver *on or before the fifth of January, &c.* twenty Quarters of Corn, *out of a Ship into a Barge, to be brought, that the Plaintiff might receive it*; the Breach aſſigned was, that the Defendant *did not deliver the ſaid Corn on the twenty-fifth Day of January*: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, that the Breach was not well aſſigned, for the Defendant, might have delivered the Corn *before the twenty-fifth of January*; but adjudged, that ſince here muſt be the Concurrence of both Parties, one to bring the Barge, and the other to deliver the Corn, the Defendant could not oblige the Plaintiff to accept the Corn till the laſt Day, that being the utmoſt Time appointed when the one is to deliver, and the other to accept, and it ſhall not be intended, that the Plaintiff was ready with his Barge to receive the Corn before that Time; but 'tis clearly helped by the Verdict; for if there had been a Delivery, it might have been given in Evidence upon this general Iſſue, and if ſo, then the Jury could not have found for the Plaintiff. 1 *Salk.* 140. *Harman* verſus *Owden.* See 3 *Cro.* 14, 73. *Sid.* 15. 1 *Saund.* 228. 1 *Vent.* 119.

Breach of Good Behaviour.

(A)

1. REcogniſance for the Good Behaviour; afterwards the Cogniſor was indicted for calling a Man *Pelter, Lyar, and Drunkard*, and for ſaying *I will make thee a poor Kirton*; and alſo, for that he *vi & armis clauſum fregit, &c.* adjudged, this was no Breach of the Good Behaviour, becauſe theſe were not Threatning Words, or which import an Intention to do ſome Act of Violence to the Body, and 'tis not broken by entering into the Cloſe, and taking the Cattle; but 'tis otherwiſe where any Thing is taken by Force by his Perſon. *Moor* 249.

Bridges

Bridges.

(A)

See *Coroner.* (A) 6.

*Postea 3. 1. UPON an *Engliſh* Bill in the Exchequer, to have * Contribution, towards the Repair of a Publick Bridge, in the *Manor of Sunning*, againſt the Freeholders and Copyholders, Tenants of that Manor, and againſt ſuch who had purchaſed *Demeſnes* of that Manor at ſeveral Times, the Charge being on the Plaintiff as Lord of the Manor *ratione tenuræ*; adjudged, that nothing is Part of a Manor but *Demeſnes* and Services; that thoſe who have purchaſed any Part of the *Demeſnes*, are chargeable, but that the Antient Tenants, both Freeholders and Copyholders, are not. *Hard.* 131. *Rich* verſus *Barker.*

2. Information againſt the Inhabitants of *Eſſex*, for not repairing a *Stone-Bridge* called *Daggenham Bridge*, in the *ſeveral Pariſhes of Hornechurch and Daggenham*; the Defendants plead, that they ought not to be charged, *&c.* for that by an Inquiſition taken at *Chelmsford*, 3 *Aug.* 26 *Car.* 2. before *Sir Matthew Hale*, *Knight*, *&c.* it was preſented, that a certain Bridge, *exiſten' in Parochia de Daggenham*, was then in Decay, and that *Sir Thomas Fanſhaw* ought to repair it *ratione tenuræ*, who pleaded, that * he ought not to repair the ſaid Bridge *ratione tenuræ*, but that the *Inhabitants of Daggenham* ought to repair it; upon which a Trial was had, and the Jury found, that *Sir Thomas* ought to repair it, and Judgment againſt him; and the Defendants aver the Bridge to be ſtill the ſame, and that the Judgment is ſtill in Force; and upon Demurrer to this Plea by the Attorney General, it was objected, that the Bridge laid in the Information was in two Pariſhes (*viz.*) in *Hornechurch* and *Daggenham*, but the Bridge in the Defendants Plea, was only in *Daggenham*, ſo it could not be the ſame Bridge; for Sir *Tho. Fanſhaw* may be obliged to repair ſo much of the Bridge which was in *Daggenham*, and the Country the other Part, which lies in *Hornechurch*; ſo Judgment was given for the King. *Raym.* 384. *The King* v. *Inhabitants of Eſſex.*

* *This is Right, for he muſt not plead Not guilty, therefore he ought to ſet forth who ought to repair, and traverſe that he ought.*

3. Adjudged, at a Trial at Bar, upon an Information, for not repairing a *Common Bridge*, which the Defendants were bound to do, that if a Manor is held by the Tenure of Repairing a Bridge, or Highway, which Manor afterwards comes into ſeveral Hands, that in ſuch Caſe every Tenant of any Parcel, either of the Demeſnes or Services, is liable to the whole Charge, but ſhall have * *Contribution* of the Reſt; 'tis true, the Lord may agree with every Purchaſer to diſcharge him of ſuch Repairing; but that will not alter the Remedy which the Publick may have, it only Binds the Lord, and thoſe who claim under him, for he ſhall never apportion the the Charge, and thereby make the Remedy for the Publick more difficult, or by Alienations to Perſons unable to pay; and tho' the Manor comes to the Crown, the Charge ſhall continue. 1 *Salk.* 358. *The Queen* verſus *Dutcheſs of Bucclugh.*

2 Lev. 112. Mod Ca. 150. *Antea 1. * *See* T. Jones. *by a Writ de onerando pro Rata*, F. N. B. 235. (B)

Regiſt. 268.

Mod Ca. 255. Poſtea pl. 6.

4. The Defendant was indicted at the Seſſions, for not repairing the Eaſt Part *Communis pontis pedalis continen' dimidium pontis in Communi ſemit'*: After Judgment for the Queen, and a Writ of Error brought, it was objected, that the Seſſions hath no Juriſdiction in Caſes of *Bridges*, but only of ſuch which are in the *Highway*, and that the Indictment ought to ſhew how many Foot in Length, and how many in Breadth, the Defendant ought to repair; and tho' it was anſwered, that there might be *communis ſemita*, which is not in the *Highway*, and that the Juſtices have Power over Nuſances in ſuch Caſes, by Vertue of the Statute 1 *Ed.* 3. and not by the Statute 22 *H.* 8. yet the Court doubted as to that Matter; but held *dimidium Pontis* to be certain enough, and reverſed the Judgment; becauſe it ought to be *pons pedeſtris*, not *pedalis*, for that ſignified a Bridge a Foot long. 1 *Salk.* 359. *The Queen* verſus *Sainthill.*

Mod. Ca. 191, 306. * *Any Inhabitant of the County may be a good Witneſs, but not be a Juror, that muſt be of the next County.*

5. Information againſt the Inhabitants of the County of *Wilts*, for not repairing *Laycock* Bridge; who pleaded, that the Village of *Laycock* ought to repair it, upon which they were at Iſſue; and upon the * Trial the Evidence was, that the Seſſions had formerly made an Order, that the Village of *Laycock* ſhould repair it; adjudged no good Evidence, becauſe the Seſſions have no Authority to make ſuch an Order; they may indict the Vill for a Neglect, but the * County is liable to repair, unleſs they can charge a Particular Perſon; and if a Private Man build a Bridge, which afterwards is a Publick Convenience, the County muſt repair it. 1 *Salk.* 359. *The Queen* verſus *Inhabitants of Wilts.* See 1 *Vent.* 61.

* Cro. Car. 361.

1 Salk. 359. Antea pl 4.

6. Indictment againſt the Defendant, for not repairing *quendam Communem Pontem*, ſituate *in quadam communi ſemita pedeſtri*, leading from ſuch a Place to ſuch a Place, which he (the Defendant) is bound to repair *ratione tenuræ*, and which he ſuffered to be very ruinous, and in great Decay, *ad commune nocumentum* of all the Queen's Subjects paſſing, *&c.* After a Verdict

and

and Judgment againſt the Defendant, and a Writ of Error brought, it was objected, that this Indictment would not lie, becauſe it did not appear, that the Bridge was in *Alta via Regia*, and the Power given to the Juſtices in this Caſe is by the Statute 22 *H.* 8. *c.* 5. (*viz.*) to Judge of Decays in Bridges in Highways; but adjudged, that the Word *Highway* is the *Genus* of all *Publick Ways*; ſo that if there is a *Common Footway*, the Indictment will lie, for an Action on the Caſe will not, without Damage; beſides, this is a *Publick Nuſance*; and by the Statute 1 *Ed.* 3. *cap.* 16. the Juſtices have Power to inquire of Publick Nuſances; but the Word *Communis* doth not *ex vi Termini* imply, that it is Common to all; it ought to be *Publicus*. *Mod. Caſes*, 256. *The Queen* verſus *Saintiff*.

Burials. See **Clergymen.**

By-Laws.

Where a By-Law is good and well pleaded, without giving Notice of it. (A)

Where By-Laws are not good. (B)

(A)

Where they are good, and well pleaded, without Notice given of them.

1. EVERY By-Law ought to be made for the *Common Benefit* of the Inhabitants of the Place, where 'tis made, and not for the * *Private* Advantage of any one Perſon; as for Inſtance, a By-Law is made, that no Perſon dwelling in ſuch a Pariſh ſhall put his Cattle into the Common Field before ſuch a Day, this is good; but if it be, that they ſhall not carry their Hay over the Lord's Lands, that is not good, becauſe 'tis only for his private Benefit. *Hill.* 30 *Eliz. Golds.* 79. * Poſtea 3.

2. An Act of Common Council was made in *London*, that if any Man offered Broad-Cloth to Sale in the City, before it was brought to *Blackwell-Hall*, to be viewed and ſearched, and a Penny Paid for Hallage, that he ſhould forfeit 6 *s.* 8 *d.* for every *Cloth*, and that the *Chamberlain of London* might bring an Action of Debt for ſuch Forfeiture; adjudged, in an Action of Debt brought, that this By-Law being made to prevent Deceits and Frauds in Cloth, purſuant to ſeveral Statutes, *&c.* was good; that the Aſſeſſing a Penny for every Cloth, to be paid as a Duty for *Hallage*, was good, becauſe it was for the *Publick Benefit*; that the Cloth ſhould be brought to the *Hall*, and no Burthen to the Subject, when he had the Benefit thereof, and that the Appointing the *Chamberlaine* to bring the Action of Debt, was good; becauſe he is a Publick Officer, and it being according to Law, may be put in Execution without any *other Allowance*. 5 *Rep.* 62. *The Chamberlain of London*'s Caſe.

3. Adjudged, that the Inhabitants of a Pariſh may make By-Laws for the Reparation of the Church, or Highways, becauſe 'tis for the *Publick Good*; and in ſuch Caſe, the Greater Number ſhall bind the Reſt, *without a Cuſtom*, to ſupport ſuch a By-Law; but if 'tis for their *own* **Private Gain*; as for Inſtance, if they make a By-Law for the better ordering their Common Fields, or the like, 'tis not good, *without a Cuſtom*; ſo likewiſe *Corporations* cannot make By-Laws, without a Cuſtom or Grant from the King, unleſs for Things which concern the *Publick Good*. 5 *Rep.* 62. *Ibid.* *Antea 1.

4. In an Action of Debt for 40 *s.* the Penalty of a By-Law, brought by the *Chamberlain of London*; upon the Return of the *Habeas Corpus*, the Caſe appeared to be, that by an Act of the *Common Council in London*, for the ordering the Companies of *Bricklayers* and *Plaiſterers*, it was ordained, *That the Bricklayers ſhould not plaiſter with Mortar made with Lime and Hair, but with Lime and Sand, and that plaiſtering with Lime and Haire ſhould belong to the Plaiſterers*; and thoſe of the reſpective Trades, who broke this Order, ſhould forfeit 40 *s.* to be recovered by the Chamberlain, *&c.* it was objected, that this was not a good Ordinance, becauſe it * reſtrained the Bricklayers in Part of their Trade, which was to plaiſter with Lime and Hair; but adjudged, this was not a Reſtraining, but the Governing the Trades, and no more in effect than a Determination of a Difference between thoſe Companies. *Palm.* 395. *Bricklayers* verſus *Plaiſterers*. 2 Roll. Rep. 391. *Poſtea 5. Poſtea (B) 3.

5. Upon an *Habeas Corpus*, it was returned, that there was a By-Law in *London*, that there ſhould be no more than 420 * Carts let to Hire in *London*, and if more are uſed, then the Owner ſhould forfeit 40 *s.* and that the Defendant, *contra veram intentionem actus præd'*, let his Cart to Hire; * Poſtea (B) 15.

Hire; it was objected, this was not a good By-Law, becauſe it was a Reſtraint to Trade, they might as well have made a By-Law, that there ſhall be but ſo many Boats on the *Thames*; but adjudged a good By-Law, for if a Reſtraint ſhould not be put to the Number of Carts, they might be a Publick Nuſance, in ſtopping up the Streets; 'tis true, a By-Law cannot reſtrain *Antea 4. * Trade, but it may reſtrain ſuch Excreſcencies in Trade, as may turn to a *Nuſance*, and may reſtrain it likewiſe as to the Place; as for Inſtance a Butcher in *Cheapſide*. *Sid.* 284. *Player* verſus *Jenkins*. See *Player* verſus *Vere*. See 4 *Mod.* 228. See 5 *Mod.* 441.

Sid. 284. Antea 5. 6. Adjudged a good By-Law *in London*, by which the Number of Carts were reſtrained. 1 *Vent.* 21. *Player* verſus *Jones*. but this was doubted in *Broadnox*'s Caſe. 1 *Vent.* 195. *Raym.* 289. *S. C.*

2 Sid. 138. * Mo. Ca. 123. Cuddon v. Provoſt. S. P. 7. The Return of an *Habeas Corpus* was, that *London* was an Antient City, *&c.* and a Cuſtom to make By-Laws, and that a By-Law was made, that *every* * *Foreigner* who ſells Goods uſually ſold by *Weight*, without bringing them to be weighed by a *Beam* there called the King's Beam, *ſhall forfeit* 13 *s.* 4 *d. for every Hundred Weight*, to be recovered by the *Chamberlain* in the Sheriffs Court, *and not elſewhere*, and that no *Eſſoin or Protection* ſhall be allowed, and ſo brings the Caſe within this By-Law; it was objected, that it was unreaſonable to compel the Subject to bring every Thing ſold by Weight to this Beam, for ſome Things may be ſold by the Lump, as the Parties can agree; but it was anſwered, that this By-Law is founded on the Cuſtom of *London*, which is of ſuch Force, that 'tis good even againſt a negative Act of Parliament; then it was objected, that this By-Law was unreaſonable in Reſpect of the Penalty and Inequality, for ſome Goods may not be worth 13 *s.* 4 *d. per Hundred*, and ſome may be worth 500 *l.* that this By-Law deprived the Subject of that Privilege which he is allowed by Law, (*viz.*) of *Eſſoins*, *&c.* that it reſtrains the Actions to their own Courts; that this Perſon being a *Foreigner*, ought to have Notice of this By-Law; to which it was anſwered, and ſo adjudged, that the Penalty was laid on the Weight, and not on the Quality of the Goods weighed, and 'tis only to compel Obedience to the Law; and as to the * *Eſſoins*, 'tis uſually ſo in all By-Laws; 'tis ſo in *Waggoner*'s Caſe; and as to the Reſtraining the Action to their own Courts, the Facts are better known there; and laſtly, as to Notice, this By-Law ariſes out of the *Cuſtom*, and every Man who will Trade in *London*, ought to take Notice of the Cuſtoms of the City. 1 *Lev.* 14. *Mayor of London* verſus *Bernardiſton*.

*Poſtea 12.

8. *Aſſumpſit*, for that the Defendant being indebted to him (the Plaintiff) in 20 *l.* forfeited by the Ordinance of the Company of *Barber-Surgeons*, for not ſerving in the Office of Steward, *&c.* according to a By-Law, *&c.* promiſed to pay, *&c.* and upon a Demurrer to the Declaration, it was inſiſted, that this Action would not lie for Money forfeited on a By-Law; beſides, a Promiſe without a Deed cannot be made to a Corporation aggregate; but adjudged, that the Action lies. 2 *Lev.* 252. *Barber-Surgeons* verſus *Pelſon*. *See* Action on the Caſe. (A) 10. *S. P.*

9. The Queſtion referred from the Privy Council to be tried, was, whether a By-Law made by the Company of Silk-Throwſters, *That none of that Company ſhould have above ſuch a Number of Spindles in one Week*, is good or not; after a Verdict for the Plaintiff, it was objected, that a By-Law made in Reſtraint of * Trade, and founded on their Charter, and not on any Cuſtom, was a Monopoly; but adjudged, that 'tis rather reſtraining a Monopoly, and that no one ſhould engroſs the whole Trade. 1 *Lev.* 229. *Freemantle* verſus *Company of Throwſters*.

*Antea 4, 5.

10. Debt, *&c.* upon a By-Law, ſetting forth, that *Cambridge* was incorporated by Letters Patent of *King James* I. with Power to make By-Laws, and to impoſe Fines, *&c.* that one of the Burgeſſes ſhould be Mayor, and that there ſhould be *twelve Aldermen* and *twenty-four Common-Council-Men*; and that the Mayor and the Majority of Burgeſſes made a By-Law, that if any Common-Council-Man ſhould *voluntarily reſign* his Office, he ſhould *pay* 10 *l.* to the Uſe of the Corporation; that the Defendant was appointed Common-Council-Men, and had *voluntarily reſigned*: Upon *Nil debet pleaded*, the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that the *Reſignation ought to be to the Mayor, and in Writing*, becauſe the Defendant had a Freehold in his Office; beſides, he ought to have *Notice* of this By-Law; but adjudged, that *Notice* is not neceſſary, becauſe all By-Laws are preſumed for the better Government, and for the Benefit of all Perſons living in thoſe particular Limits where they are made, and therefore all who live within that Juriſdiction are bound to take * Notice of ſuch Laws. 1 *Lutw.* 402. *Mayor of Cambridge* verſus *Herring*. *See* Reſignation. (B) 4.

* Poſtea 13.

11. In Treſpaſs, for Breaking and Entring his Houſe, and taking two Pewter Diſhes; the Defendant *proteſtando*, that the Diſhes did not exceed the Value of 3 *s.* 4 *d.* juſtify'd the Taking by Vertue of a By-Law made by the Maſter, Warden, and Brotherhood of Taylors in the City of *Litchfield*, that every Year, within one Month of *Midſummer*, they ſhould chooſe a Maſter and two Wardens, who were to continue for a Year, and that upon the Day of the Election there ſhould be a *convenient Dinner* for the Maſter and Company, and that every one ſhould pay his Share towards the ſaid Dinner; and if any one ſhould be abſent, he ſhould pay into the Common Stock, *as much as the Maſter paid for his own Dinner*, upon Pain of forfeiting 3 *s.* 4 *d.* *&c.* that *Anno* 18 *Eliz.* thoſe By-Laws were approved by Sir *Edward Saunders*, *then Chief Baron*, according to the *Statute* 19 *H.* 7. and ſo brings the Caſe within this By-Law; and upon Demurrer, this was adjudged a good By-Law upon the Authority of * *Wallis*'s Caſe, but yet the Plaintiff had Judgment, becauſe the Breach of this By-Law was not well aſſigned, for the Defendant did not alledge, that the Plaintiff had *Notice how much the Maſter paid for his Share towards the Dinner*, which ought to have been alledged, and not only ſo, but an expreſs Demand of it; for

* Poſtea Cuſtom. (A) 15.

for the Plaintiff is not to incur any Penalty, unleſs he failed in paying that very Sum. 2 *Lutw.* 1320. *Gee* verſus *Wilden.* *See* Cuſtoms. (A) 15. *S. P.*

12. The Return of an *Habeas Corpus* was, that *London* was an antient City, *&c.* and that by an Act of Common-Council, the *Porters of Billingſgate were made a Fellowſhip*, and that the Corn-meeters ſhould give Notice to the Porters to unlade ſuch Corn as ſhould *arrive there*, and that no Barge-man, not being free of the ſaid Fellowſhip, ſhall unlade any Corn, on the Forfeiture of 20 *s.* to be recovered by Action brought in the Name of the *Chamberlain*, in which no Eſſoin or Wager of Law ſhall be allowed; it was objected againſt this By-Law, that the Common-Council have aſſumed an Authority to create a Fellowſhip, which is a Prerogative of the Crown, and they have not ſhewed any ſpecial Cuſtom to warrant it; this By-Law is too general, for it extends to thoſe who unlade their own Goods there; it prohibits Barge-men, not of the Fellowſhip, to unlade any Grain *arriving there*, and they have not averred, that the Corn unladed did *arrive* there, ſo they have not purſued the Words of the By-Law, 'tis ſaid, that no * Eſſoin or Wager of Law ſhall be allowed, which is a parliamentary Power, and not to be aſſumed by any inferior Juriſdiction. *Adjournatur.* 3 *Mod.* 193. *Anonymus.* * Antea 7.

13. On a *Habeas Corpus*, the Franchiſe of the City of *London*, as to chooſing Sheriffs, was returned, and alſo *the Cuſtom* of making By-Laws, and that *Anno* 7 *Car.* 1. a By-Law was made, that a *Freeman of London*, choſen to be *Sheriff*, ſhall not be exempted, unleſs he will make Oath, that he is not worth 10000 *l.* and bring ſix approved *Compurgators*; and that upon Proclamation *made at Guildhall* of the Choice, and the Perſon choſen being called to come and take upon him the Office, at the next Court, and enter into a Bond of 1000 *l.* for that Purpoſe, upon Default ſhall forfeit 400 *l.* and if not paid within three Months, ſhall forfeit 400 *l.* more, *&c.* upon a Motion for a *Procedendo* it was inſiſted, that the *Chooſing a Sheriff* is not within the *Cuſtom of* making *By-Laws*, becauſe 'tis granted to the City by a new Charter of *James* II. But adjudged, that where a Franchiſe is granted for the Benefit of a Corporation, they have an incident Power to regulate that Franchiſe, for their Publick * Benefit; and as every Member hath the Benefit of the Franchiſe, ſo he is compellable by Penalties to undergo the Charge to which the Corporation is liable; 'tis true, the Perſon choſen may be indicted and fined for his Refuſal, but that will not ſave the City Franchiſe, therefore it ſhall not hinder the Forfeiture incurred by the By-Law; 'tis true likewiſe, all the *Freemen* are ſubject to this By-Law, but 'tis the *Livery-men* who are to chooſe; now, ſince the *Free-men* are repreſented by the *Livery-men*, tho' this By-Law doth not provide, that the Perſon choſen ſhall have Notice of his Election, yet they who are repreſented, muſt take as much * Notice of the Act of the repreſentative Body, as if they had been preſent at the Election. 1 *Salk.* 142. *London City* verſus *Vanacre.* 5 Mod. 438. *See London.* (A) 4. * Antea 10.

(B)

Not good. See *Copyhold.* (H) 3. *Monopolies.* (A) 2.

1. IN Replevin, the Defendant avowed, for that the Cuſtom of the Manor of *Chilton* in *Berks* was, that the Majority of the Tenants of that Manor, at a Court, *&c.* have uſed to make By-Laws *pro bono regimine & utilitate*, *&c.* to be obſerved, and to impoſe a Penalty, and that the Lord might diſtrain for the ſame, and that at ſuch a Court, *&c.* an Order was made by the Majority of the Tenants then preſent, and for their Benefit, that *no Tenant for the Time to come ſhould keep in the common Fields, any Steers above a Year old*, and that the Plaintiff was Tenant, *&c.* and kept Steers in the Common contrary to that By-Law, and ſo juſtified the Taking for the Penalty, *&c.* and upon a Demurrer to this Conuſance, it was held an unreaſonable By-Law, becauſe it was to bind the Plaintiff and his Heirs for ever, if they had any Inheritance in this Common, and that without their Conſent, of which they cannot be deprived without due Courſe of Law. 1 *And.* 234. *Latton* verſus *Erbury.*

2. By an Act of Common-Council in *London*, it was decreed, that none ſhould bring any *Sand*, nor ſell or Uſe any in the City or Suburbs of *London*, but that only which was taken out of the *River Thames*, and if any did the contrary, then to forfeit 5 *l.* to be recovered in an Action of Debt, in which *no Eſſoin, Protection, or Wager of Law ſhould be allowed*; and it was ſhewed, that the *Thames Sand* was worſe than Land Sand, and leſs in Meaſure, but greater in Price; adjudged, that this Ordinance was againſt Law, for it was unreaſonable, that a *Freeman* ſhould be reſtrained to ſell Sand, for it may concern the Inheritance of many Men who have Sand in their Lands, and it was preſumptuous to make a By-Law in the Form of an Act of Parliament, (*viz.*) that *no Eſſoin or Protection ſhould be allowed*, *&c.* *Mich.* 29 *Eliz.*

3. In *Falſe Impriſonment*, the Defendant juſtified, for that the Queen having appointed the Term to be kept at *St. Albans*, the Mayor and Burgeſſes, with the Aſſent of the Plaintiff, who was a Burgeſs, did aſſeſs on every Inhabitant, *&c.* towards the Charges of erecting and building Courts there, and made a Law, that if any refuſed to pay it, he *ſhould be impriſoned*, and becauſe the Plaintiff refuſed to pay, *&c.* the Defendant, as Mayor, committed him; adjudged, this was no good Juſtification, becauſe the By-Law was againſt *Magna Charta*, (viz.) *Quod nullus liber homo impriſonetur*, *&c.* they might have inflicted a * reaſonable Penalty, and appointed it to be levied by Diſtreſs, or to bring an Action of Debt to recover it. 5 *Rep.* 64. *Clerk's* Caſe. *Poſtea* 5. *S. C.* Poſtea 5. * March 15. S. P.

4. Covenant, *&c.* upon an Indenture of Apprenticeſhip, the Defendant pleaded a By-Law made by the Common-Council in *London*, where he was bound an Apprentice, that if a Freeman took the Son of an Alien to be Apprentice, *his Bonds and Covenants ſhall be void*; and upon Demurrer this was adjudged an ill By-Law, for the Common-Council cannot make the *Covenants void*; they might have inflicted a Puniſhment on the Maſter for Taking ſuch an Apprentice. *Moor* 411. *Doggerell* verſus *Pokes*.

5. In *Falſe Impriſonment*, the Defendant juſtified under a By-Law made at *St. Albans*, *&c.* that if any Burgeſs give the Mayor opprobrious Language, he ſhall be impriſoned by the Mayor during Pleaſure, and that he (the Defendant) being Mayor, ſent an Officer to the Plaintiff, being a Burgeſs, to come to the Town-Hall about ſome Affairs concerning the Borough, who ſent this Anſwer back, *Let the Mayor come to me if he will, for I will not come to him*, by Reaſon whereof the Mayor committed him; adjudged no good By-Law, but if it had been to diſfranchiſe him, ſuch a By-Law had been good, but not to impriſon him. *Moor* 411. *Bab* verſus *Clerke*. *Antea* 3. *S. C.*

6. *Debt*, in which the Plaintiff declared, that *Graveſend* and *Milton* were antient Towns adjoining to the River *Thames*, and ſo laid a *Preſcription* in the Inhabitants, that Time out of Mind, they had an antient Paſſage in a Ferry-Boat, from thence to *London*, and have uſed to make By-Laws for the Government of the ſaid Paſſage, and have provided Water-men and Rowers, *&c.* and took of every Paſſenger 2 *d.* and that they were incorporated by Queen *Elizabeth*, by the Name of *Portreeve* Jurats, and Inhabitants of *Graveſend*, *Poſſeſſors of Ships*, and that they had enjoyed the ſaid Ferry without any Interruption; and that *Anno* 37 *Car.* 2. they made a By-Law, that no Water-man ſhould ply any Paſſenger till the Ferry-Barge had received ſo many, which at the Rate of 2 *d.* a-piece ſhould amount to 4 *s.* and that if any Water-man received any Paſſenger *willing to go by the Barge*, before the ſame was filled, as aforeſaid, that he ſhould pay to the *Portreeve*, for every Paſſenger ſo received, 2 *d.* and ſo aſſigned the Breach of this By-Law; upon *Nil debet* pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe he had not laid in his Preſcription, that the Barge had any *Precedence* before other *Boats*, and if he could not preſcribe to any ſuch Precedence, then every Water-man had an equal Liberty to carry what Paſſengers he could get; and this being the Liberty of the Subject, could not be reſtrained by the Grant of the Queen, or by any By-Law; beſides, this By-Law is not good in it ſelf, for 'tis, that no Water-man ſhall carry a Paſſenger before the Barge hath received ſo many, *&c.* which is not good, becauſe 'tis not alledged, that after it received ſo many, it departed in convenient Time; for it may receive its full Complement, and yet not paſs towards *London* that Tide, but if it had been good, 'tis not well purſued, for 'tis, that if any Water-man receive a Paſſenger, *willing to go by the Barge*, before the ſame is filled, that then, *&c.* and 'tis not averred, that the Paſſengers which the Defendant received *were willing to go by the Barge*: The Mayor of *Graveſend* verſus *Edmonds*. 2 *Brownl.* 177.

7. The Defendant was committed for not paying a Fine, upon a Breach of a By-Law, and upon an *Habeas Corpus* the Return was, that a By-Law was made in *London*, that no Man ſhould make or uſe a *Hot-Preſs* within that City, under the Penalty of 10 *l.* for the Maker, and 5 *l.* for him who uſes it, and that the Defendant was fined for uſing a Hot-Preſs, *&c.* and committed for not paying the Fine; it was moved, that he might be diſcharged, becauſe this By-Law was illegal, it being made for ſuppreſſing Trade; but it was held, that it was uſed to deceitful Purpoſes, to hide the Faults in Stuffs and Cloths, that it was dangerous to fire Houſes, that the Statute 5 *Ed.* 6. brands a Hot-preſſer with the Name of Deceitful, for it forbids any *Hot-preſſer*, or other deceitful Manner, *&c.* thereupon a *Procedendo* was granted. 1 *Roll. Rep.* 312. *Edwards's* Caſe.

Godb. 252. 1 Roll. Rep. 4. 2 Roll. Rep. 97.

8. By-Law made by a Corporation, that none ſhould exerciſe any Trade there, unleſs he had ſerved ſeven Years as an Apprentice in the ſame Trade, and alſo *ſhall be approved by them to be skilful therein*, this is not good; becauſe 'tis againſt the Common Law to reſtrain Men from Trades; and 'tis likewiſe prejudicial to the Community, becauſe it puts a greater Reſtraint upon Tradeſmen than is ordained by the Statute 5 *Eliz.* for that Statute requires, that there ſhall be Apprenticeſhip for ſeven Years; and this Law enjoins, that tho' there hath been an Apprenticeſhip for that Time, yet the Perſon ſhall not exerciſe his Trade, unleſs *he be approved by the Corporation to be skilful therein*. 11 *Rep.* 54. *The Taylor of Ipſwich's* Caſe. *Poſtea* Trade 4. *S. C. Hob.* 210. *S. P.*

9. In Treſpaſs againſt the Corporation of *Butchers* in *London*, they pleaded a Power to make By-Laws, and then they ſet forth a Law made by them, that no *Butcher*, *or Perſon being a Stranger*, ſhould ſell any Veal in *London*, unleſs he dreſſed the Kidneys in ſuch Manner as the Kidneys of Sheep, and if he did otherwiſe, then to forfeit 6 *d.* and if he refuſed to pay it, then to forfeit the Veal; then they ſhew the Breach of this Law, and ſo juſtify the Taking the Veal; adjudged, that this By-Law was not good, becauſe it was to reſtrain *Strangers*, who are not bound to take Notice of any private By-Law made in a Corporation, unleſs 'tis to ſuppreſs Fraud, or any other Injury uſed by *Foreigners*, as Corruption, or the like, in the Sale of their Meat, and then they ought to take Notice thereof. 1 *Bulſt.* 11. *Franklin* verſus *Green*.

Hob. 210. Moor 869.

10. Debt, *&c.* upon a Breach of a By-Law made by the Wardens and Company of *Weavers* in *Newbury*, which was, that none ſhould Uſe the Art of Weaving within the ſaid *Borough*, or ſhould have any Loom in his Poſſeſſion, unleſs he *had been Apprentice to that Art within the ſaid Borough* for ſeven Years, *&c.* upon *Nil debet* pleaded, the Plaintiff had a Verdict, but the Judg-

ment was arreſted, becauſe this By-Law was unreaſonable, for it extends to thoſe who *had ſerved an Apprenticeſhip for ſeven Years, before it was made*, but excludes all thoſe who ſerve an Apprenticeſhip *afterwards*, and prohibits them to Uſe their Trade, under a Penalty, unleſs *admitted by the Company*. *Hutton* 5. *Norris* verſus *Stapes*. *Poſtea* Trade 4. *S. C.*

11. In Treſpaſs for Taking his Goods, *&c.* the Defendants juſtified for the Breach of a By-Law, ſetting forth a *Cuſtom*, for the Maſter and Company of *Shoemakers of the City of Exceſter*, to make By-Laws, and that they made a Law, that *no Perſon, not being of their Fraternity*, ſhould *make Shoes, &c.* within the City or *County* of *Exceſter*, nor do any Thing *pertaining to the Art of Shoemakers*, under Pain of forfeiting to the Maſter, *&c.* for every ſuch Offence, *ſuch Sum as ſhould be aſſeſſed by the Maſter and Wardens, &c.* and if he ſhall refuſe to pay the ſame, *upon Proof made of the Breach* of this Order, it ſhould be lawful for the Maſter, *&c.* to diſtrain; and ſo ſhews, that the Plaintiff being an Inhabitant in the *City of Exceſter*, and no Brother of the Society did make Shoes, *&c.* and that a Fine was impoſed on him for the ſaid Offence, of which he paid Part, but refuſed to pay the reſt, and thereupon the Defendant diſtrained, *&c.* upon Demurrer to this Plea it was adjudged ill, becauſe the Defendant had exceeded the *Cuſtom* alledged in the Extent of the By-Law; for the Cuſtom was, to make By-Laws for the better Government of the Company of Shoemakers *of the City of Exceſter*; but the By-Law is, that none ſhall *make* or ſell any Shoes within the City or *County of Exceſter*, which is not warranted by the Cuſtom; and in this likewiſe they have exceeded their Power in the *Thing prohibited*, for 'tis not to reſtrain a Man from uſing the Art of a *Shoemaker in the City*, but 'tis to reſtrain him generally from making Shoes, and that extends to making Shoes for himſelf, which is void; 'tis void likewiſe as to the Reſtraining Perſons from doing any Thing *pertaining to the Art of a Shoemaker*, becauſe many ſuch Things are done by other Artificers; the Penalty likewiſe impoſed by this By-Law, is not warranted by the Cuſtom or By-Law, becauſe that ought to be expreſſed, that the Court might be Judge of the Reaſonableneſs of it; but here no certain Penalty is ſet down, for that is left to the Diſcretion of the Maſter and Wardens, *&c.* and laſtly, the Defendants have diſtrained before their Time, for they ought not to do it before Refuſal to pay, and *Proof thereof* made, which ought to be by Verdict, and not before the Maſter and Wardens. *Bridgm.* 139. *Wood* verſus *Searle*.

12. Debt upon a *By-Law*, (*viz.*) That if *any Perſon* ſhould be duly elected to be *Chamberlain of the City of Oxford*, and ſhould refuſe to undertake that Office, he ſhould forfeit 10 *l.* to the Mayor, *&c.* and then ſets forth, that the 30*th of September*, *&c.* the Defendant was duly elected into the ſaid Office, he being a *Citizen and Freeman* of the ſaid City, and that he refuſed to accept it, whereby the Action accrewed for the ſaid 10 *l.* and upon a Demurrer to the Declaration it was held ill, becauſe a *By-Law to elect any Perſon* is void, for if it ſhould be good, they may elect a Stranger, and the Alledging, that *he was duly elected*, will not cure this Fault, becauſe thoſe Words extend only to the Manner of Electing, but not to the Perſons elected; 'tis true, 'tis ſaid that they *elected a Citizen and Freeman*, but that relates only to the Execution of the By-Law, and ſhall not make that good which is void in it ſelf; it ought to be, if any Citizen or Burgeſs ſhall be elected, *&c.* and not *if any Perſon, &c.* 3 *Lev.* 293. *Mayor of Oxford* verſus *Wildgooſe*.

13. In Treſpaſs for Entring his Houſe, and Taking four Diſhes, the Defendant pleaded the Letters Patents of *Ed.* 4. by which the *Company of Taylors in Exceſter were incorporated*, with a Power to make By-Laws, and that the ſaid Corporation, on the 20*th of March*, *&c.* did make a By-Law, that if any Perſon of the ſaid Body, at any of their Aſſemblies, ſhould revile or uſe any unhandſome Speech of the Maſter, Warden, or any of the Council, *he ſhall forfeit* 3 *s.* 4 *d.* the Fines to be levied by Diſtreſs, upon a Warrant under the Corporation-Seal, and *by Sale of the Goods of the Offender*, *&c.* then he ſets forth, that the Plaintiff being a Member of the Corporation, and having Notice of this By-Law, did, at an Aſſembly of the ſaid Maſter and Wardens, *&c.* ſay of them, that *they were all a Company of Pick-pocket Rogues*, whereby the Plaintiff *forfeited* 3 *s.* 4 *d.* for which the Defendant juſtified, *&c. nomine diſtrictionis*; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe a Corporation cannot make a By-Law to have a *Forfeiture levied by Sale of the Goods*, and tho' the Defendant is not charged with *Selling* the Goods, yet the By-Law being void as to the *Selling*, 'tis void in the Whole, and therefore the Defendant cannot juſtify upon it. 2 *Vent.* 182. *Clerke* verſus *Tucker*. 8 *Rep.* 127. *S. P.* 3 Lev. 281.

14. In Debt upon a By-Law, in which the Plaintiffs declared upon a Preſcription to make By-Laws, and that Time out of Mind, an antient Officer of *Guildford*, called a *Bailiff*, had been choſen there on *Monday* next after *Michaelmas-Day*; then they ſet forth a By-Law, that *if any Inhabitant of the ſaid Town* ſhould be choſen to the ſaid Office, and ſhould refuſe to take it upon him, he ſhould forfeit and pay to the Corporation 20 *l.* that upon the 30*th of September*, in the firſt Year of King *William*, the Defendant being an *Inhabitant and Free-man* of the ſaid Town, was choſen Bailiff, *&c.* of which he had Notice, but refuſed, *unde actio accrevit*, *&c.* the Defendant pleaded in Bar, for that by the Statute 13 *Car.* 2. for regulating Corporations, *&c.* it was enacted, that *no Perſon ſhould be choſen into any Office, who within one Year next before ſuch Election, had not received the Sacrament, according to the Uſage of the Church of* England; then he ſets forth, that he, at the Time of his Election, was a Proteſtant Diſſenter, and that he had not received the Sacrament within a Year before, by Reaſon whereof he was not capable of being choſen, ſo that the Election was void, and avers his Plea, to which the Plaintiffs demurred, and adjudged a good Plea; becauſe the Defendant cannot incur the Penalty of this By-Law, till a Choice made, and Refuſal; now, if he was never choſe to this Office, then he could never refuſe

to

to hold it, and 'tis plain he never was choſen, becauſe by the Statute he is a Perſon incapable to be choſen: And this is not like *Sir John Reaa*'s Caſe, who was appointed *High Sheriff of Hertfordſhire*, and executed the Office for three Months, but being at that Time under an *Excommunication* for not paying *Alimony*, and ſo diſabled to receive the Sacrament, he left it, and did not attend at the Aſſiſes, for which he was fined 500 *l.* and it being inſiſted on his Behalf in the Exchequer, that by the Statute 25 *Car.* 2. made againſt Popiſh Recuſants, this Office was void, for his not receiving the Sacrament, and that he was diſabled by Reaſon of his *Excommunication*; it was adjudged, that he ſhould pay it, becauſe, *being once in the Office*, he was obliged to qualify himſelf to proceed; but in the principal Caſe, the Defendant never was in the Office, for it was expreſly prohibited by the Statute to chooſe him; beſides, the By-Law it ſelf is ill, becauſe 'tis, that *if any Inhabitant of the ſaid Town* ſhall be choſen into the Office, *&c.* whereas they cannot make a By-Law to bind the *Inhabitants*, but only the Members of the Corporation; and 'tis likewiſe ill pleaded, becauſe the Uſage is ſet forth, that the Bailiff ſhould be choſen *on Monday next after Michaelmas*, and the Election of the Defendant is alledged to be *upon the 30th Day of September*, but *Non conſtat*, whether it was *upon a Monday*, and the Court will not conſult the Almanack, when the Party ought to ſet forth the Day in Pleading. 2 *Vent.* 247. *The Mayor and good Men of Guildford* verſus *Clerke*.

Sid. 284. 15. Upon an *Habeas Corpus* directed to the Mayor, Aldermen, and Citizens of *London*, they return a Cuſtom to make By-Laws, and to alter and amend them, and that at a Common-Council, held *April* 2. *Anno* 1677. it was enacted, that a former By-Law concerning the Ordering of Carts and Car-men, ſhould be repealed, and that the Preſident of *Chriſt's Hoſpital* ſhall have the Ordering thereof, and that there ſhall be no more than 420 * Carts to work in the City and Liberties thereof for Hire, and that 17 *s.* 6 *d.* and no more, ſhall be paid *yearly for every Cart, and* 20 *s.* and no more, for a *Fine, upon any Admittance* or Alienation of a Cart, which ſhall be applied towards the Relief of the poor Orphans in *Chriſt's Hoſpital*; and that if any Wharfinger or Retailer in Fuel, ſhall keep or work a Cart not licenſed by the Preſident and Governors of the ſaid Hoſpital, he ſhall forfeit 13 *s.* 4 *d.* to be recovered by Action of Debt, in the Name of the Chamberlain of the City, in the Lord Mayor's Court; they farther certify, that before the Coming of this *Habeas Corpus*, the Defendant was taken and impriſoned by the Sheriffs of *London*, by Vertue of an original Bill of Debt, upon Demand, for 13 *s.* 4 *d.* upon this By-Law, according to Cuſtom, *&c.* adjudged, that this was a void By-Law, becauſe in all Privileges, either by Cuſtom or by Charter, to make By-Laws, there muſt be this Clauſe either expreſſed or implied, that they be *ad utilitatem Regis & populi & rationi conſona*; now it may properly be ſaid to be *ad utilitatem populi* when the Advantages are mutual, that is, when the Duty is equivalent to the Profit; ſo is the Caſe of *Blackwell-Hall.* 5 *Rep.* 62. *b.* where the Penny for *Hallage* is equivalent to the Labour of the Searcher; but here, by this By-Law, there is 17 *s.* 6 *d. per Annum* Rent, and 20 *s.* Fine, to be paid by the Car-men, not in reſpect to any Thing, for Overſeeing and ordering their Carts, but for the Uſe of the Poor of *Chriſt's Hoſpital*, ſo that 'tis a meer Impoſition, without any Regard to the Thing in Queſtion. *Raym.* 288. *Player* verſus *Vere*, and 324 *S. C.* See 2 *Roll. Rep.* 413. *Kete* verſus *Michell.*

* Antea (A) 5, 6.

16. Upon a *Mandamus* to reſtore *Jeremiah Taverner* to the Place of a Livery-man of the Company of Vintners; the Maſter, Warden, and Aſſiſtants of the Company made a Return to this Effect, that *London* is an antient City, *&c.* and that there are ſeveral Fraternities and Guilds therein, of which the Company of Vintners is one, that there are Livery-men of that Company which hath been antiently incorporated, and that 2 *Feb.* 9 *Jac.* that King, by his Letters Patents, incorporated them by the Name of Maſter, Warden, and Free-men of the Commonalty of the Miſtery of Vintners of the ſaid City of *London*, with Power *to make By-Laws*, that Time out of Mind, the Place and Office of a Livery-man hath been a Place of Pre-eminence in the ſaid Company, and he was uſed and ought to be a Man of Subſtance, and to pay a competent Sum before his Admiſſion to the ſaid Place, for the better and neceſſary Support, and towards the Charge and Expence of the ſaid Company; and that on the 24*th of April* 1657. a By-Law was made, that for the Time to come 31 *l.* 13 *s.* 4 *d.* and no more, ſhould be paid by every Livery-man, upon his Admiſſion into the ſaid Office, it being uſual to pay more before that Time; and that from that Time the ſaid Sum had been always paid by every one admitted to the Livery, that *Taverner* was choſe a Livery-man, 11 *June* 1680, and was required, and the Maſter, *&c.* was ready to admit him to that Office, upon Payment of 31 *l.* 13 *s.* 4 *d.* which he ought to pay, according to the ſaid By-Law, which he refuſed, and thereupon the Company refuſed to admit him; it was inſiſted, that this By-Law was unreaſonable, and againſt Law, to impoſe ſuch a Fine upon every Livery-man; but adjudged, that the Sum impoſed, whether more or leſs, would not make this By-Law void, becauſe it only concerned the Members of that Corporation or Fraternity; and if a Man will agree and ſubmit himſelf to be of a Company, he ſubmits to the By-Laws thereof, and this Court will not take Notice of any extravagant Charges they lay upon themſelves. *Raym.* 446. *Taverner*'s Caſe.

17. Debt upon a By-Law, which was, That *two Men appointed by the Company of Horners in London, ſhould buy rough Horns for the Company, there to be diſtributed, &c. and that no Member of the Company ſhould buy rough Horns within twenty-four Miles of London, but of thoſe two Men*, under ſuch a Penalty; after Judgment by Default, it was ſet aſide, becauſe this was no good By-Law; for being a Company incorporated in *London*, they are reſtrained to that Place, and by Conſequence cannot make a By-Law, which ſhall extend *twenty-four Miles out of it*;

for by the ſame Reaſon they may extend it all over *England*, and ſo make it as binding as an Act of Parliament. 3 *Mod.* 158. *Company of Horners* verſus *Barlow.*

18. Debt upon Breach of a By-Law, ſetting forth, that *Bedford* was incorporated by the Name of Mayor, Bailiffs, *Burgeſſes* and Commonalty of *Bedford*, and that there was a Cuſtom for the *Mayor, Bailiffs and Commonalty* to make By-Laws (leaving out the Word *Burgeſſes*) and that *John Peck*, Mayor, *&c.* and ſeveral Aldermen, Burgeſſes, Bailiffs, Chamberlains and Common-Council-Men, (naming them all) had made an Order, that no Perſon, who was not a Freeman of that Corporation, ſhould ſet up a Trade there, under the Penalty of 5 *s. per Day*, to be paid to the Chamberlain to the Uſe of the Corporation, and if not paid, then to be levied by Diſtreſs, *&c.* and upon Demurrer to this Declaration, it was objected, that there was a Variance in the Name of the Corporation; for the Action was brought by the Mayor, Bailiffs, *Burgeſſes* and Commonalty, and in ſetting forth the Cuſtom to make By-Laws, the Word *Burgeſſes* was left out; beſides, the By-Law was againſt Law, becauſe it excludes all thoſe who had ſerved Apprenticeſhips in the Corporation. 1 *Lutw.* 562. *Mayor of Bedford* verſus *Fox.*

19. Debt for 10 *l.* upon a Forfeiture for Breach of a By-Law, which was, that every Perſon uſing the Occupation of *Muſick and Dancing* in the City of *London*, who ſhall have a Privilege to be made Free by Patrimony, ſhall at the next *Court of Aſſiſtants of the Company of Muſicians*, after Notice, accept and take the *Freedom of the ſaid Company*, under the Penalty of 10 *l.* adjudged, this is a void By-Law, for it hath no Cuſtom to ſupport it; 'tis true, the Cuſtom is laid to be, that whoever is Free of the City, muſt be Free of ſome Company, yet that Cuſtom doth not oblige a Man to be free of any particular Company, but leaves it at Large to be free of ſome Company: Now in the principal Caſe, tho' the Defendant ſhould be intitled by Birth, or by Apprenticeſhip, to be free of a Company, yet he muſt likewiſe be free of the Company of Muſicians, otherwiſe he cannot exerciſe this Art, but under ſuch a Penalty; ſo that tho' the Lord Mayor and Aldermen, *&c.* may compel a Man to take his Freedom, yet they cannot direct in what Company; and if ſo, then this By-Law exceeds the Cuſtom; for tho' the Defendant is a Freeman, yet if he did not take his Freedom of the Company of Muſicians, 'tis not good; and for that Reaſon this By-Law was held void. 5 *Mod.* 104. *Robinſon* verſus *Groſcourt.*

20. The Maſters, and Wardens and Aſſiſtants of *Trinity-Houſe*, brought an Action of Debt upon a By-Law by Vertue of a Charter of *King Car.* 2. enabling them to make By-Laws, and that this By-Law was confirmed by the *Lord Chancellor, Treaſurer* and *Ch. Juſtice*, ſſ. *That every Mariner, within twenty-four Hours after he ſhould come to Anchor in the River Thames, ſhould bring on Shore all Gunpowder (the Weather permitting) upon Paine of forfeiting twenty Nobles*, and that the Defendant had Notice of this By-Law, *&c.* and they being at Iſſue upon the Point of *Notice*, the Plaintiff had a Verdict; it was admitted on all Hands, that this was a good By-Law in itſelf, but that it was not made by a ſufficient Authority, for the King himſelf cannot by his Proclamation make ſuch an univerſal Law, (and by Conſequence the Patentees cannot) to extend in Places out of their Juriſdiction; this is different from By-Laws made by Corporations, for thoſe bind by the Conſent of Parties; but in this Caſe it cannot be intended, that thoſe out of their Juriſdiction are conſenting to be bound by this By-Law. *T. Jones* 144. *Trinity-houſe* verſus *Criſpin.*

21. *By-Law*, that all *Strangers* coming into the Port of *London*, ſhall employ *City Porters* to carry their Goods, was adjudged ill; 'tis true, they may make a By-Law, that none but *Freemen ſhall be Porters*, but 'tis unreaſonable to confine Strangers to *City Porters*; becauſe, if the City, appoint no Porters, there is no Remedy to compel them; beſides, *Strangers* may not know who are *City Porters*, neither can they compel them to carry their Goods. 1 *Salk.* 143. *Cuddon* verſus *Eaſtwick.* Mod. Ca. 123.

22. The Mayor and Commonalty of London, made a By-Law, the Penalty for the Breach of which Law was 400 *l.* of which 300 *l.* was to be forfeited to the Mayor and Commonalty, and for which an Action of Debt was brought in the Mayor's Court, and the Plaintiff had a Verdict and Judgment; and upon a Writ of Error before Commiſſioners to examine Errors, *&c.* it was adjudged, that the Mayor and Commonalty might make a By-Law and limit the Penalty to themſelves, becauſe there was no Way to enforce Obedience, but by Puniſhment; but they could not ſue for the Penalty in the Mayor's Court, unleſs the Mayor could be ſevered, which he cannot, for 'tis his Court, and the Style of it is *coram Majore*, ſo that he is an integral Part, and therefore he would be both Plaintiff and Judge. 1 *Salk.* 397. *Mood* verſus *Mayor of London.* *See* Wager of Law. *S. C.*

Canons and Canon Law.

(A)

See *School-Maſter.*

1. ADjudged, that *Canons* made in *Convocation*, and confirmed by the *King*, do bind as firmly in all Eccleſiaſtical Cauſes, as Acts of Parliaments do in other Caſes; for by the Common Law, every *Biſhop* in his Dioceſe, and each *Archbiſhop* in his *Province*, and the Convocation, may make Canons, which ſhall be Binding within their Juriſdictions. *Moor* 783.

2. By the Statute 25 *H.* 8. *cap.* 19. All Canons not repugnant to the King's Prerogative, nor to the Cuſtoms, Laws and Statutes of this Realm, ſhall be uſed and executed.

3. The *Convocation* for the Province of *Canterbury*, was held at *London Anno* 1603. by the King's Writ, and they had a Licence under the Great Seal, to conſult and agree to ſuch Canons as they ſhould think fit; they made ſeveral Canons, which had the Royal Aſſent, and were confirmed by Letters Patents, according to the Statute 25 *H.* 8. which Canons thus warranted by Act of Parliament, are the Laws of the Land as well as Acts of Parliament; and what ever is the Law of the Land, is as much the Law as any other Law is, becauſe that which is Law cannot *recipere magis vel minus. Vaugh. Rep.* 327. 2 *Lev.* 222.

Caveat.

Entered upon the Vacancy of a Church. (A) | As to Adminiſtration, or Probate of a Will. (B)

(A)

Entered upon the Vacancy of a Church.

1. WHEN a Church becomes void, and a *Caveat* is entered with the Regiſter of the Biſhop of the Dioceſe, that none be inſtituted to that Church until he be made Privy thereto, and the Biſhop before he hath Notice of the *Caveat*, doth inſtitute a Clerk, ſuch Inſtitution is void in the Spiritual Law; becauſe the Regiſter ought to give Notice to the *Biſhop*, that a *Caveat* was entered, and his Negligence ſhall not prejudice him who entered; but if the Biſhop hath Notice of the *Caveat*, and gives a Day to him who put it in, and before that Day he inſtitutes another, the Entring a *Caveat* is a *Superſedeas* in our Law. *Golds.* 146. *In the Lord Zouch's* Caſe.

* 2 Cro. 463. Poph. 133. 1 Roll. 191, 227. 2 Roll. Rep. 6.

2. The * King was Patron of the Church of *C.* and one who pretended to a Right of a Preſentation, entered a *Caveat in the Life-time of the Incumbent*, who was then very ſick, and ſoon afterwards died; then a Stranger preſented his Clerk, who was inſtituted and inducted, and he who entered the *Caveat* preſented his Clerk, who was likewiſe inſtituted and inducted, the King likewiſe preſented his Clerk, who was alſo inſtituted and inducted; and it being a Queſtion in the Spiritual Court, which of theſe Clerks had a good Title, it was referred to a Trial at Law, in which the Leſſee of the Preſentee of the King, was Plaintiff in Ejectment; and it was adjudged, that the *Caveat* was void, it being entered in the *Life-time of the Incumbent*; that the Church was full by *Inſtitution* againſt all Perſons but the King; that the Preſentation of him who entered the Caveat, was void, by Reaſon of the Super-Inſtitution of the Clerk of the Stranger; and ſo the Preſentation of the King was good. *Poph.* 133. *Morgan* verſus *Roan.*

(B)

As to Adminiſtration, or Probate of a Will.

1. WHere any Controverſy may ariſe concerning the *Probate of a Will*, or the Right of any *Adminiſtration* may come in Queſtion, 'tis uſual for one of the Parties to enter a *Caveat* in the Spiritual Court, which, as a Doctor of the Civil Law affirmed in *Hitchins and Glover's* Caſe, ſtands in Force for three Months. 2 *Roll. Rep.* 6.

2. The Entering a *Caveat*, being at the Inſtance of the Party, is only for the Benefit of the Ordinary, that he may do no Wrong; 'tis a Cautionary Act, for his better Information, to which the Temporal Courts have no Manner of Regard; therefore, if after a *Caveat* entered, the Ordinary ſhould grant Adminiſtration or Probate of a Will, 'tis not void by our Law; 'tis true, 'tis void by the Canon Law; but our Law takes no Notice of a *Caveat*. 1 *Roll. Rep.* 191. *Hutchins* verſus *Clover*. 1 Roll. Rep. 227. 2 Roll. Rep. 6. Poph. 133. 2 Cro. 463.

Certiorari.

To whom directed to remove Records. (A)
Where grantable or not, to remove Records. (B)
Where granted to remove Indictments and Orders. (C)
Where not grantable to remove Indictments and Orders. (D)
Of the Variance between the *Certiorari* and the Record removed. (E)

(A)

To whom directed to remove Records, and by whom returned, good.

1. THE *Cogniſee of a Statute-Merchant* ſued a *Certiorari* directed to the Mayor, *&c.* before whom it was acknowledged, and thereupon a *Capias* iſſued againſt the Cogniſor; and upon *Non eſt inventus* returned, the Cogniſee brought an *alias Capias*, but *died* before it was returned; it was a Queſtion, whether his Executors ſhould have a *Sci. fa.* againſt the Cogniſor, or a new *Certiorari*, to the Mayor, *&c.* and adjudged, that a new *Certiorari* was the beſt Method. *Paſch.* 2 *Eliz. Dyer* 180.

2. A *Certiorari* was directed to *two Clerks* of the Parliament, to certify the *Tenor of an Act of Parliament*, concerning the Attainder of the *Duke of Norfolk*, and *one of the Clerks* made the Return; for which Reaſon it was held ill; and becauſe the *Certiorari* was only to certify the Tenor of the Act, without mentioning the Commiſſion ſigned by the King to give his Aſſent to it; the Original Act was brought by the Clerk of the Parliament to the Juſtices at *Serjeants-Inn*; and it appearing to them, that the King was ſo very ill when he ſigned the Commiſſion, that he could ſcarce write, and becauſe his Name was writ at the Bottom when it ſhould have been at the Top, it was declared by the Parliament to be void. 1 *Mich. Dyer* 93.

3. *Certioraries* have been directed to the Executors of *Juſtices of Aſſiſe of Niſi prius*, to bring in Records of Verdicts taken before them, where ſuch Juſtices *died* before the Return of the Records; but it was adjudged by the Judges at *Serjeants-Inn*, that the Clerks of Aſſiſe, in whoſe Cuſtody thoſe Records were, might bring them in, for 'tis in their Diſcretion to give more Credit to thoſe Clerks than to the Executors or Adminiſtrators of the Juſtices deceaſed. *Mich.* 6. *Mar. Dyer* 163.

4. It was ſaid, that the *Chancellor*, or any Judge of a *Court of Record at Weſtminſter*, might bring a Record to one another * without a *Certiorari*, becauſe one Judge is ſufficiently known to another; but a Judge of an Inferior Court, or a Juſtice of Peace, cannot do ſo. *Paſch.* 24 *Eliz. Godb.* 14. * Poſtea 8, 9.

5. Judgment was obtained in *Aſſumpſit* in the Court of Common Pleas; and upon a Writ of Error brought, and the Record certified, the Plaintiff in the Writ of Error alledged *Diminution*, for want of an Original, which was certified and entered, and then he aſſigned for Error, that there was a Variance betwixt the Original and Declaration, and he brought a *Scire facias ad audiendum Errores*; the Defendant ſuggeſted, that there was another Original, and that the Plaintiff in Error had procured an ill Original to be certified, and thereupon the Defendant prayed a *Certiorari* to certify the other Original, which was granted; for tho' one Perſon can have but one *Certiorari*, yet the Plaintiff may have one, and the Defendant another. 2 *Cro.* 597. *Johns* verſus *Bowers*.

6. *Anno* 6 *H.* 4. *a Scire facias* was brought in the Name of the King, at the Petition of the *Prince of Wales*, to repeal a *Grant* made by *R.* 2. of the Manor of *M.* in the County of *Cornwall*, and that the ſame might be reſtored to him, as Parcel of the *Dutchy of Cornwall*, *and the Record was brought by the* * *Chancellor into the King's Bench*, and delivered to *Gaſcoigne*, *then Chief Juſtice*, and upon the Proceedings the Court gave Judgment, that the Letters Patents ſhould be revoked, *&c.* which ſhews, that a Record brought into that Court by the Chancellor alone, without a *Certiorari*, was allowed good. 8 *Rep.* 23. *In the Prince's* Caſe, *Poſtea* Sci. fa. (G) 12. *S. C.*

* Poſtea 7.

7. *Anno* 3 *Phil. & Mar.* the Office of *Serjeant at Arms* was granted to *Mark Steward* for Life; it was found by Vertue of a Commiſſion iſſuing out of Chancery, that the ſaid *Mark Steward* had abſented himſelf, and did not attend the Office, *&c.* whereupon he appeared, and ſaid, that *Queen Eliz. Anno* 11. *of her Reign*, gave him Leave to abſent himſelf, *&c.* at his Will and Pleaſure; upon which Iſſue was taken, *and Sir Thomas Bromley*, *the Lord Chancellor*, brought in the Record, *coram Domina Regina in Cancellaria habitum*, without any *Certiorari* for that Purpoſe; and afterwards the Jury gave a ſpecial Verdict, upon which Judgment was given, that the ſaid *Mark Steward* ſhould be reſtored to his Office. 8 *Rep.* 99. *at the End of Mark Steward's* Caſe. *Poſtea* Office. (A) 5. *S. C.*

8. *Certiorari* awarded out of *B. R.* directed to the *Cuſtos Brevium* of the Common Pleas to remove a Record of a Fine, it having been adjudged erroneous, upon a Writ of Error brought to reverſe it; and the Intent of this *Certiorari* was, that the Record of the Fine might be taken off the File, for by the Writ of Error nothing was removed but the Tranſcript; and upon Precedents ſhewed, the *Certiorari* was granted; yet where a Verdict was given in the Common Pleas, and the Jury convicted upon an Attaint brought againſt them in *B. R.* and a *Certiorari* brought to remove the Record of *Niſi prius* out of the Common Pleas, directed to the Chief Juſtice of that Court, ſuch *Certiorari* was denied; becauſe it muſt be out of the * Chancery, and the Record muſt be ſent from thence by *Mittimus* into B. *R. Paſch.* 10 *Eliz. Dyer* 275. *Bowen* verſus *Ruſſell.*

Poſtea 9. 9. poſt. (B) 1.

9. *Debt, &c.* was brought in the Court of Common Pleas, upon Judgment obtained in *B. R.* the Defendant pleaded *Nul tiel Record*, whereupon the Plaintiff obtained a * *Certiorari* out of the Court of Chancery, to ſend the Record into that Court, which might be ſent from thence by *Mittimus* into the Common Pleas; it was doubted, whether ſuch a *Certiorari* ſhould be allowed, becauſe the Records were never removed out of the King's Bench, for that the Pleas are *coram Rege*; but it was granted. *Cro. Car.* 217. *Lutterell* verſus *Lea. Paſch.* 28 *Eliz. Dyer* 32. *S. P.*

*Antea 8.

10. Debt in *B. R.* upon an Indictment in *C. B.* the Defendant pleaded, *Nul tiel Record*, and thereupon a *Certiorari* was awarded, to certify the Record returnable *immediate*; and after eight Days expired, and no Record certified, the Court was moved for an *Alias Certiorari with a Penalty*, which was granted. *Palm.* 562. *Saltingſtall* verſus *Garraway.*

(B)

Where grantable and not, to remove Records.

1. *INformation, &c.* upon the Statute of *Recuſancy*; the Defendant pleaded, that he was indicted in another County for the ſame Offence; the Plaintiff replied, *Nul tiel Record*; thereupon the Defendant brought a *Certiorari to the Juſtices of the Peace*, and at the Day of the Return he brought in the *Tenor* of the Record, certified by *W. R. Cuſtos Rotulorum*; adjudged, that the Defendant need not take this *Certiorari* out of the Court of Chancery, and bring it by *Mittimus* into the Court of Common Pleas; becauſe that Court might immediately ſend a *Certiorari* to any *Inferior Court*; but if it was to certify the Record it ſelf, and not *tenorem Recordi*; or if the *Certiorari* had been from the Court of King's Bench to an *Inferior Court*, which removes the Record itſelf, there it had been otherwiſe; but the Return of the *Certiorari* in this Caſe was diſallowed, becauſe it was made by the *Cuſtos Rotulorum*, when it ought to have been made in the Names of the Juſtices before the Information was taken; like the Caſe of the *Cuſtos Brevium* in the Court of Common Pleas; for tho' he keeps the Record, yet the *Chief Juſtice* certifies them; beſides, the Conviction upon this Information was before the Juſtices of Gaol-Delivery, and not at the Seſſions, and ſo the *Certiorari* and all was void; and a *Certiorari de novo* was granted to them. *Hob.* 135. *Pie* verſus *Thrill. Poſtea* Failure of Record. (B) 4. *S. C.*

2. *Error, &c.* of a Judgment in Debt, and the Error aſſigned was, that no *Warrant of Attorney* was entered in the Cauſe *in ſuch a Term*, and for that Reaſon the Rule was, *quod judicium reverſetur*; but this Judgment of Reverſal being not entered, a *Certiorari* was granted to inform the Court, whether any Warrant of Attorney was entered, and *when*, becauſe it might be entered in *another Term*, and good, and it was the Neglect of the Plaintiff himſelf in the Writ of Error, that the Judgment for Reverſal was not entered. 1 *Bulſt.* 21. *Smith* verſus *Skipwith. Poſtea* War. Attorn. (A) 2. *S. C.*

3. Error, *&c.* of a Judgment by *Nil dicit* in an Action of Debt on a Bond, and the Error aſſigned was in the Adjournment of the *Continuances*; the Defendant pleaded, *In nullo eſt Erratum*,

tum, and thereupon a Motion was made for a *Certiorari* to certify them; the Court doubted at firſt, whether they ſhould grant it after *in nullo eſt erratum* pleaded, becauſe it was in order to reverſe, and not to affirm a Judgment; but at laſt it was adjudged, that it might be granted as well in the one Caſe as the other. *Mich.* 10 *Jac.* 2 *Cro.* 445. *Trin.* 3 *Jac.* 2 *Cro.* 139. *Sir William Read* verſus *Potter contra.* See *Poſtea pl.* 5.

4. Error, *&c.* of a Judgment, and the Error aſſigned was, for Want of a *Warrant of Attorney*; and thereupon the Plaintiff in Error prayed a *Certiorari* to the Chief Juſtice of the Common Pleas; and another to the *Cuſtos Brevium*, and they both returned *Non inveni aliquod Warrantum*; and now he who obtained the Judgment being dead, the Plaintiff brought another Writ of Error by *Journeys Accompts* againſt his Son and Heir, who appeared, and then the Plaintiff alledged *Diminution in her*, for that the Warrant of Attorney was not certified, and prayed a *new Certiorari*, both to the *Chief Juſtice* and the *Cuſtos Brevium*; it was objected, that it ought not to be granted twice in the ſame Action, eſpecially when the firſt has been returned by one who is a Judge of Record, (*viz.*) by the Chief Juſtice, who has certified, that *Non inveni aliquod Warrantum*, for which Reaſon Diminution cannot be alledged in this *Warrant of Attorney*, if another *Certiorari* ſhould be granted; but on the other Side it was ſaid, that this *Certiorari* was only to inform the Court, and that if it was granted, and the Judge ſhould certify, that *Habetur aliquod warrantum*, that Certificate would not be contrary to the firſt, becauſe that was *Non inveni aliquod Warrantum*, both which may be true and ſtand together; the Court was of Opinion not to grant a *Certiorari*, unleſs ſome Variance could be alledged, as in *Laſſel's* Caſe, where the Return of a *Certiorari* was *Non habetur aliquod Warrantum*, and afterwards, upon a Motion for a new *Certiorari*, as in this Caſe, it appeared, that the Original was between *John Laſſels* Eſq; *Executorem Teſtamenti, &c.* and he was not named *Executor* in the firſt *Certiorari*, and therefore in that Caſe a *Certiorari de novo* was granted. 1 *Leon.* 22. *Darrell* verſus *Thinn.*

5. *Error, &c.* in the Exchequer, upon a Judgment in *B. R.* in Trover againſt Husband and Wife, and ſeveral Errors aſſigned, which were all over-ruled; afterwards, upon a Suggeſtion that there was not any *Bail entered* for the Wife, the Court was moved for a *Certiorari*; it was objected againſt the Granting it, that the Plaintiff in Error had aſſigned ſeveral Errors, but not this for one, and that the Defendant had pleaded * *in nullo eſt erratum*, therefore 'tis now too late for a *Certiorari*, to alledge Diminution, eſpecially ſince 'tis to diſaffirm a Judgment; tho' the Court might have granted it upon ſuch a Suggeſtion, to help a Record in Affirmance of a Judgment; but adjudged, that tho' the Plaintiff in Error cannot aſſign this for an Error after *in nullo eſt erratum* pleaded, yet the Court, for their own Information, may award a *Certiorari* upon ſuch a Suggeſtion, after that Plea is pleaded, and a *Certiorari* was granted accordingly. 2 *Cro.* 5. *Cox* verſus *Cropwell.* *Antea* 3. contra

6. *Certiorari* was denied to remove an *Information* exhibited in the *Mayor's Court of London*, againſt a Wood-monger there, grounded upon an *Act of Common-Council*, unleſs ſuch Act had appeared to be againſt Law. *Paſch.* 1649. *Style* 211.

7. Error, *&c.* of a Judgment, upon *Non ſum Informatus, &c.* and the Error aſſigned was, that it appeared by the Record, that the Plaintiff declared againſt the Defendant before he had any Cauſe of Action; it was ſaid, if that was true, then there was a wrong Original certified, whereupon a *Certiorari* was granted to certify the true One. *Style* 352. *Jennings* verſus *Downs.*

(C)

To remove Indictments and Orders, &c. where grantable, and where Proceedings may be afterwards.

1. TWO were indicted for a Murder, *one of them* fled, and the other moved for a *Certiorari*, to bring the Indictment into *B. R.* and it being a Queſtion in this Caſe, whether the whole Record ſhould be removed, or only Part, it was inſiſted, that the Whole ſhould be removed, for there could be no Tranſcript of it, becauſe the Writ was to certify *Recordum & proceſſum cum omnibus ea attingentibus*, but the Court doubted, whether the whole Record ſhould be removed, becauſe it might be miſchievous to attaint him by Outlary who was fled, when he might know nothing of it; but they held, that the Clerk of the Aſſiſes might bring in the Indictment without a *Certiorari*. *Trin.* 17 *Car. March* 112.

2. Two were *indicted* upon the Statute of forcible Entry, they brought a *Certiorari* to remove the Indictment, and *one* of them refuſing to be bound in 10 *l.* with Sureties, as the Juſtices of Peace ſhould think fit, according to the Statute 21 *Jac. cap.* 8. the ſaid Juſtices proceeded to try the Indictment; but it was adjudged, that where one of the Parties finds Sureties, the Indictment ſhall be removed, tho' the other refuſes, and that after a *Certiorari* brought, and a Tender of Sureties, all the Proceedings are *coram non judice.* *Trin.* 15 *Car. March* 27.

3. *Certiorari* directed to the Juſtices of Peace to remove an Indictment of forcible Entry taken before them at a *private Seſſions*; and a Motion being made for an Attachment againſt them, becauſe they refuſed to allow it, their Counſel inſiſted, that this *Certiorari* was delivered to them in a *private Seſſions*, when it ought to have been in an open and general Quarter-Seſſions; and the Party who procured it ought to give Security to proſecute, *&c.* according to the Statute, which

he had not done, for which Reaſons it was not allowed; but the Court ordered Reſtitution, and ſpared the Attachment. *Style* 89. *Chambers* verſus *Floyd.*

4. A *Certiorari* was denied to remove an Order of Seſſions for chooſing one *Conſtable*, becauſe, if it had been granted, it might have prevented Juſtice being done by the Juſtices of Peace, but they granted a *Mandamus* to ſwear him. *Paſch.* 25 *Car. Style* 127.

5. The Defendant was indicted before Juſtices of Peace, and after he had pleaded Not guilty, and the *Jury were gone to conſider of their Verdict*, he delivered a *Certiorari*, and the Juſtices returned the Verdict, and held good; for it cannot be delivered after the *Jury is ſworn.* 1 *Salk.* 144. *The King* verſus *North.*

6. After a Warrant granted and Diſtreſs made, upon a Conviction for Deer-ſtealing, a *Certiorari* was brought to remove the Conviction; and after the Record was removed, the Conſtable ſold the Goods, but kept the Money, and would not *return his Warrant*; adjudged, that the Conſtable might proceed in the Execution after the *Certiorari*, becauſe it was begun before; for a *Certiorari* is no more a *Superſedeas* than a Writ of Error on a Judgment in *C. B.* to ſtay the Execution on a *Fi. fa.* already begun; that *B. R.* have no Power over this Warrant, becauſe it was granted before the *Certiorari* iſſued, therefore they would make no Rule on the Conſtable to return it, but ſaid, that the Juſtices might fine him if he did not return it, or pay the Money to the Proſecutor. 1 *Salk* 147. *The Queen* verſus *Naſh.*

7. The Cenſors of the College of Phyſicians, having Power by their Charter, confirmed by Act of Parliament, to fine and impriſon, for ill Practiſe in Phyſick, condemned, fined, and committed Dr. *Groenvelt* for the ſame; adjudged, that a *Certiorari* lies on this Judgment, becauſe a Writ of Error would not, it being a Proceeding without Indictment, and not according to the Courſe of Common Law, but no inferior Juriſdiction can be exempt from the Superintendency of the King in this Court. 1 *Salk.* 144. Dr. *Groenvelt* verſus *Burwell.*

8. It was objected againſt granting *Certiorari*'s into *Wales*, that by this Means the Court of Grand Seſſions would be rendered uſeleſs; but adjudged, 'tis the conſtant Practiſe to ſend them into *Counties Palatine*, and yet they have original Juriſdiction, and the like Courts within themſelves, as they of *Wales* have. 1 *Salk.* 146. *The Caſe of Cardiffe Bridge.* 1 *Salk.* 148. *Croſſe* verſus *Smith. S. P. Poſtea pl.* 10. *S. C.*

Mod. Caſes 61. 9. *Certiorari after Conviction* ought to remove both Indictment and Conviction; and if it mentions one and not the other, it may be quaſhed; and if taken out before Conviction, and not uſed till after, the Party ought to loſe the Benefit of it. 1 *Salk.* 150. *The Queen* verſus *Dixon.*

10. Error in *B. R.* of a Judgment in the *Court of Ely*, *&c.* the Error aſſigned was, that a *Certiorari* iſſued, *&c.* to remove the Cauſe, and after it was allowed they ſtill proceeded there; the Defendant in Error pleaded a Grant to the *Biſhop of Ely* of Conuſance of Pleas, and ſhewed an Allowance of it in *B. R. Anno* 21 *Ed.* 3. and that the Cauſe did ariſe within the Juriſdiction, *&c.* that they returned this Matter on the *Certiorari*, and ſo the Court of *Ely* had Authority to proceed; and upon Demurrer to this Plea, it was inſiſted for the Defendant, that a *Certiorari* ought not to go to *Ely*, becauſe they have a *Franchiſe of Conuſance of Pleas*; and admitting the *Certiorari* would lie, yet 'tis no *Superſedeas*, but the Cauſe below could not be removed by *Certiorari*, becauſe the Plaint there was entered after the *Teſte*, and before the Return of the *Certiorari:* But adjudged, if the Franchiſe is *Tenere placita*, then *B. R.* hath a concurrent Juriſdiction, and the Party may chuſe whether he will be ſued there or here in *B. R.* that the Subjects have Right to a *Certiorari*; and this appears by the Statute 43 *Eliz. cap.* 5. and 21 *Jac. cap.* 23. which reſtrains the Abuſe of them, that a *Certiorari* will lie to a *Franchiſe* which hath *Conuſance of Pleas*, which is more than *Tenere placita*, that it lies to an *exempt Juriſdiction*, becauſe that is a *Franchiſe* only for the Benefit of the Defendant, which he may waive if he will; that even in cuſtomary Proceedings, as upon *Foreign Attachment*, if the Defendant cannot find Bail below, he may bring a *Certiorari*, and upon putting in Bail above, the Court below may proceed; that all Proceedings, *after a Certiorari allow'd*, are erroneous, therefore, as to ſuch, 'tis a *Superſedeas*, by the ſame Reaſon as a *Habeas Corpus* is, that this Plaint is well removed, becauſe a *Certiorari* is like a *Recordari*, which removes every Thing pending between the *Teſte and Return.* 1 *Salk.* 148. *Croſſe* verſus *Smith.* See 1 *Cro.* 160, 261. *Jones* 209. 1 *Vent.* 63. 3 *Brownl.* 335.

11. *Certiorari* on an Order of Seſſions for removing a High Conſtable and putting in another; upon a Motion for a *Procedendo* it was inſiſted, that the Writ was made out on the *Saturday* before *Hillary Term*, 12 *Feb.* and the *Fiat* was not ſigned till the firſt Day of *Eaſter-Term* following, this being irregular, a *Procedendo* was granted; and it was held, that where a *Certiorari is to remove Orders*, the *Fiat* for making out the Writ muſt be *ſigned by the Judge*, and not the Writ it ſelf; but where 'tis to remove an *Indictment*, *the Fiat* muſt be ſigned and the Writ too, for that is required by a late Statute, that if a *Fiat* for a *Certiorari* to remove an Order, is ſigned on the ſame Day the Writ was taken out, 'tis good in the principal Caſe, becauſe it was before the Eſſoin-Day of *Hillary-Term*; but a *Fiat* ſigned in *Eaſter-Term* cannot Warrant a *Certiorari*, bearing *Teſte* the laſt Day of the precedent Term. 1 *Salk.* 150. *The Queen* verſus *White.*

12. *Certiorari* to remove an Indictment at the *Old Baily* againſt the Defendant for a Cheat, for that he borrowed 600 *l.* of a Feme covert, and promiſed to ſend her fine Cloth and gold Duſt as a Pledge, and inſtead of that, ſent her coarſe Cloth and no gold Duſt; a *Certiorari* was granted, becauſe it was not a criminal Matter, and the Defendant offered to try it that Term, which would be a Benefit for the Proſecutor, becauſe, by the Courſe of the *Old Baily*, he could not try it ſo ſoon. 1 *Salk.* 151. *Nehuff*'s Caſe.

13. The Defendant being convicted on an Indictment on the Statute 14 *Car.* 2. for Beating certain Officers, *&c.* obtained a *Certiorari*; and upon a Motion for a *Procedendo* it was inſiſted, that a *Certiorari* was not proper after Conviction and before Judgment, becauſe the Juſtices who tried the Fact were the moſt proper to ſet the Fine: But adjudged, that this Writ lies after Conviction, *&c.* becauſe in ſome Caſes a *Writ of Error* will not lie, but in this it will; becauſe the Proceedings were grounded on an Indictment, and therefore the Party grieved might have a Remedy by a Writ of Error, and for that it may not be ſo proper in this Court to ſet the Fine, a *Procedendo* was granted: And *Holt* Ch. Juſt. held, that if a Judge of Aſſiſe, upon a Conviction there, doubted of the Judgment, he might remove the Record into this Court by *Certiorari*, and that upon Judgment given here, a Writ of Error of a Record *coram vobis reſiden'*, would lie. 1 *Salk.* 149. *The Queen* verſus *Porter.* Mod. Caſes 17.

(D)

Where not grantable to remove Indictments and Orders.

1. *Certiorari* not granted to remove an Indictment of *Barretry* found at the Aſſiſes; for the Court held it was never granted in ſuch Caſes, nor to the *Old Baily*, without ſome ſpecial Cauſe. 1 *Salk.* 144. See *Antea* (C) *pl.* 12. See 1 *Salk.* 150. *The Queen* verſus *Knatchbull. S. P.*

2. *Two Juſtices* tendered the Oaths appointed by the Statute 1 *Will.* 3. *cap.* 8. to *Dr. Sands*, which he refuſing, it was certified to the Judge of Aſſiſe, and by him into the *Exchequer*, according to the Statute 7 *&* 8 *Will.* 3. *cap.* 27. and upon a Motion for a *Certiorari* to remove this Conviction of *Recuſancy*, it was denied, becauſe it would be to evade the Statute, for when 'tis in *B. R.* it cannot be ſent back again, and this Court cannot proceed againſt the Party; 'tis true, it was granted in the Caſe of the *Duke of York*, being preſented upon the Statute 3 *Jac.* 1. *cap.* 4. at the Quarter Seſſions, for not coming to Church, but that was the only Caſe. 1 *Salk.* 145. *Dr. Sands's* Caſe.

3. This Writ is never to be allowed without *Bail* indorſed on it; this is required by a late Statute, and ought not to be allowed without it. 1 *Salk.* 149. *The Queen* verſus *Bothell.* Mod Caſes 17, 33.

4. Ruled, that no *Certiorari* ſhall be granted to remove any Orders of Juſtices, where an Appeal lies to the *Seſſions*, before the Matter is determined on the Appeal; and if an Order ſhould be removed before that Time, then before 'tis filed, the Party may object againſt this *Certiorari*, and the Order ſhall be ſent down again; but after the Time of Appeal is expired, or after the Order is filed, then 'tis too late. 1 *Salk.* 147. Poſtea (E) 9.

(E)

Variance between the Certiorari and the Order, and Indictment removed, and of Returns of the Writ, good, and not good.

1. *W. F.* and *L.* were all Three *jointly* indicted at the Seſſions; there was another Indictment againſt *W. alone*, and another againſt *W. and L. and one T. S.* and a *Certiorari* was brought to remove all Indictments in which the ſaid *W. and F. and L.* were indicted, without ſaying, *vel aliquis eorum indictatus exiſtit*; adjudged, that only the *joint Indictment* was removed. 1 *Salk.* 146. *The King* verſus *Brown.*

2. *Certiorari* to remove all Orders againſt *A.* and *B.* and the Order was made againſt *A. alone*; adjudged, that Order was not removed, for it ought to be, to remove all Orders againſt *A.* and *B. vel aliquem eorum.* 1 *Salk.* 151. *The Queen* verſus *Barnes.*

3. *Certiorari* to remove an Order againſt *T. S.* concerning *foreign Salt*; and it appeared by the Order removed, that it was only about *Salt*, without the Word *Foreign*; adjudged, the Order was not removed. 1 *Salk.* 145.

4. *Certiorari* to remove a Conviction for *Deer-ſtealing*, and the Juſtices returned *two Affidavits*, and a Warrant to diſtrain; this Return was quaſhed, as being imperfect. 1 *Salk.* 146. *The King* verſus *Levermore.*

5. *Certiorari* to remove an Order, the Return was, *cujus quidem tenor ſequitur in hæc verba*, it was quaſhed, becauſe it ſhould be *qui quidem ordo ſequitur in hæc verba.* 1 *Salk.* 147. *The Queen* verſus *St. Mary's Pariſh in the Deviſes.*

6. *Certiorari* to remove a Conviction for ſelling Cyder, without paying the Duty on the late Statute, and the Return was in *Engliſh*, and held good upon a Motion to quaſh it. 1 *Salk.* 149.

7. By the Statute 5 *&* 6 *Will.* 3. *cap.* 11. where a *Certiorari* is brought to remove an Indictment, the Party muſt enter into a Recognizance of 20 *l.* to try it; a *Scire facias* was brought upon ſuch a Recognizance, which, upon *Oyer*, appeared to be in 40 *l.* now, this being not according to the Statute, was held to be no *Superſedeas*, but yet ſtill 'tis a Recognizance at Common Law, upon which a *Scire facias* may be brought. 2 *Salk.* 564. *The King* verſus *Ewer.*

8. Upon a *Certiorari*, the very Record muſt be returned, and not a *Tranſcript*, for if ſo, then the Record will ſtill remain in the *inferior Court*; 'tis true, in the *C. B.* they return the *Tran-*

Tranſcript, but that is returned as if it was the Record it ſelf; and ſo it is in Judgment of Law. 2 *Salk.* 565. *The King* verſus *North.*

Antea (D) 3. 9. *Certiorari* to remove an Indictment, but the Party did not find two Manucaptors before the Juſtices of Peace, in the Sum of 20 *l.* to plead to the Indictment, and to try it the next Term, *&c.* according to the Statute, and for that Reaſon this was held to be no *Superſedeas.* *Mod. Caſes* 33. *The Queen* verſus *Bothell.*

10. *Certiorari* to remove *all Inquiſitions* of *Forcible Entries* made upon *W. R.* the Juſtices return an Inquiſition of a Forcible Entry *made by W. W.* upon *W. R.* and now Affidavits were offered to give the Court ſatisfaction, that there was no other Inquiſition of a Force againſt him; but the Court would hear no *Affidavits* againſt the Return, or for it, becauſe the Return was Matter of Record. *Mod. Caſes* 90. *Cowper's* Caſe.

11. After a *Writ of Error*, upon a Judgment in the *C. B.* and the Judgment affirmed, the Plaintiff in the original Action moved for a *Certiorari* to remove into *B. R.* the Recognizance taken in *C. B.* upon the Allowance of the Writ of Error, that the Plaintiff might bring a *Scire facias againſt the Bail*; it was objected, that *B. R.* could not grant ſuch a *Certiorari*, becauſe the Recognizance is a Record, and therefore not to be removed by ſuch a Writ, for that removes only * *tenorem Recordi: Sed per Curiam*, the Recognizance in the Courts in *Weſtminſter* is taken by it ſelf, and is no Part of the Record on the Roll, and therefore it may be removed by *Certiorari*, and it was granted accordingly. 4 *Mod.* 104. *Barſdale* verſus *Drew.*

* Dyer 275. a. Antea 5.

Ceſſion.

(A)

1. IN a *Quare Impedit*, the Caſe was, *William Paul*, Rector of *Chinner*, was elected *Biſhop of Oxford*, and before his Conſecration he got a Diſpenſation from the Archbiſhop, to *retain* his ſaid Rectory with the Biſhoprick, which Diſpenſation was confirmed by Letters Patents under the Great Seal, with a *Non obſtante*, according to the uſual Form; and this was to retain the ſaid Rectory during his Life, and ſo long as he continued *Biſhop of Oxford*, that *William Paul* died, and the Plaintiff being Patron of *Chinner*, brought this *Quare Impedit* againſt the Defendant, who, after the Death of *Paul*, was elected *Biſhop of Oxford*, and got Letters of Diſpenſation, *&c.* to hold the ſaid *Rectory in Commendam*, *&c.* It was agreed, that if an Incumbent of one or more Benefices is conſecrated a Biſhop, all his Benefices are void, and that upon ſuch an Avoidance, the King hath a Prerogative to preſent by *Ceſſion*, and not the Patron, that a Diſpenſation *after the Conſecration*, comes too late to prevent ſuch Avoidance: But it was adjudged, that ſuch a Diſpenſation and Confirmation before the *Conſecration*, prevents the Avoidance afterwards; and in ſuch Caſe the Incumbent, tho' made a Biſhop, continues Incumbent ſtill, ſo that the Avoidance is not by *Ceſſion*, but by Death, and conſequently in this Caſe, the Biſhop being dead, it belongs to the Plaintiff (being the true Patron) to preſent. *Vaugh.* 18, 20. *Eades* verſus *Biſhop of Oxford.*

Challenge.

To the Array good, and how to be tried. (A)
To the Array, not good. (B)
To the Polls, good. (C)
To the Polls, not good. (D)
In Capital Caſes, good. (E)
In Capital Caſes, not good. (F)

Challenge of Jurors is either to the Array, *or to the* Polls; *the one is, when the whole Panel is excepted againſt as partially returned by the Officer; the other is, when one or more of the Jurors is excepted againſt, as not indifferent; and this is either* Peremptory, *as in criminal Caſes,* (viz.) *In Felony, the Party may except* againſt twenty, *and in Treaſon* againſt thirty-five, *without ſhewing any Cauſe; or 'tis* Principal, *as in civil Actions, where the Party may except againſt any of the Jurors, for ſome Cauſe ſhewn, which, if true, the Law allows to be a* principal Challenge; *as for Inſtance, where the Juror is of* Kindred, *or Tenant to either of the Parties; and this is called a* Challenge to Favour.

(A)

To the Array good, and how to be tried.

1. IN an *Aſſiſe, &c.* the Defendant was an *Earl*, and he challenged the *Array*, for that he was a Peer of the Realm, *habens locum & vocem in Parliamento*, and there was no *Knight* returned on the Panel by the Sheriff, *&c.* and this was held a good Challenge. *Paſch.* 1 *&* 2 *Mar. Dyer* 107. *Plow. Com.* 117. *S. P.* 4 *Eliz. Dyer* 208. *S. P.* 6 *Rep.* 45. *In the Counteſs of Rutland's* Caſe.

2. Where the *Array* was challenged by the Defendant, becauſe the * *Under-Sheriff was Couſin to the Plaintiff*, it muſt be ſhewed *how Couſin*, and then the Challenge is good to the Favour. *Bendl.* 33. *Dabur* verſus *Lamb. Mich.* 29 *Eliz. Goldsb.* 42. *S. P.* * Poſtea (B) 4. S. P.

3. In a *monſtrans de droit* for certain Lands in the Poſſeſſion of the *Queen*, by Reaſon of the *Infancy of W. R.* the Parties being at Iſſue, and the Jury returned, the Attorney General challenged the *Array*, becauſe returned by the *Sheriff of Kent*, who was Tenant to the Plaintiff; the Defendant counter-pleaded, that he was alſo Tenant to the Queen, which Counter-Plea was adjudged immaterial; for tho' he was Tenant to both, yet the Infant ſhall have the Benefit of his Challenge; afterwards the Defendant confeſſed the Challenge, and the *Array* was quaſhed, and a new *Venire facias* awarded. *Cro. Eliz.* 663. *Lord Hunſdon* verſus *Baker.* Moor 553.

4. In Treſpaſs, *&c.* the Jury were ready at the Bar to try the Iſſue, and it was moved, that the Sheriff, by whom they were returned, held certain Lands of the Manor then in Queſtion, and of which Manor the Defendant in the Action was then poſſeſſed; and that he likewiſe held other Lands of the ſame Defendant for the Term of Years; and it being objected by the Plaintiff, that the Defendant ought to rely upon one of the aforeſaid Cauſes, the Court held, that he might rely on both; for it amounted to no more than, that the Sheriff who returned the Panel was within the Diſtreſs of the Defendant; thereupon the Plaintiff replied, not within the Diſtreſs, and *Tryers* being appointed by the Court, the Defendant objected, that they ought not to be two of the Jury, becauſe all of them were favourable, and therefore prayed two *De circumſtantibus*, but the Court ordered two of the Jury, (*viz.*) the fourth and ſeventh in the Panel, but the Defendant refuſed the fourth, and ſo the third was taken, and they found the Jury favourable; and ſo the Panel was quaſhed. *Goldſ.* 91. *Liſter* verſus *Delabarr.*

5. The Defendant challenged the *Array*, becauſe the Sheriff was *Couſin* to the Plaintiff, which was confeſſed by him; but at the ſame Time he alledged, that he was as near a Kin to the Defendant, upon which it was demurred, but the Challenge was held good to the Favour; but 'tis not a principal Challenge, and the Array was quaſhed. *Cro. Eliz.* 23. *Audley* verſus *Sattrell.*

6. Where the Challenge is to the *Array*, the Court appoints *two Tryers*, who are ſworn, and then the Cauſe of Favour is ſhewed to them, which may be called the Iſſue they are to try; and if 'tis proved, then they give their Verdict, that they are not indifferently impaneled, and this is entered of Record; but if the Favour is not proved, then they ſay, that the Jury was indifferently impanelled, and ſo the Trial goes on without making any Entry of that Matter. *Paſch.* 9 *Jac.* 1 *Bulſt.* 114.

7. This Challenge ought to be read at the Bar by the Council in *French*; but if 'tis put into the Court in Writing, it muſt be in *Latin*, but ſtill to be repeated at the Bar in *French*. *Paſch.* 9 *Jac.* 1 *Bulſt.* 114.

8. 'Tis

Yel. 51. 8. 'Tis a good Challenge to the Array, if any Juror was put in the Panel at the Inſtance or Deſire of either the contending Parties, as it was held in 1 *Brownl.* 195. *Freſhwater* verſus *Read. Poſtea* Uſes. (A) 17. *S. C.*

9. *Error, &c.* in the *Exchequer-Chamber* of a Judgment, *&c.* and the Error aſſigned was, for that the Sheriffs of *London* having returned a Jury, and all of them not appearing, the Plaintiff prayed a *Tales*, which was granted; and after the Jury was *full*, the Plaintiff *challenged the Array*, which was quaſhed, for a Cauſe ſhewed againſt the Sheriff who returned the Panel, and thereupon a new Jury was impanelled by the *Coroner*, by which Jury the Cauſe was tried, which ought not to have been done; becauſe the Plaintiff having prayed a *Tales* to the Sheriffs, and having obtained it, he is eſtopped to object any Thing againſt them by a Challenge to the *Array*; but adjudged, that there can be no Challenge, either to the *Panel* or to the *Polls*, *till the Jury is full*; and in this Caſe, thoſe of the *principal Panel* not appearing, there was a Neceſſity to have a *Tales*, otherwiſe the Challenge could not be taken; and if the Plaintiff had not prayed it, the Defendant would not, and ſo the Cauſe would have remained *pro defectu Juratorum*; but when once the Jury is full, the *Array* muſt be challenged before one of them is ſworn, or elſe 'tis too late; it was likewiſe held, that tho' the Plaintiff ſues his *Venire Facias* to the Sheriff, he is not eſtopped thereby to challenge the Panel for Kindred, or any other lawful Cauſe ariſing before. *Hob.* 235. *Viccars* verſus *Langham.*

10. The Iſſue was, whether the Lands in Queſtion were Parcel of ſuch a Manor, or of another, and the Court awarded, that the Jury ſhould have a View, but that no Evidence ſhould be given to them upon the View; but yet Evidence was given to ſome of them, and when they came into Court to be ſworn, they were for that Reaſon challenged; but thoſe who had not heard any Evidence, were ſworn, and they appointed two Triers to try, whether thoſe who were challenged were indifferent or not; and the Court directed *thoſe Tryers* in the Law, that thoſe could not be indifferent, who had heard any Evidence before they came thither; thereupon the Tryers examined them one by one, whether they were indifferent, afterwards they informed the Court that they were, and ſo they were ſworn, and added to the reſt; and when the Jury was full, the Court committed the *two Tryers*, for ſaying they were indifferent, when the Court had directed that they were not, and that they would Fine thoſe of the Jury which had heard Evidence contrary to the Direction of the Court. *Palm.* 363. *Sir John Dalſton* verſus *All-Souls-College.*

11. The Jury being ready to try the Cauſe at the Bar, the Array was challenged for want of *Hundredors*; but it was inſiſted, that the Jury was returned by the *Secondary*, by Rule of Court, and the *Hundredors* were left out by the *Conſent* of the Parties, adjudged, that their *Conſent* ſhall not alter the Law, ſo as to avoid the Challenge, and ſo the Array was quaſhed. *Mich.* 1649. *Style* 233.

(B)

To the Array, not good.

1. IN Attaint the Array was challenged, becauſe the Son and Heir of *Mary*, who is Wife to *W. R.* the Sheriff, is *Couſin* to one of the Petit-Jury; it was *demurred to the Challenge*, becauſe it was not ſhewed, that he was Sheriff *at the Time of the making the Panel*, or that *Mary* was *then* his Wife. 1 *Mar. Dyer* 191. 29 *H.* 8. *Dyer* 38. *S. P.*

2. The *Array* was challenged, becauſe the Sheriff was *Conſanguineus* of the Defendant; Now, tho' this is a Principal Challenge, and ſo it is, if the Defendant had been *Conſanguineus* of the Sheriff's Wife; yet becauſe he did not ſay, that he was *Conſaguineus* of the Defendant *at the Time of the Array* made, the Challenge was diſallowed. *Mich.* 29 *H.* 8. *Dyer* 37. See 1 *Mar. Dyer* 191. and 14 *Eliz. Dyer* 309. *S. P.*

3. In Ejectment, *&c.* upon a Leaſe made by *Sir John Digby*; after Not guilty pleaded, the Array was challenged, for that the Sheriff was *Conſanguineus* of the Leſſor of the Plaintiff, and thereupon a *Venire facias* was awarded to the Coroner; but afterwards the Challenge being adjudged inſufficient, a *Venire facias* was awarded to the Sheriff, and good. *Hutt.* 25. *Bedford* verſus *Dandy*. *Hutt.* 26. *Craddock* verſus *Wenlock. S. P. pl.* 24. *S. P.*

4. Judgment in an Action on the Caſe was reverſed in the Exchequer-Chamber, for that the *Venire facias* was awarded to the *Coroner*, upon a Suggeſtion by the Plaintiff, that the *Under-Sheriff was Couſin* to the Defendant, and * ſhewed how; and it not being denied by him adjudged, this was no *Principal Challenge* to the Array. 2 *Cro.* 547. *Simonds* verſus *Walſh. Hutt.* 24. *Eire* verſus *Barriſter. S. P. Sir Edw. Kinaſton* verſus *Earl of Bridgwater. S. P.* but tis good to the Favour.

* Antea (A) 2.

5. In an *Aſſiſe, &c.* The Tenant challenged the *Array*, for that he had an Action of Treſpaſs then depending againſt the *Sheriff*; and the better Opinion was, that 'tis no principal Challenge, unleſs the Treſpaſs is for his Entering on the ſame Lands for which the Aſſiſe was brought; but if the Treſpaſs is for entering on other Lands, not in Demand, then 'tis no principal Challenge; the Law is the ſame where the Action is only to recover the Debt and Damages; for if ſuch an Action is depending, 'tis no principal Challenge. 2 *Brownl.* 229. *Earl of Shrewsbury* verſus *Earl of Rutland.*

6. In a *ſecond Deliverence* there was a Challenge taken to the *Hundred*, and it appeared, that the *Hundred of Feverſham in Kent* was within the *Lathe of Scray*; and that there never had been any Court in the *Hundred of Feverſham*, but all the Inhabitants of that Hundred always went to the Court of the *Lathe of Scray*; adjudged, that the Challenge ought to be taken to the *Lathe*, and that 'tis not good to the *Hundred*. *Mich.* 29 *Eliz.* 2 *Leon.* 109. *Stainsby* verſus *Hales*.

7. In Ejectment, upon a Leaſe made by *Sir Edward Kinaſton*, after iſſue joined, the Plaintiff in the Ejectment (who was only Nominal) prayed a *Venire facias* to the *Coroner*, for that the *Sheriff* (who returned the Panel) *was of Kin to him*, which the Defendant denied, and that was entered, and thereupon the *Venire facias* went to the Sheriff, and the Cauſe coming to be tried by *Niſi prius*, the Defendant challenged the *Array*, for that *the Sheriff was of Kin to Sir Edw. Kinaſton*, the Leſſor of the Plaintiff; upon which Challenge the Plaintiff demurred, the Queſtion was, whether the Defendant was barred to challenge the *Array* for any other Cauſe than what the Plaintiff himſelf had ſhewed, to have the *Venire facias* to the *Coroners*? and adjudged that he might; then another Queſtion was, whether this Challenge for *Affinity* between the Sheriff and Sir *Edw. Kinaſton*, who was the Leſſor of the Plaintiff, is a principal Challenge, or not, ſince *Sir Edward* himſelf was no Party to the Suit; and adjudged no principal Challenge; but that it was a good *Challenge to the Favour*, and triable by Tryers, unleſs the Defendant had alledged, that the Leaſe was made to try the Title, and that the Action was proſecuted at the Coſts of Sir *Edward Kinaſton* the Leſſor. *Moor* 894. *Eyre* verſus *Baniſter*.

(C)

To the Polls, good.

1. IN Ejectment, *&c.* the Parties were at Iſſue, and the Defendant challenged one of the Jury, for that he held Land under the ſame Title as he did, which he proved by a Witneſs produced by the Plaintiff himſelf in this Cauſe; and this was held a good Challenge. 2 *Leon.* 40. *Green* verſus *Edwards*.

2. After iſſue joined, a *Superſedeas* was awarded, but the Judge of *Niſi prius* not knowing it, proceeded to try the Cauſe, and there was a Verdict for the Defendant; afterwards the Plaintiff moved the Court for a new Trial, upon *Affidavit* made of this Matter, and becauſe the firſt Trial was *coram non judice*, by Reaſon of the *Superſedeas*, another Trial was granted; adjudged, that if any of the Jury which tried the Cauſe, were returned upon the ſecond Panel, it was a principal Challenge, that he was in the firſt Trial. *Cro. Eliz.* 33. *Long*'s Caſe.

2. A Juror was challenged, for that the Plaintiff was Lord of the Hundred, in which he dwelt, and did Suit to his Court-Leet, and this being tried, and found to be ſo, it was held a principal Challenge; for he was within the *Diſtreſs* of the Plaintiff, and therefore he was withdrawn. *Hill.* 2 *Eliz. Dyer* 176.

4. In *Replevin, &c.* the Defendant avowed for Rent-Charge, the Plaintiff replied, *hors de ſon fee*, upon which they were at Iſſue; and the Jury being returned, the Plaintiff challenged one of them, becauſe *he was Steward of the Manor*, of which the Defendant was Lord; adjudged a principal Challenge. *Trin.* 27. *H.* 8. *Bendl.* 6. *Moor* 3. *S. C.*

5. So 'tis a good Challenge to ſay, that *W. R.* returned of the Jury, was an *Arbitrator* for the Party, becauſe he is created by their own Submiſſion; but otherwiſe, if he was choſen * Commiſſioner to examine Witneſſes in Chancery; for tho' he is choſen by the Party, he is appointed by Commiſſion under the Great Seal. 9 *Rep.* 71. *In Sir Richard Peacock*'s Caſe, and *Godb.* 193. *Forteſcue* verſus *Cook. S. P.* * Poſtea (D) 2.

6. In *Treſpaſs*, where the Defendant juſtified as Servant to the Lord of a Manor, and by his Command, 'tis a good Challenge to ſay, that he is Tenant to the Lord, tho' the Lord himſelfis no Party to the Record. 1 *Brownl.* 195. *Freſhwater* verſus *Read*.

7. 'Tis a *principal Challenge*, that a Juror ſtood Godfather to the Plaintiff's Child; ſo where four Knights were impanelled in a Grand Aſſiſe, 'tis a good Challenge, that one of them married the Plaintiff's Daughter, and this ſhall be tried by the other three Knights. *Moor* 3.

8. In a *Writ of Right*, four Knights were returned, and they appeared at the Bar without their Swords, the Court told them that they ought to be *gladiis cincti*, and that it was a good Challenge, if they were not; thereupon they went from the Bar and returned with their Swords. *Trin.* 6 *Eliz. Moor* 67. *Squire* verſus *Read*.

9. 'Tis a good Challenge to ſay, that one of the Jurors hath a Suit in Law depending with the Plaintiff; but if after a Verdict an *Affidavit* is made of this Matter, 'tis not a good Cauſe for a new Trial, becauſe the Party might have challenged him before the Trial. *Style* 129. *Loveday*'s Caſe.

10. The Queſtion at a Trial at Bar was, whether the Fair called *Wayhill Fair*, ſhould be kept at *Wayhill*, or *Andover in Hampſhire*, one of the Jury, who lived at *Wayhill*, was challenged, for that if the Fair was held there, it would occaſion Manure to improve the Land: Now this being a Challenge to the *Favour*, two of the Jurors were ſworn *Tryers*, and their

Oath was, ſſ. *You ſhall well and truly try, whether T. S.* (the Juror) *challenged, ſtand indifferent between the Parties.* 1 *Salk.* 144.

11. *Cook* being indicted for High Treaſon, and the Jury called, he offered to ask them one by one, whether he had not ſaid, he was guilty, or would be hanged; Adjudged, this is good Cauſe of Challenge, if proved by a Witneſs, but not out of the Mouth of the Juryman himſelf; for he ſhall never be examined, nor a Witneſs in any Matter criminal nor infamous, in Order to challenge him. 1 *Salk.* 145.

(D)

To the Polls, not good.

1. THE Queen brought an Information againſt the Defendant, for an Intruſion, who challenged a Juror for want of a ſufficient Freehold; upon Examination of the Matter, it was found, that he had a Freehold to the Value of 15 *s. per Annum*; adjudged, that tho' by the Statute 5 *H.* 5. he ought to have 40 *s. per Annum*, and by the Statute 27 *Eliz.* 4 *l. per Annum*, yet thoſe Statutes extend only to Common Perſons, and not to the *Queen*; for where ſhe is a Party, any Freehold is ſufficient, and ſo the Challenge was not allowed. *Cro. Eliz.* 413. *Sir Chriſtopher Blunt*'s Caſe.

2. 'Tis no good Challenge, to ſay, that one of the Jurors was a Commiſſioner in Chancery for the other, to examine Witneſſes; for tho' he is choſen by the Party, he is appointed by a * Commiſſion under the Great Seal, and is upon Record, and therefore is preſumed to be indifferent; but 'tis otherwiſe, where he is Arbitrator, becauſe he is choſen, and hath his Authority by the Submiſſion of the Parties. 9 *Rep.* 71. *In Sir Richard Peacock*'s Caſe. *Godb.* 193. *Forteſcue* verſus *Cook. S. P.*

* Antea (C) 5.

3. Where the Plaintiff laboured with a Juror to appear, and to give a Verdict according to his Conſcience; this was held no Cauſe of Challenge. *Mich.* 38 *H.* 8. *Dyer* 48.

4. 'Tis not a principal Challenge, that a Juror is in Debt either to the Plaintiff or Defendant. *Mich.* 26 *H.* 8. *Moor* 3.

5. The Defendant firſt challenged the *Array*, for that the Sheriff was of Kin to the Plaintiff, and this was tried againſt him; then he challenged the Polls, but the Court would not allow that Challenge, without ſhewing Cauſe, why he did challenge them one by one. *Moor* 846. *Luke* verſus *Clerke.*

6. Information for a Forgery, the Defendant challenged one of the Jury, for that he had been lately entertained at the Proſecutor's Houſe; and this was allowed a good Challenge to the Favour, tho' againſt the King. 1 *Vent.* 309. See *Cro. Car.* 663. *S. P.*

7. In Ejectment, upon Not guilty pleaded, and the Jury being at the Bar, one was challenged, for that he was Tenant of a Manor, to which there was a *Court-Leet*, and that the Plaintiff was *Steward* of that Court; the Court inclined, that it was no principal Challenge. *Allen* 29. *Lawrence* verſus *King.*

8. Information againſt *Ford Lord Grey*, tried at the Bar, for taking away the Daughter of the *Earl of Berkley*; the Counſel for the King challenged ſome of the Jury of *Surrey*, and it was inſiſted for the Defendant, that according to the Statute 33 *Ed.* 1. called, *The Ordinance of Inqueſts*, the Cauſe of Challenge ought to be ſhewed preſently, and to enforce the Counſel for the King ſo to do; the *Lord Grey*'s Counſel challenged *Touts paravaile*; but adjudged, that by that Statute the King ought not to ſhew Cauſe of his Challenge before all the Jurors are called over, for if there are enough, beſides thoſe who are challenged, then there will be no Occaſion to ſhew any Cauſe, why he challenged the reſt; but if there are not enough, then he muſt ſhew the Cauſe of his Challenge. *Raym.* 473. *The Lord Grey*'s Caſe. 1 *Vent.* 310. *S. P.*

9. In an Information in the Nature of a *Quo Warranto* againſt ſeveral Cittizens of *Worceſter*, for uſing ſeveral Liberties and Franchiſes in the ſaid City, the Jury being out of the ſaid City, the Counſel for the Defendants challenged the Polls, for that the Jurors had not any Freehold within that City; adjudged no good Challenge, becauſe the Statute 2 *H* 5. *cap.* 5. doth not extend to Caſes where the King is Party; and the Statute 35 *H.* 8. *cap.* 6. extends not to Cities and Corporations, but to the Sheriffs of Counties at Large; for if a Panel made in Corporations muſt have Freeholders, it muſt likewiſe have ſix Hundredors, which cannot be in any Corporation; and ſo 27 *Eliz. cap.* 6. therefore the Jurors in Corporations muſt not be as at Common Law; 'tis true, in *Cro. Eliz.* 413. *Blunt*'s Caſe, 'tis ſaid, that there ought to be ſome Freeholders, but that cannot be intended in Corporations; becauſe in many there are no Freeholders at all, and ſo there would be a Failure of Juſtice; and ſuch a Challenge was never made in any Trial at *Niſi prius* in *Guild-hall, London*, and it would be inconvenient, after ſo long Practice to the contrary, to admit ſuch a Challenge. *Raym.* 486. *The King* v. *Higgings.* 1 *Vent.* 166. *S. C.*

(E)

In Criminal Cauſes, good. Antea (C) 11.

1. TWO were indicted for Felony; one of them challenged a Juror, and the other would not, yet if the Cauſe of Challenge is found to be true, he ſhall be withdrawn. *Mich.* 4 & 5 *Mar. Bendl.* 7. Moor 13.

2. Where the King is Party, if the other Side challenge a Juror above the Number allowed by Law, he ought to ſhew the Cauſe of his Challenge immediately, and the two Foremen of the Jury are uſually appointed by the Court, to try, whether for that, or any other Cauſe, the Juror challenged, is indifferent, or not. *Paſch.* 10 *Jac.* 1 *Bulſt.* 191.

3. In *Appeal* of Manſlaughter, it was held, that the Defendant might challenge twenty peremptorily, as well as upon an Indictment. *Trin.* 28 *H.* 8. *Bendl.* 6. *Moor* 12. *Newman* verſus *Punter. S. P.* 1 And. 41.

4. Indictment for a Riot and Battery, to be tried at Bar, one of the Jurors was challenged for the Defendants, it being againſt the King, the Cauſe muſt be ſhewed immediately; and it was, for that he was one of the *Grand Jury* who found the Bill of Indictment, and the Challenge was allowed. *Sid.* 244. *In the King and Percivall's* Caſe.

(F)

In Criminal Cauſes, not good.

1. THree Men were indicted of Murder, and eleven of the Jury only appearing at the Trial, and were ſworn, and before they were ſworn one of them was challenged by the Priſoners, and a *Tales* awarded for the Queen, and the Trial was put off till another Day, at which Day the Jury appeared full, and then one of them was challenged for the Queen, for that he was within the *Diſtreſs* of the Maſter of one of the Priſoners, which the Queen's Counſel did not know when he was ſworn; but adjudged, that the Queen could not have that Challenge after the Juror was ſworn. *Yelv.* 25. *Wharton's* Caſe.

2. In an Attaint one of the Grand Jury was challenged, for that he was a *Captain*, and one of the Petty Jury was his *Lieutenant*; but this was adjudged no principal Challenge; and ſo it was held, where one of the Grand Jury was *Maſter of the Game*, and one of the Petty Jury was *Keeper of his Park. Godb.* 110. *Hodie* verſus *Winchcomb.*

3. In an Indictment for Murther, the Queen cannot challenge peremptorily, without Cauſe ſhewn. *Moor* 595. *Savage* verſus *Brooks.*

Chancellor. See **Clergy.**

Chancery.

In what Caſes it relieves, and in what not. (A)
Where it will relieve, or not, after a Verdict and Judgment at Common Law. (B)

(A)

In what Caſes it relieves, and in what not.

1. IN *Falſe Impriſonment*, the Defendant juſtified, for that the City of *York* was an antient City, incorporated by the Name of *Mayor, Aldermen and Commonalty*, and that they had *Time out of Mind a Court* there called a *Court of Chancery*, for all Cauſes of Equity ariſing within that City, and that they uſually directed Precepts for Appearance, and committed Perſons for Contempt; then he ſet forth, that an Order was made for the Plaintiff to anſwer, which he refuſed to do, and ſo juſtified his Commitment for the Contempt; it was objected

againſt this Plea, that a *Court of Equity* could not lie in *Grant*, but much leſs in *Preſcription*, being a Juriſdiction to be derived out of the Crown; 'tis true, *Cheſter* and *Durham* have Courts of Chancery; but 'tis becauſe thoſe are *Counties Palatine*, which have *Jura regalia*, and a Court of Chancery is incident to a *County Palatine*; ſo likewiſe there is a Court of Equity in *London*, and in the Cinque-Ports; but that is by Authority of Parliament: As for the High Court of Chancery at *Weſtminſter*, 'tis coeval with the Government of this Nation; and therefore where one pleadeth a Thing done in that Court, 'tis poſitively alledged to be done there, without beginning the Plea with a Preſcription; and ſo it is in all other Courts of the King at *Weſtminſter*; it was the better Opinion in this Caſe, that a Court of Chancery could not commence by Preſcription. *Hob.* 63. 2 *Roll. Rep.* 109. *Martin* verſus *Marſhall. Godb.* 262. *S. P. Noy* 147. *Andrews* verſus *Webb. S. P.*

2. A Suit was in the *County Palatine of Cheſter*, againſt the *Earl of Darby*, who was *Chancellor* there, and one *Kelly*, for a Leaſe, and the *Chancellor* decreed the Leaſe to *Kelley*, and ſo was a Judge in his own Cauſe, and in Effect made a Decree for himſelf; whereupon the Complainant exhibited his Bill in the Court of Chancery at *Weſtminſter*, to have Relief; adjudged, that ſuch a Bill is proper in that Court, after a Decree made in the *Chancery at Cheſter*; and 'tis alſo proper for Lands lying in a *County Palatine*, tho' the Complainant live elſewhere. 3 *Bulſt.* 118. *Sir John Egerton* verſus *Kelley.*

3. Feoffment in Fee to the *Earl of Worceſter* and others, to the Uſe of the *Lady Southampton*; the Earl exhibited his Bill in Chancery, and had a Decree againſt the Defendant, *Sir Moile Finch*, who finding himſelf aggrieved, petitioned the Queen for Redreſs, and ſhe referred the Matter to the Judges, who reverſed the Decree. *Mich.* 43. *Eliz. Sir Moile Finch* verſus *Earl of Worceſter.* See 3 *Bulſt.* 116. *Vandry* verſus *Pannell.*

4. There were two Aſſignes of a Leaſe in Truſt, for the Benefit of an *Infant*, one of them took all the Profits, and was in Arrear 1500 *l.* and being unable to ſatisfy the Debt, the Queſtion was, whether the other agreeing to this Aſſignment, and executing the Counter-part, and joining with the other in Acquittances for the Rent, for a Year and an Half, but never medling afterwards, ſhall be chargeable for what the other was not able to pay? and it was decreed, that he ſhould; but it was reverſed upon a Bill of Review, and decreed, that he ſhould be anſwerable for no more than came to his Hands; for the other being truſted as well as he, it was the Fault of him who truſted them, to repoſe any Truſt in him who was not able to pay, and therefore the other ſhall not be compelled to ſatisfy his Deficiency. *Cro. Car.* 227. *Townley* verſus *Challoner. Bridgm.* 35. *S. C. By the Name of Townley and Sherbon*, where it is farther held, that if one of the Truſtees, without any Warrant from the Party who truſted him, or Leave of the Court, aſſigneth his Eſtate, and the Aſſignee receiveth the Profits, and becomes inſolvent, the Aſſignor ſhall be liable; and moreover, if upon Circumſtances and Proof, the Court is ſatisfied, that there is *Dolus Malus*, or any ill Intent or Fraud in him who permitted his Companion to receive the whole Profits, there he ſhall be charged, tho' he received none himſelf. *Ibidem.*

5. The *Chancellor* cannot direct an Iſſue to be tried in a *County Palatine*, but the Court of King's Bench may; and in ſuch Caſe, if a Trial is had, and a Verdict given, it ſhall be quaſhed in *B. R. Paſch.* 1 *Car. Yelv.* 3.

6. A Court of Equity (for ſuch is the Court of the Council of *York*) making a Decree, which is againſt a Rule in Law, 'tis for that Reaſon void; as if they decree, that where there are two Jointenants, and one of them dies, that the Heir of him ſo dying, ſhall have a Moiety of the Lands, when by Law the whole ought to go to the Survivor; except there was an Agreement in the Life-time of both, that there ſhould be no Survivorſhip. *Winch.* 79. *Portington* verſus *Beaumont.*

7. Upon a Bill exhibited in the *Court of Requeſts*, the Complainant ſuggeſted, that he had loſt his Deed, and ſo could not avow for the Rent at Common Law, and therefore prayed, that the Defendant might be decreed to pay the Rent; but a Prohibition was granted; for tho' Suits concerning *Deeds loſt* have been in the Court of Chancery, yet the *Court of Requeſts* ſhall not be allowed in ſuch Proceedings. *Hill.* 1 *Car. Latch* 24. *Barry* verſus *Styles.*

8. The Father granted an *Annuity* to his youngeſt Son, who delivered the Deed to one of his Brothers to keep, which Brother went into *Ireland*, and in removing his Goods and Writings, this Deed was loſt, whereupon he exhibited his Bill in Equity againſt the Elder Brother to have the Payment of the Annuity decreed; but adjudged, that in this Caſe he could not be relieved in Equity, for it was his Folly to deliver the Deed to one who took no more Care in the keeping it; but if it had been caſually burnt he might have Relief. *Paſch.* 1 *Car. Latch.* 248. *Brightman's* Caſe.

9. A Bill was exhibited in Chancery, ſetting forth, that in the *eighteenth Year of the Reign of Q. Elizabeth, W. R.* the Father of the Complainant had conveyed his Eſtate to the Uſe of the Complainant for Life, and that if he died without Iſſue Male, then to the Father of the Defendant, and the Heirs Males of his Body, *&c.* with a Proviſo of *Revocation* by any Writing under his Hand and Seal, in the Preſence of two Witneſſes; and in this Bill the Complainant alledged in Fact, that his Father had made a Revocation purſuant to this Power; the Defendant in his Anſwer denied that any Revocation was made, and having brought an Ejectment, wherein the Point would have turned upon a Revocation or not; the Complainant obtained an Injunction, and ſome Witneſſes were examined by the Lord Chancellor *Egerton*, aſſiſted by ſome of the Judges, as to the Matter of Revocation, but he dying before any Decree made, the Matter was again

debated before the Lord *Keeper Bacon*, aſſiſted by Sir *Henry Hobart*, Chief Juſtice of the Common Pleas, and the Maſter of the Rolls; and the Queſtion was, whether this Matter was examinable in the Court of Chancery? and they all reſolved, that it was not; ſo the Bill was diſmiſſed. *Trin.* 14 *Jac. Hob.* 103. *Mannering* verſus *Dennis, and Cavendiſh* verſus *Worſly. Ibidem S. P.*

10. The Attorney General, in Behalf of the King, and the *Lord Hunſdon* his Tenant, exhibited a Bill in Chancery againſt the *Counteſs of Arundel*, and the Queſtion upon the Pleadings was, that whereas the Title between the King, in the Right of *Francis Lord Dacres*, ſtood partly upon an Act of Parliament, and partly upon a Feoffment made by *William Lord Dacres*, and a Re-feoffment back again, which *Feoffment* the Defendant ſaid *was not lawfully executed*; and that Point having been examined before the Council of *York*, the Defendant required, that thoſe Depoſitions might be read in this Court, eſpecially, ſince they were allowed and read *Anno* 36 *Eliz.* upon an Office taken at *Carliſle* upon the Attainder of the ſaid *Francis Lord Dacres*; but the Court would not allow them to be read in this Cauſe, becauſe the Originals of thoſe Depoſitions *at York* were all loſt, and there were no Exemplifications of them, but in the Hands of the Defendant, and ſo the King would fight with Weapons aſſigned to him by his Adverſary; and for this Reaſon chiefly thoſe Depoſitions were not allowed to be read, and afterwards a Decree was for the Plaintiffs. *Trin.* 14 *Jac. The King and Lord Hunſdon* verſus *Counteſs of Arundell.*

11. Adjudged, that a Man cannot claim to hold a Court of Chancery by Preſcription; becauſe every Preſcription is againſt Common Right, and a Court of Chancery is founded upon Common Right. *Mich.* 13 *Jac. Mayor of York*'s Caſe. *Godb.* 262.

12. Suit in the Court of the *Marches of Wales*, for not making a Leaſe according to an Agreement; *per Coke* and *Curiam*, a Court of Equity cannot compel the Performance, becauſe the Party grieved may have an Action at Common Law, and recover Damages; and if a Decree ſhould be made for him to execute a Leaſe, and he refuſes, there is no Way to compel him, but only to commit him till he doth. 1 *Roll. Rep.* 366. *Bromage* verſus *Jennings.*

13. Upon a Bill in Equity, the Caſe was, the Cogniſor acknowledged a Statute of 1500 *l.* for the Payment of 800 *l.* and Intereſt, upon which his Lands were afterwards extended to ſuch a yearly Value; then he ſettled the ſame *Lands in Tail*, for a valuable Conſideration, and afterwards borrowed more Money of the ſame Cogniſee, and by Articles between them, it was agreed, that the *Statute and Extent ſhould ſtand as a Security for the Money newly borrowed*; then the Cogniſor died, and the Right of Entail deſcended on the Complainant, the Principal Sum of 800 *l.* being ſatisfied by Perception of Profits: Adjudged by *Hale Ch. Baron*, and the Court, that the Plaintiff could not be relieved againſt the Penalty of this Statute; 'tis true, he had *Equity* on his Side, becauſe the Entail was made for a valuable Conſideration; but the Cogniſee had both *Law and Equity* on his Side, and therefore the Plaintiff ſhall not be relieved till the whole Penalty of the Statute is levied according to the extended Value; and yet they all held, that the Cogniſee could not be relieved for the * Money he lent after the Entail, upon the Credit of the former Security; for if he ſhould, no Purchaſe could be ſafe. *Hardr.* 318. *Hedworth* verſus *Primate.*

* 1 Chan. Caſes. 119. S. P.

14. Upon a Bill in the Exchequer, the Caſe was, *Worſely* had mortgaged his Lands to *Rogiſon*, and afterwards articled with the Plaintiff to convey the ſame Lands to him for 250 *l.* free from all Incumbrances, and ſo received 50 *l.* of the Purchaſe-Money; then *Worſely* the Mortgagor *releaſed* the Equity of Redemption to *Rogiſon* the Mortgagee, and pending the Bill, brought by the Plaintiff againſt both of them, he the ſaid *Worſely releaſed* all his Right in and to the ſaid Lands, but no Money, or any valuable Conſideration, was paid for theſe *Releaſes*; adjudged, that neither of them ſhould obſtruct the Conveyance to be made to the Plaintiff, becauſe made without any Conſideration, and one of them, pending the Suit: The Scope of this Bill was, that *Worſely* ſhould make the Conveyance, and that *Rogiſon* ſhould diſcover what was due to him; therefore the Court could not decree him to convey, becauſe not prayed in the Bill. *Hardr.* 320. *Hill* verſus *Worſley.*

15. Bill in the Exchequer againſt the Defendant, to ſhew by *what Title he held ſuch a Meadow*, which the Plaintiff ſuggeſted belonged to the Office of Keeper of *Glouceſter Caſtle*, granted to him for Life, and likewiſe againſt other Defendants, as Brewers in the ſaid City, who *by Cuſtom were to pay ſuch an annual Sum to the ſaid Officer:* The Defendants demurred, for that this Bill concerned Things *of diſtinct Natures*, and being brought againſt ſeveral Perſons, will occaſion ſeveral Anſwers, ſo that each Party will be obliged to take a Copy of what doth not concern his Caſe, ſo that the Charge would be encreaſed to no Purpoſe; and the Demurrer was held good for this Reaſon. *Hardr.* 337. *Berke* verſus *Harris & al'. See* Clergy. (B) 9. *S. P.*

16. Bill in the Exchequer, to diſcover what Eſtate the Defendant claimed in ſuch Lands, and whether they were mortgaged with a Power of Redemption; the Defendant pleaded, that he was a Purchaſer for a valuable Conſideration, without Notice of the Plaintiff's Title, and that ſome Years after he had been in Poſſeſſion, a Fine was levied to the Uſe of him and his Heirs; adjudged a good Plea, without ſhewing at what Time, and for what Conſideration in particular. *Hadr.* 501. *Day* verſus *Arundel. See Ch. Rep. Shirley* verſus *Fagg. S. P.*

17. The Plaintiff being about twenty-eight Years of Age in the Life-time of his Father, and having Occaſion for Money, bought Goods of the Defendant of the Value of 400 *l.* and gave Bond

Bond to pay 800 *l.* for them, if he ſurvived his Father, at which Time he would have an Eſtate of 5000 *l. per Annum*, and he having ſurvived his Father, exhibited his Bill to compel the Defendant to take the 400 *l.* and Intereſt; it being proved, that the Defendant had ſome Intimation, that the Father was then ill, and not like to live, and in truth he died ſoon afterwards; and one *Stiſted* an imfamous Man was employed in tranſacting this Bargain; the Lord Chancellor *Fynch* decreed the Payment of the 400 *l.* and Intereſt, which was afterwards paid, and the Defendant obtained a Rehearing before the *Lord Keeper North*, there being ſome ſmall Omiſſion in the Enrollment of the Decree, and he affirmed the Decree. 2 *Vent.* 359. *Barney* verſus *Tyſon.*

18. A Statute was acknowleged to *T. P.* who died, and afterwards the Adminiſtrator *de bonis non, &c.* of the ſaid *T. P.* agreed with the Cogniſor to aſſign it in Conſideration of ſo much Money to be paid to him, which ſaid Money the Conuſor covenanted to pay to the ſaid Adminiſtrator, or to his Executors or Adminiſtrators; but before it was paid the ſaid *Adminiſtrator de bonis non, &c.* died, but the Court decreed the Money to be paid to his Executor, and not to the new Adminiſtrator *de Bonis non*, altho' before an Extent taken out the Statute could not be legally aſſigned; but in this Caſe it did not appear, that there were any Debts owing by the firſt Inteſtate. 2 *Vent.* 362.

19. *Sir Robert Reve* made a voluntary Settlement of certain Lands in *Suffolk*, which he charged with 3000 *l.* to be paid as a Portion to his Daughter, and only Child, by the firſt Venter; afterwards, upon his *ſecond Marriage*, he ſettled thoſe and other Lands in *Suffolk* upon his Wife, for her Jointure, and ſome Time after that, he took Notice by his Will, that the Jointure Lands were incumbered with the Charge of this 3000 *l.* and therefore he deviſed other Lands in *Bickerton in Yorkſhire* to his Wife in Lieu of thoſe Lands in *Suffolk*, which were charged with this Portion, if ſhe ſhould accept thereof: *Sir Robert Reeves* died, the Lands in *Bickerton* were not equivalent to the *Suffolk Lands*, and therefore the Widow would not accept them, but kept the *Suffolk Lands*, for they were not prejudiced by this voluntary Settlement; but the Lord Keeper *North* decreed, that ſo much of the ſaid 3000 *l.* as was defeated by the Jointure, ſhould be charged on the *Bickerton Lands*. 2 *Vent.* 363. *Sir Robert Reeves*'s Caſe.

20. Where there is a Defect in a *voluntary Conveyance*, ſo that it cannot operate at Law, the Court of Equity will not decree an Execution of it, unleſs where 'tis intended for a Proviſion for Younger Children. 2 *Vent.* 365.

21. *W. R.* being ſeiſed in Fee in Conſideration of 1000 *l.* paid to him by *T. P.* who married his Kinſwoman, conveyed his Lands to the ſaid *T. P.* and his Heirs, and takes a Re-demiſe to himſelf for ninety-nine Years, if he ſhould ſo long live, in which there was a Covenant, that if the ſaid *W. R.* ſhould at any Time, *during his Life*, pay to the ſaid *T. P.* 1000 *l.* with Intereſt, that then he ſhould reconvey to him and his Heirs, and that if he did not pay the Money in his Life-time, that then his Heirs, *&c. ſhould have no Power to redeem the Lands*; he died, without paying the Money, and his Heir at Law exhibited a Bill in Equity to redeem; and it was inſiſted for him, that in every Conveyance, which was a Security for Re-payment of Money, a Covenant to exclude the Mortgagor *from Redemption*, was never regarded in this Court; and that the Perſon to whom the Conveyance was made, might have a Bill in the Life-time of him who conveyed, to have a Time ſet for the Payment of the Money, or otherwiſe to be foreclоſed. But the *Lord Keeper North* diſmiſſed the Bill; he admitted it to be true, that in a Common Mortgage of Lands to ſecure the Re-payment of Money, a Covenant to reſtrain the Mortgagor from Redemption would not be regarded; but the Conveyance in this Caſe was in the Nature of a Settlement of the Eſtate in Marriage, and not only in Conſideration of ſo much Money paid; and he denied, that if *T. P.* had exhibited a Bill againſt *W. R.* in his Life, to have a Time ſet for the Payment of the Money, or to be foreclоſed, that this Court could limit the Time; becauſe by the Conveyance he was to do it at any Time during his Life, and this Court cannot ſhorten that Time which is given by the expreſs Agreement of the Parties, and cannot foreclоſe till that Time is paſt. 2 *Vent.* 364. *Bonham* verſus *Newcomb.* This Diſmiſſion was affirmed in Parliament, where a Bill is exhibited to examine Witneſſes *in perpetuam rei Memoriam*, if the Complainant therein prays Relief, his Bill ſhall be diſmiſſed. 2 *Vent.* 366.

1 Mod. 29. Sid. 436.

22. *Scire facias out of the Petty-Bagg in Chancery*, brought by the Plaintiff to have Execution of a Recogniſance for 4000 *l.* acknowledged by one *Yarway*; the Sheriff returned that *Yarway* was dead, whereupon another *Sci. fa.* iſſued againſt his Tertenants, and the Sheriff returned *Scire feci Orpwood*, *Moreton*, and *Jackſon* Tertenants, who all appeared and pleaded ſeverally as to the Lands of which they were Tertenants, (*viz.*) *Orpwood* pleads in Bar, that *Yarway* was Jointenant with another, and traverſed, that he was ſole ſeiſed; to which Plea the Plaintiff replied, and confeſſed, that *Yarway* was jointly ſeiſed with another, but that they being ſo ſeiſed, did by Bargain and Sale enrolled in Conſideration of Money, convey one Moiety of the Lands to him (the Plaintiff) in Fee, and traverſed, that *Yarway* died ſeiſed *modo & forma*; the Defendant demurred to this Replication, and the Plaintiff joined in Demurrer: and as to the Land of which *Moreton* was Tertenant, he pleads in Bar, that one *Warne* was ſeiſed thereof in Fee in Truſt for *Yarway the Conuſor*, and that they both joined in a Conveyance to him, *&c.* and traverſed, that *Yarway* was ſeiſed in Fee at the Time of the Recogniſance, or at any Time after; the Plaintiff replied, and took Iſſue upon this Traverſe; the other Defendant *Jackſon*, pleaded *Non tenure*, and all this whole Record being tranſmitted out of Chancery into *B. R.* Judgment was had there by Default upon the Demurrer, with a *Ceſſat executio*, till the Iſſue was tried, which afterwards coming to the Trial, there was a Verdict for the Plaintiff; and as to the Plea of *Non tenure*,

nure, he entered a *Nolle proſequi*; and it was moved, that theſe Proceedings were irregular; for tho' an Iſſue joined in Chancery may be tranſmitted into *B. R.* yet a Demurrer cannot, for that is properly determinable in that Court, by the *Lord Keeper or Chancellor* for the Time being, which is very true, if here had been a Demurrer, and no more; but here is an Iſſue as well as a Demurrer, and the Chancery cannot try an Iſſue by Jury, therefore of Neceſſity that Court muſt tranſmit the whole Record into *B. R.* and this appears in *Sarnefield's* Caſe cited in the *Prince's* Caſe. 8 *Rep.* 23. (*a*) and of that Opinion was all the Court of *B. R.* and that this Record was well tranſmitted by the Chancery, for they might ſend any Cauſe into *B. R.* to be determined there, either before or after Iſſue or Demurrer joined in Chancery, and that the Court of *B. R.* may retain the Record, and give Judgment there, without remanding it into Chancery. 2 *Saund.* 23. *Jefferſon* verſus *Moreton & al'*. See 1 *Rep.* 157. *Digg's* Caſe. 9 *Rep.* 99. *Steward's* Caſe cited in *Sir George Reynall's* Caſe. *S. P.*

23. Treſpaſs, for an Aſſault, Battery and Falſe Impriſonment, the Defendant, as to all beſides the Impriſonment for ten Days, pleads Not guilty; and as to the Impriſonment he pleads, that by an *Order of the Court of Chancery*, in a Cauſe there depending between *T. P.* Plaintiff, and the now Plaintiff *Furlong*, he being ordered to pay the ſaid *T. P.* 100 *l.* and being in Contempt for not obeying the ſame, it was ordered, that he ſhould ſtand committed to the *Fleet*; whereupon the Defendant, as Servant and Aſſiſtant to *Bold Boughey*, the Warden of the *Fleet*, and by his Command took the Plaintiff and delivered him to the *Warden* to be impriſoned, whereupon he was impriſoned for ten Days, *quod eſt idem impriſonamentum, &c.* and upon Demurrer to this Plea, it was adjudged ill, becauſe an Order of Chancery, without a *Writ of Attachment*, is not a ſufficient Warrant to take and impriſon a Man; for the uſual Courſe in Chancery is, to award a Writ where the Party is in Contempt. 2 *Saund.* 182. *Furlong* verſus *Bray*. 1 Mod. 272.

24. The Lord of two Manors received a Rent iſſuing out of a Tenement belonging to one of them, but to which he could not tell, and the Tenant of that Tenement refuſing to pay it, the Lord exhibited a Bill to the *Chamberlain of Cheſter*, againſt the Tenant to diſcover a Deed concerning the ſaid Rent; the Defendant put in his Anſwer, that he had no Deed concerning the Rent, whereupon that Court ordered a Trial at Law, to try to which of the ſaid Manors the Rent was payable; but a Prohibition was granted, becauſe a Court of Equity cannot charge the Inheritance of a Man's Land with a Rent. *Raym.* 221. *Oſely* verſus *Sir Geo. Warburton.*

25. The Teſtator deviſed his Lands to Truſtees, and their Heirs, in Truſt, that *if within three Years* there happened a Marriage between the *Lord Guilford* and *Mrs. W.* (who was Heir at Law to the Teſtator) then to her for Life, Remainder to her firſt Son, *&c.* and if the Marriage did not happen, then the Remainder to the *Lord Faulkland in Tail*; ſhe did not marry the *Lord Guilford*, but *Mr. C.* who brought a Bill in Equity to have the Eſtate, as being equal in Eſtate, Family and Perſon to the *Lord Guilford*, and the Lady an *Infant*, and in no Fault, he differing with her Truſtees about the Terms, and therefore ſhe ought not to looſe her Eſtate for the Fault of another, and ſeveral Papers, Letters, and Sayings of the Teſtator, were offered as Evidence to prove that his Intention was, that it ſhould not be in the *Lord Guilford's* Power to make her forfeit; it was decreed, that Notice could not be taken of thoſe Papers to influence the Conſtruction of a Will, for that would be to make them Part of the Will it ſelf, when by the Statute of Frauds, every Part of a Will muſt be in Writing, *&c.* and even before that Statute no collateral Proofs were admitted, either by *Papers* or *Words*; becauſe a Will was a conſummate Act in itſelf; that Chancery could not relieve in this Caſe, becauſe the *Condition was precedent to her Taking the Eſtate*, (viz.) *If ſhe married the Lord Guilford within three Years*; ſo that for the Non-performance of this Condition, this Court cannot relieve; 'tis true, it may be done where there is a Forfeiture upon a Non-performance, becauſe Equity may make an Eſtimate, and give Compenſation; therefore the Decree was for my *Lord Faulkland*, but reverſed on an Appeal to the Houſe of Peers. 1 *Salk*, 231. *Bertie* verſus *Faulkland*.

26. Bill to Foreclоſe the Equity of Redemption of a Mortgage of the whole Iſland of *Sarke*; the Defendant pleaded to the Juriſdiction of the Court, (*viz.*) that *Sarke*, *Guernſey*, *Jerſey*, *&c.* were Iſlands governed by the Laws of *Normandy*; it was objected, that Bills to redeem were antient, but that *Serjeant Hutchins* ſaid, he remembered when the firſt Bill was brought to *Foreclоſe*; to which it was anſwered, that the Chancery *agit in perſonam*, and that if the Perſon is here, he may be ſued in Chancery, tho' the Lands lie in another Kingdom, or in a County-Palatine; for which Reaſon *Wright*, *Lord Keeper* over-ruled this Plea; for if the Chancery could not Act againſt the Perſon, and againſt his Conſcience whilſt he was here, and his Lands in *Barbadoes*, there might by a Failure of Juſtice. 1 *Salk.* 404.

(B)

In what Caſes it will Relieve, and where it will not relieve after a Judgment at Common Law. See *Revocation.* (G) 5.

1. THE Queen granted a Leaſe of Lands to *Throgmorton*, rendring Rent, and afterwards ſhe brought an Action of Debt for Non-payment of the Rent, and had *Judgment*, which was affirmed in a Writ of Error; then ſhe ſold the Reverſion to *Sir Moyle Fynch*, who entered and avoided the Leaſe; afterwards the Leſſee exhibited his Bill in Chancery, ſetting forth, that

that at the Time of Non-payment of Rent, he ſent it by his Servant, who was robbed, and ſoon after the Robbery he paid the Money to the Queen, which ſhe accepted and continued in Poſſeſſion, and paid the Rent till the Reverſion was ſold, and ſo prayed to be relieved; the Defendant pleaded the Proceedings againſt the Plaintiff at Common Law, and the Judgment obtained againſt him; and it was reſolved by all the Judges of *England*, that if the Complainant had exhibited his Bill * *before Judgment* was had againſt him at Law, he might have been relieved, but now he came too late; therefore *Sir Moyle Fynch*, who was committed for not performing the Decree, being brought up by *Habeas Corpus*, was diſcharged. *Mich.* 40 *Eliz. Cro. Eliz.* 220. *Throgmorton* verſus *Sir Moile Fynch.*

* Hardr. 23. Morell v. Duglas. S. P.

2. The Plaintiff ſold a counterfeit Jewell to the Defendant, a Young Gentleman, for 360 *l.* when in Truth it was not worth 20 *l.* and he took a Bond of him in the Name of a third Perſon, for the Payment of 600 *l.* which Bond he afterwards put in Suit, and had Judgment, which was affirmed on a Writ of Error; then the Defendant exhibited his Bill in Chancery to be relieved, and upon Hearing the Cauſe it was decreed, that the Plaintiff in the Action at Law ſhould take his Jewel again, and that he ſhould procure the Perſon in whoſe Name the Bond was taken, to acknowledge Satisfaction upon Record; but he refuſing to perform this Decree, was committed, and being brought to the Bar by *Habeas Corpus*, it was adjudged, that the Decree and Impriſonment, after a Judgment at Common Law, was unlawful, whereupon the Plaintiff in Chancery exhibited his Bill to the Parliament, and had a ſpecial Act for his Relief. 2 *Cro.* 344. *Courtney* verſus *Glanvill.* 1 *Roll. Rep.* 252. *S. P.*

1 Roll. Rep. 111. 2 Bulſt. 301.

3. Judgment againſt the Defendant in Debt, upon the Statute of *Uſury*, and he having given Notice to move in Arreſt of Judgment, exhibited his Bill in Chancery, to be relieved againſt the ſaid * Judgment, and procured an Injunction, notwithſtanding which the Court awarded Execution, and wondered, that no Body would bring Informations againſt thoſe who procured ſuch Injunctions after Trials had at Common Law; for the Statutes 27 *Ed.* 3. *cap.* 1. and 4 *H.* 4. *cap.* 23. expreſly enjoin, that after Judgment given, the Parties ought to be quiet, and ſubmit to it. 2 *Bulſt.* 194. *Heath* verſus *Ridley.*

* Hardr. 120. Harris v. Colliton. S. P. Sid. 463. S. C. 1 Roll. Rep. 277.

4. Leſſee for forty Years, made an Under-Leaſe for twenty-one Years, rendring Rent, and afterwards granted all his Eſtate to the Plaintiff, and the Leſſee for twenty-one Years, refuſed to attorn, or to pay the Rent; the *Lord Chancellor* decreed, he ſhould do both, and likewiſe pay all the Arrears, becauſe the Grantee of the Reverſion could not compel the Leſſee to attorn by Law, and yet, without any Attornment, the Reverſion to which the Rent is incident, is in the Grantee; but he having no Means to make him attorn, a Court of Equity will interpoſe. *Moor* 805. *Shute* verſus *Mallaroy.*

Dr. Gouge his Caſe.

5. Treſpaſs by a Tenant of *Dutchy Lands*, and Judgment againſt him; afterwards he brought an *Engliſh* Bill in the Dutchy-Court againſt the ſame Defendant, for the ſame Treſpaſs, and thereupon a Prohibition was granted; ſo *per Coke Chief Juſtice*, where an *Engliſh*-Court holds Plea after a Judgment given in a Court at Common Law, a Prohibition lies; and it was granted to the Chancery after a Judgment in a *Quare Impedit*, when the Bill was to avoid that Judgment. *Moor* 836. *Wright's* Caſe. 838. *Glanvill's* Caſe. *S. P. Moor* 916. *S. P.*

6. The Teſtator having made his Will, and executed it according to Form, did afterwards declare his Will to be, that *T. S.* ſhould have the Bond of 100 *l.* which he owed to him, and died; the Executor proved the Will, but not this *Codicil*, and then *T. S.* exhibited his Bill in the Exchequer, againſt the Executor, to compel him to prove the Codicil, (he having put the Bond in Suit, pending this Bill) and to have the Benefit of this Bequeſt, and to be relieved in the Premiſſes: Upon hearing the Cauſe it was held by the Court, that no Relief lay for this Legacy before the Codicil was proved; but that afterwards it was proper for Relief, and that it muſt be proved in the Spiritual Court, and not here. *Hardr.* 96. *Took* verſus *Fitz-John.*

7. The Caſe was, *ſſ.* The Plaintiff was a Purchaſer for a valuable Conſideration, and the Lands were mortgaged to the *Defendant*, who being informed, that the Purchaſe was before his Security in Time, he took in two Aſſignments of three Recogniſances, prior to the Plaintiff's Title, two of which were for Money, and the third for Counter-Security; and upon theſe Recogniſances, he extended all the Lands; and now the Plaintiff exhibited his Bill in the Exchequer, to diſcover the Nature of thoſe dormant Incumbrances, and for what Conſideration contracted, and what was actually received and paid upon them, or by Perception of Profits ſince the Extent; to which the Defendant pleaded his Mortgage, and his Purchaſe of the Recogniſances, to corroborate his Security, and therefore that he ought not to make any Diſcovery; but the Court ordered him to anſwer, and that the Matter of his Plea ſhall be ſaved to him on hearing the Cauſe; but Baron *Turner* held, that if the Incumbrance taken in had been a Mortgage in Fee, and forfeited inſtead of the Recogniſances, then the Defendant ſhould not be compelled to anſwer, in order to make any Diſcovery, becauſe in ſuch Caſe the whole Eſtate had been abſolutely in the Mortgagee, and conſequently the Plaintiff could nave no Intereſt in it; but here the Recogniſances were only Charges on the Land, and the Cogniſees had no Intereſt in Title. *Hardr.* 172. *Hacket* verſus *Wakefield.*

8. A Suit was brought in the Admiralty, upon a Policy of Aſſurance, which Suit was diſmiſſed, and the Plaintiff brought an Action in *B. R.* for the ſame Thing, and the Queſtion was, whether it would lie; 'tis true, the Admiralty, by the Statute 43 *Eliz. cap* 12. is a Court of Equity, and in many Things hath a concurrent Juriſdiction with the Common Law; but yet if

an Action is brought in *B. R.* for a Thing where Judgment hath been given in the Admiralty, that Judgment is pleadable to ſuch Action; but adjudged, that the Plaintiff might have his Action at Common Law, for the Statute 43 *Eliz.* by which this Court was erected, gives them Juriſdiction *in perſonam*, but not *in Rem*; for 'tis a certain Rule, that a Decree in a Court of Equity, is no Bar to an Action at Common Law; for if they ſhould make a Decree upon a Covenant, yet the Plaintiff might bring an Action of Covenant; or if a Bill is exhibited for a Legacy, or Marriage-Portion, and diſmiſſed, yet the Party may proceed at Law. 2 *Sid.* 121. *Came* verſus *Moye.*

9. *Thomas Shelley* entered into a Statute to *Middleton*, *Anno* 43 *Eliz.* which was for Aſſurance of the Manor of *D.* to him for Money paid to *Shelley*, who afterwards mortgaged the ſame Manor to *Sir John Shelley*, who afterwards purchaſed the Equity of Redemption; *Middleton* extended this Statute on an *Infant*, which, tho' void, yet he was relievable in Equity, and might have ſued there, tho' the Infancy continued ſeveral Years; but ſince he had not done it, but ſate ſtill above *forty Years*, without ſeeking any Relief, the Court now diſmiſſed his Bill, by Reaſon of the Antiquity of the Statute. 1 *Lev.* 197. *Middleton* verſus *Shelley.*

10. *B.* being poſſeſſed of a Term for 100 Years, *deviſed it to his Wife*, and made *T. S.* his Executor, and died; the Wife died; after her Death the Executor entered, and enjoyed it for ſeveral Years, and then ſold it to *G. D.* who ſurrendered the Reſidue of the Term and took a new Term for 200 Years, and laid out 250 *l.* in Building: *Battaly* married the Daughter of the Deviſee, and being twenty Years beyond Sea, at his Return into *England*, being informed of his Title in Right of his Wife (who was then dead) took out Adminiſtration to the Deviſee, and in Ejectment recovered by Vertue of the Leaſe for 100 Years; the Purchaſer exhibited his Bill in Equity for Relief, and it was decreed, that the Poſſeſſion being ſo long with the Executor and him, and having no Notice of this dormant Title, that the Purchaſer ſhould hold the Land till he was diſcharged what he laid out in Building, diſcounting the Profits after the Purchaſe. 2 *Lev.* 152. *Edlin* verſus *Battaly.*

11. The Teſtator deviſed his Lands to *T. S.* in Fee, upon Condition, that he paid his Heir at Law 20000 *l.* (*viz.*) for the firſt ſixteen Years after his Death, 1000 *l. per Annum*, and afterward 2000 *l. per Annum*, till the whole be paid, and for Non-payment of 1000 *l.* the Heir entered, and *T. S.* brought his Bill to be relieved, and upon the Hearing the Cauſe, it was inſiſted for the Heir, that he was reſtored to the Eſtate upon the Breach of the Condition, and that a Court of Equity would not interpoſe to his Diſinheriſon; but decreed, that the Entry of the Heir was only to enforce the Payment of the Principal; as where a Mortgagee enters the Court can give him Intereſt from the Time it became payable, and where ever the Court can give Compenſation for the Breach of a Condition, there they can relieve from the Forfeiture; that for every 1000 *l.* from the Time it became payable, the Legatee or Heir ſhall have *Intereſt*, becauſe both the Sum and Time of Payment were certain and paſt. 1 *Salk.* 156. *Grimſtone* verſus *Lord Bruce.*

12. A Factor entruſted with Merchants Goods ſells them, and receives the Money, and dies indebted in Debts of a Superior Nature, if upon Evidence it appears, that this Money was laid out in other Goods, and not paid to the Merchant, theſe Goods ſhall be taken as Part of the Merchant's Eſtate; but if the Factor hath the Money, it muſt be accounted his own, and anſwer his Debts of a Superior Nature; becauſe Equity cannot follow Money in Behalf of the Merchant, tho' it can Goods, which may be known, but Money cannot. 1 *Salk.* 260. *Whitecomb* verſus *Jacob.*

13. By Articles of Agreement Money was to be laid out in Land; it was decreed, that this ſhall be taken in Equity, as Land it ſelf; for Equity is to enforce the Execution of Agreements; and therefore Lands agreed to be ſold ſhall be taken as Money, and Money agreed to be laid out in Land, ſhall be taken as Land, and go to the Heir, unleſs there are Debts.

Charitable Uſes.

Of Charitable Uſes upon the Statute 43 *Eliz. cap.* 4. (A)

Where a Charity ſhall be eſtabliſhed, tho' the Conveyance is defective. (B)

(A)

Upon the Statute 43 *Eliz. cap.* 4.

A Deviſe of Lands to his Executors, to find a Preacher, a Schoolmaſter, and to relieve the Poor, the Lands being then of the yearly *Value of* 40 *l.* and afterwards encreaſed to 100 *l. per Annum*; adjudged, that the whole *Encreaſe* ſhall be employed to the ſame Uſes, and no Part of it ſhall be converted to the Uſe of the Deviſees; and ſo it is where the Revenues of a College encreaſe, they ſhall be imployed in ſuch Works of Charity as the Founder expreſſed before the Encreaſe, and no Part of it ſhall be converted to the Private Uſe of any Perſon whatſoever. 8 *Rep.* 130. *Thetford-School's* Caſe.

W. Jones 147. 2. The Queſtion to the Judges, upon a Reference to them out of Chancery, was, whether a Decree made by the Commiſſioners by Vertue of this Statute, and Exceptions taken to it in Chancery, and there confirmed, might be re-examined upon a *Bill of Review*, as other Bills of Review upon Decrees in Chancery? and reſolved, that it could not, for the *Decree confirmed by the Chancery is Concluſive*; becauſe it hath an Authority by Act of Parliament, and therefore not to be reſembled to a Decree made by the Chancellor by his ordinary Authority, which may be re-examined; but the Act mentions but one Examination. *Cro. Car.* 40. *Winſor* verſus *Inhabitants of Farnham.*

3. The Deviſee of a *Rent-Charge* to a Charitable Uſe *purchaſed* the Lands out of which the Rent was iſſuing; now, tho' by Law the Rent was extinguiſhed, yet the Commiſſioners decreed, that it ſhould be *revived*, and ſettled on Truſtees to ſupport the Charity. *Moor Ch. Uſe.* 79. *Lord Dorſet* verſus *Eaſtgrinſted.*

4. Deviſe of a *Rent* to a Charitable Uſe is a Deviſe of the Land itſelf, and not only the Rent then reſerved, but the improved Value ſhall paſs. *Moor Char. Uſe.* 79. *Kennington Haſting's* Caſe. *Moor Rep.* 640. *Kerry* verſus *Dethick.*

5. The *Biſhop of the Dioceſe* muſt be one in the *Commiſſion* by the expreſs Words of the Statute, but the Commiſſioners may proceed without him; but if the Commiſſion be iſſued *ſede vacante*, it need not be directed to the Metropolitan as a Commiſſioner; if the Commiſſioners find a Leaſe made to Defraud the Charity, they may decree it void both in Eſtate and Intereſt, unleſs it was made to one for a valuable Conſideration, who had no Notice of the Fraud; they may decree the Party or his Executors or Adminiſtrators, who had received the Meſne Profits for a long Time paſt, and miſimployed them, to repay them, as well as they may appoint him to pay the ſame for the Time to come; and they may ſettle the Charity in natural Perſons, and their Heirs. *Moor* 559, 560.

6. The Sea-Captains and Mariners made an Agreement amongſt themſelves to abate 4 *d. per* Month of their Wages, where they received above 7 *s. per* Month and 3 *d. per* Month where they received above 5 *s.* and *Sir Tho. Middleton*, who paid them their Wages, retained 300 *l.* which was to be for the Relief of Poor Seamen, hurt and wounded, and kept it above twenty Years; and now the Seamen obtained a Commiſſion upon the Statute of Charitable Uſes, and the Commiſſioners made a Decree for them, which was confirmed in Chancery. *Moor* 889. *Sir Tho. Middleton's* Caſe.

7. The Teſtatrix *Mary Chambers*, deviſed 100 *l.* to the *Church-wardens* and Overſeers of the Poor of the Pariſh of *St. Giles's Cripplegate*, to be paid to them to encreaſe the Pariſh-Stock, which Money they received and put it out at Intereſt, and received the Profits, and paid it to the Poor of that Pariſh, which lies in *London*, but none to the Poor of the other Part of the Pariſh, which lies in *Middleſex*; adjudged, that it was well paid. *Moor Ch. Uſe. Rooks* verſus *Dorrington.*

8. Deviſe of a Portion of Tithes, to the Intent the Profits ſhould be employed to build a Grammar-School, and for the Maintenance of the Maſter; the Tithes were then in Leaſe for a Term of Years, at the yearly Rent of 7 *l.* the Deviſees received that Rent, and built the School, and in Conſideration of the Surrender of the Term, they granted a longer Term to the firſt Leſſee, (*viz.*) for fifty Years, at the ſame Rent; the Leſſee died about twenty-four Years after the Commencement of his Leaſe, and his Executor enjoyed it about fourteen Years afterwards, during all which Time, the yearly Value was worth 43 *l. per Annum* more than the reſerved Rent; but before the Leaſe of fifty Years expired, the ſurviving Deviſee made a Leaſe of theſe Tithes for twenty-one Years, at the yearly Rent of 10 *l.* to commence after the Expiration of the

Leaſe for fifty Years; adjudged, that this concurrent Leaſe was void, being made to defraud the Charity of the Encreaſe of the Tithes, which were then worth 60 *l. per Annum* more than the reſerved Rent, and that the Truſtees ought to let it at that Value, and not exceeding twenty-one Years. 16 *Car.* 2. *Wright* verſus *School of Newport.*

9. The Teſtator being ſeiſed in Fee of a *Manor held in Capite*, deviſed it to be ſold by his Executors, and that Part of the Money ariſing by ſuch Sale ſhould be paid to his Wife, and Part in ſeveral other Legacies, and the Reſidue to be beſtowed in Charitable Uſes; the Queſtion was, whether this was a good Conveyance within the Statute, becauſe there was no Diſpoſition of the Land to any Charity, but only an *Appointment that it ſhould be ſold*, and the Money divided as aforeſaid; and reſolved, that it was not a good Conveyance within the Statute. *Cro. Car.* 378. *Aſcue's* Caſe.

10. *Henry Fryer* made a Feoffment of his Lands, being of the Value of 400 *l. per Annum*, in Truſt, *&c.* and by his Will appointed the Truſtees to pay 100 *l. per Annum* to three Pariſhes (naming them) for the Poor of theſe Pariſhes, and that his ſaid Truſtees ſhould ſtand ſeiſed of the Reſidue, to *the Uſe of the Poor in general for ever*; the Commiſſioners of Charitable Uſes made a Decree, by which they ſettled *the whole Eſtate to charitable Uſes*; and this Decree was quaſhed by the *Lord Keeper Finch*, becauſe this being a Charity to ſome particular Poor, and the Reſidue *to the Poor in general*, the Commiſſioners cannot intermeddle, but it muſt be determined by the King himſelf in the Court of Chancery, upon an Information by the Attorney-General in Behalf of the King; and now, upon ſuch Information brought, 100 *l. per Annum* was decreed to the three Pariſhes, and the Reſidue was decreed by the Directions of the King, to the Maintenance of the the mathematical Scholars in *Chriſt's Hoſpital.* 2 *Lev.* 167. *Attorney-General* verſus *Matthews.*

11. The Teſtator deviſed an Annuity out of his Lands for the Maintenance of *Watford-School*; and upon a Bill in Equity exhibited by the Attorney-General in Behalf of the Charity, it was inſiſted, that all the Tertenants of the Lands charged with the Annuity ſhould be made Parties; but decreed, that they ſhould not, becauſe every Part of the Land is chargeable. 1 *Salk.* 163. *Attorney-General* verſus *Shelley.*

(B)

Where 'tis good, tho' the Conveyance is defective: For Miſnoſmer, or otherwiſe, and where not.

1. DEviſe to the *Parſon and Church-wardens* of a Pariſh in *Thames-ſtreet, London*, of a Copyhold in *Barking*, that they ſhould ſell the ſame, and employ the Money to a Charity in *that Pariſh*; adjudged, that tho' the *Parſon and Church-wardens* are not a Corporation to have Land not lying in *London*, nor to ſell it for ſuch Uſes, yet the Deviſe was good. *Moor Ch. Uſe* 81. *Champion* verſus *Smith.*

2. So a Deviſe to a Corporation by a wrong Name, (*viz.*) to the *Mayor and Chamberlain* of *London*, inſtead of the *Mayor, Aldermen, and Commonalty*, is good, becauſe it appeared by the Will, that the Teſtator *intended* it to the Corporation. *Ibid.*

3. So a Deviſe to the *Poor People* in ſuch an Hoſpital, is good, for tho' they could not take by that Name, becauſe they were no *Corporation*, yet becauſe the Mayor and Burgeſſes of the Place were capable, and they were Governors of the *Hoſpital*, it was decreed, that the Lands ſhould be conveyed to them for the Uſe of the Poor. *Moor Char. Uſe* 81. *The Mayor of Reading* verſus *Lane.*

4. Tenant in Tail of a *Copyhold* ſuffered a *Recovery*, but no Judgment was given againſt the *Vouchee*, for which Reaſon it was void to bar the Entail; yet a *Deviſe* thereof by the Tenant in Tail was held good to *St. John's College* in *Cambridge*, as a Gift or Limitation of the Lands to a Charity. *Moor Char. Uſe. Platt* verſus *St. John's College* in *Cambridge. Ibid. Woodford Poor* verſus *Parkhurſt.*

5. A *Feme Covert*, who was entituled to a Debt as *Adminiſtratrix, &c.* deviſed it to a Charity; adjudged, that tho' the Will was *void in Law*, yet it was a *Declaration* of her Intention within the Statute, and the Charity ſhall be ſupported if ſhe had Aſſets of the Inteſtate; but if ſhe had deviſed a Rent out of her own Land, the Statute doth not ſupply that defective Deviſe, becauſe the Will was void *ab initio*, for a Feme covert cannot make a Will of any Thing which ſhe hath in her own Right. *Moor* 822. *Damn's* Caſe. *Bramble* verſus *Poor of Havering. Ibid.*

6. Deviſe of 41 *l. per Annum* out of the Manor of *W.* which was held *in Capite*, and this was to be paid every Year to the Mayor and three ſenior Aldermen of *Southampton*, to put out *Apprentices*, and for the Relief of the old and impotent; now, tho' this Will was void as to the third Part of the Manor, becauſe it was held *in Capite*, yet the Money was decreed to the Deviſees by the Commiſſioners, and confirmed in the Court of Chancery. *Moor Char. Uſe* 83. *Higgins* verſus *Poor of Southampton.*

7. So a Deviſe of Lands held *in Capite* to the *principal Fellows and Scholars of St. John's College in Oxford*, to find a Scholar of the Blood of *Dr. Lloyd*, the Teſtator, tho' it was void in Law in ſeveral reſpects, becauſe one third Part of the Lands *in Capite* is not deviſable by the Statute 34 *H.* 8. *of Wills*, but muſt deſcend to the Heir, and alſo, becauſe by that Statute a Deviſe to a *Corporation in Mortmain* is void; yet, tho' theſe Lands could not paſs by the *Will*, as

it was a Will, 'tis a good *Limitation* and *Appointment* within the Statute of Charitable Uſes. *Hob.* 136. *Dr. Loyd*'s Caſe. *Coliſon*'s Caſe. *Ibid.* 136. *S. P.* 1 *Lev.* 284. *The King* verſus *Newman. S. P.*

8. But if a Man *convey* two Parts of his Lands which he held *in Capite*, for a valuable Conſideration, and then deviſeth the remaining third Part to a Charity; this is not helped by the Statute, becauſe in that very inſtant of Time, when he dieth, this third Part deſcends to the Heir, and he having diſpoſed the other two Parts, hath no Power by the Common Law, and is diſabled by the Statute of Wills to deviſe the other Part. *Moor Char. Uſes* 78. *Lord Mountague*'s Caſe.

9. So where the Teſtator gave *a Rent* iſſuing out of ſuch an Houſe, to a Charity, and deſired a Scrivener to put his Will in *Writing*, and died, then the Will was wrote; adjudged, that tho' a *Rent* cannot be created or granted without *Writing*, yet this *nuncupative Will* was good, not as a Gift of the Rent by the Will, but as a *Limitation* or Appointment of it by the Statute. *Moor Char. Uſe* 81. *Stoddard*'s Caſe. *Moor* 88. *Rolfe*'s Caſe. *S. P.* 888. *S. C.*

10. Where a Will or Money given to a Charity have been *concealed*, the ſame hath been decreed to ſupport a Charity, as for Inſtance, the Will of *James Meek* was concealed, by which he gave 100 *l. per Annum* in *Eaſt Smithfield*, *St. Katherine*'s, and *Aldgate*, to learn poor Scholars, to be choſen out of the Free-School in *Worceſter*, and to be educated in *Magdalen-Hall in Oxford*; it was proved he made ſuch a Will, and that a little before his Death he declared, that he would not alter it, and the Heir at Law refuſing to convey theſe Houſes out of which the Rent iſſued, according to the Will of the Teſtator; the Commiſſioners decreed, that the Chancellor, Maſters and Scholars of the Univerſity ſhould ſtand ſeiſed, *&c.* and pay the Rents as directed by the Will, which Decree was confirmed in Chancery. *Moor Char. Uſe* 79. *Meek* verſus *Magdalen-Hall. Seymour* verſus *Poor of Thetford. Ibid. S. P.* for Money concealed.

11. Deviſe of Money to a Charity *not appointing out of what it ſhall iſſue*; as for Inſtance, a Deviſe of 20 *l.* to maintain a Preaching Miniſter; the Court in ſuch Caſe decreed the Executrix to buy Lands, and ſettle it on the Charity, where the Teſtator had Lands and perſonal Aſſets. *Moor Char. Uſe* 82. *Penſtred* verſus *Payer.*

12. So a Deviſe of Lands to be ſold, and the Money to be applied to ſuch a Charity, not appointing *by whom* it ſhould be ſold; the Commiſſioners may appoint any Perſon to ſell, and Decree the Sale to be good. *Moor Char. Uſe* 79. *Steward* verſus *Germin.*

13. Tho' two Executors may have a joint and equal Intereſt over the Charity, yet one alone may be chargeable, as where both prove the Will, and one receives the Money given to the Charity, and dies inſolvent, the Survivor ſhall be charged with the Whole, if the Teſtator left ſufficient Aſſets, becauſe they both jointly took upon themſelves the *Probate* of the Will; whereas, if one alone had proved it, then the other could not be charged. 4 *Car.* The Caſe of the Poor of *Walthamſtoe.*

14. So if an Executor detains the Money, and will not lay it out purſuant to the Direction of the Donor, the Commiſſioners may Decree it with Intereſt; and if a Sum of Money is given, and 'tis not directed out of what it ſhall iſſue, and where the Donor left Lands and a perſonal Eſtate, and his Executor refuſed to buy Lands, *&c.* to the Value of the Money given in Charity; the Court of Chancery decreed, that a Purchaſe ſhould be made, and the Lands ſettled upon the Charity. *Antea pl.* 11. *S. C.*

15. Deviſe of *Copyhold-Lands* to his Son and Heir, and to his Heirs for ever, upon Condition to employ the Rent and Profits to the Relief of the Poor of *Stow-Market in Suffolk*; the Teſtator died, and made no Surrender of the Lands to the Uſe of his Will; yet adjudged, that the Will was a good Limitation, and an Aſſignment to a charitable Uſe within the Statute. *Moor* 890. *Rivett*'s Caſe.

16. In Replevin, *&c.* the Caſe was, Sir *Tho. Smith* deviſed his Lands in Fee to ſuch charitable Uſes as the *Lord Lumley* and Sir *Henry Henn* ſhould appoint, *&c.* they appointed 5 *l.* to the Poor of the Pariſh of *St. Mary in Cheſter*; and the Commiſſioners decreed, that the Church-wardens might *diſtrain*, *&c.* The Queſtion was, whether they could *add a Power to diſtrain* where there was none in the original Gift; and the Lands lying in *Eſſex*, whether the *Commiſſioners in Cheſhire* can bind the Lands there with ſuch an *additional Clauſe*, and adjudged in both Points that they might. *Raym.* 209. *Harriſon* verſus *Groſvenor.*

17. Tenant in Tail by *a nuncupative Will*, deviſed a Rent of 20 *l. per Annum*, out of his Eſtate-tail, for building a Free-School, and ordered, that his Executors ſhould purchaſe other Lands for the Maintenance thereof; this Will was made before the Statute of Frauds, but the Teſtator died afterwards; it was held by *Harcourt*, Lord Chancellor, that at Common Law, Lands were not deviſeable, that the Statute 31 *H.* 8. which gave the Owners of Lands Power to deviſe them, doth as much require that the Will ſhould be in Writing, as the Statute of Frauds requires three Witneſſes, and if there are but Two, the Will is void; and that the Statute 43 *Eliz.* which favoured *Appointments* to Charities, is now repealed by the Statute of Frauds *pro tanto.* 1 *Salk.* 163. *Genner* verſus *Harper.*

Chattels.

Deviſe of a perſonal and particular Thing to a particular Purpoſe. (A)
Deviſe of a perſonal Thing, with a Remainder over. (B)
Deviſe of the Uſe of a perſonal Thing, with a Remainder over. (C)
Deviſe of Money in preſent, and in Contingency. (D)

(A)

Deviſe of a perſonal Eſtate, and of a particular Thing, and of a Deviſe of a Thing to a particular Purpoſe.

See *Remainder*. (A) per totum.

1. *Chattels* are either *Perſonal* or *Real*, and thoſe again are divided into *moveable* and *immoveable*; *perſonal Chattels* are of ſeveral Sorts, as *Beds*, *Books*, *Cows*, *Houſhold-ſtuff*, *&c.* and theſe, and many more of the like Nature, paſs by the Word *Moveables*, of which ſome are *inanimate* and paſſive in their Motion, as *Beds*, *&c.* and ſome are animate and active in their Motion, as *Horſes*, *&c.* and all Things of this Nature are accounted in the *actual Poſſeſſion of the Executor*, immediately upon the Death of the Teſtator, tho' they are at never ſo great a Diſtance from him.

2. *Chattels real* on Leaſes for Years of *Advowſons*, *Commons*, *Fairs*, *Houſes*, *Lands*, *Markets*, *&c.* and theſe paſs by the Name of *Immoveables*, and are never accompted in the Poſſeſſion of the Executor, till he makes an Entry, or hath recovered the ſame, except where there is a *Leaſe for Years of Tithes*, for in ſuch Caſe there can be no Entry made, neither are Debts due to the Teſtator, or Arrears of Rent incurred in his Time, in the actual Poſſeſſion of the Executor till recovered.

3. The Teſtator deviſed a *Moiety of his perſonal Eſtate* to his Wife, and ſeveral Legacies to particular Perſons, and afterwards he deviſed the *Reſidue* to *T. S.* and died; adjudged, that if there is enough to pay his Debts, ſhe ſhall have a *Moiety of the whole perſonal Eſtate*, and that the Debts ſhall be paid out of the *Reſidue* deviſed to *T. S.* and that if this perſonal Eſtate conſiſted in Chattels perſonal and real, as in Money, Goods, Bonds, and Leaſes for Years, a Moiety of all ſhall paſs by this Deviſe. 1 *Ch. Rep.* 16. *Lee* verſus *Hale*.

4. An *Earl* deviſed his *Jewels* to his Wife, and died; adjudged, that neither his *Collar of SS*, nor his *Garter of Gold* did paſs, becauſe thoſe were not Jewels in Propriety of Speech, but Enſigns of *Honour*, as he was a *Knight of the Garter*, neither did his *Gold Buttons* on his Clothes, paſs by that Word, becauſe they were annexed to his Robes, but Chains and Bracelets of Gold and Rings did paſs, neither will Jewels or Plate paſs by the Word *Utenſils*. *Owen* 124. The Earl of *Northumberland*'s Caſe. *Dyer* 59. *b. Latimer*'s Caſe. *Poſtea* Legatee. (B) 1. *S. C.*

5. The Teſtator deviſed *all his Corn which ſhall grow on Black-acre* in the Year next after his Death, and there was no Corn ſowed there in that Year; adjudged, that the Legacy is void; but if he had deviſed *ſo much Corn*, and appointed that it ſhould be paid *out of the Corn* growing on that Acre in that Year, there the Deviſe is good, becauſe 'tis of an abſolute Thing, with an Appointment how it ſhall be paid; and tho' it cannot be paid in that Manner, yet that ſhall not make the Legacy void.

6. The Teſtator deviſed ſeveral Legacies to particular Perſons, and after thoſe were paid, he deviſed the *Reſidue* of his Goods, *&c.* to his Wife, *To diſpoſe for the Good of his Soul, and for Payment of his Debts*, and made her ſole Executrix, and died; the Widow married *T. S.* who made a Will, and *G. D.* Executor thereof, and died; adjudged, that the Widow, and not *G. D.* ſhall have the Reſidue of the Goods, for *T. S.* the ſecond Husband, was not entituled to them by the Intermarriage, becauſe his Wife had no Intereſt in them by the Will of her firſt Husband, they being deviſed to her for a particular Purpoſe, (viz.) *for the Payment of his Debts*. *Dyer* 331.

7. The Teſtator deviſed *all his Goods* to *T. S.* adjudged, that by theſe Words a Leaſe for Years will paſs; but if the Legatee ſues to have the Leaſe, he muſt make the Executor a Party, otherwiſe his Bill will be diſmiſſed. *Cro. Eliz.* 386, and *Moor* 352. *Portman* verſus *Willis*. 1 *Ch. Rep.* 277. *Moor* verſus *Blagrave*.

8. A Choſe in Action as Money due on a Bond, or Damages upon a Breach of Covenant is not deviſable, as for Inſtance, an *Orphan*, whoſe Portion was in the Court of Orphans, married, and afterwards her Husband deviſed the Money to her, provided ſhe did not claim any Dower out of his Lands, and died before ſhe was twenty-one Years old; it was inſiſted in the Court of Chancery, that the Money being actually veſted in the Husband by the Intermarriage, he might deviſe it as a perſonal Chattel, and that the *Chamberlain of London* having only the Cuſtody of the Money, his Poſſeſſion ſhall be the Poſſeſſion of the Husband, for 'tis not a Duty to the Chamberlain,

to

to be reduced into a Property, by an Action to be brought againſt him at the Suit of the Huſband, but 'tis only a *Depoſitum* there for his Uſe; but adjudged, that 'tis a Choſe in Action, and cannot be in the Poſſeſſion of the Husband till actually recovered; for by the Cuſtom of *London* it may be recovered when the Orphan is married or come of Age, and an Action of Debt lies for it, and therefore not deviſable till recovered. 2 *Vent.* 340. *Pheſant* verſus *Pheſant.*

(B)

Deviſe of Limitation of a perſonal Thing, with Remainder over.

1. THE Law will not ſuffer a Deviſe of a perſonal *Thing*, with a Remainder over; but a Deviſe of a *Chattel real*, with Remainder over, hath been adjudged good in a Court of Equity; as to the firſt Point, the Teſtator being poſſeſſed of a *Leaſe for Years*, in a Form, deviſed to his Son *the whole Years* he had therein, and if his Son died, then he *deviſed it to his Daughters*, and made his Son ſole Executor, and died; the Son proved the Will, and afterwards he died Inteſtate; adjudged, that his Adminiſtrator had a Right to the Remainder of the Term, becauſe it being a perſonal Thing, and deviſed to the Son, it cannot be deviſed over to the Daughters after his Death. 2 *And.* 185.

2. So a Deviſe of *his Goods* to his Wife for Life, *and after her Deceaſe to T. S.* who commenced a Suit in the *Marches of Wales*, to ſecure his Intereſt in Remainder; but a Prohibition was granted, becauſe a Deviſe of *the Goods in Specie*, with a Remainder over, is void. *March* 106.

3. But a Deviſe of a *Chattel real*, with a Remainder over, is good, as where the Teſtator made a *Leaſe in Truſt*, referring to his Will, and then he deviſed Portions to his Daughters, to be paid at their reſpective Marriage, or Age of twenty-one Years, *which Portions were to be raiſed out of this Term for Years*; and if his Daughters ſhould die before Marriage, or the Age of twenty-one Years, that then the *Reſidue of the ſaid Term ſhould remain to T. S.* the Daughters had no *preſent Proviſion* or Maintenance, and the Chancery could not Decree any, becauſe of the Deviſe over to *T. S.* which was adjudged to be good. 1 *Ch. Rep.* 249. *Leech* verſus *Leech.*

4. In Chancery, the Caſe was, the Father had a Son and two Daughters, and being poſſeſſed of a Leaſe for Years, he deviſed the ſame to his Son; and if he died, then to his two Daughters; and if they die, then to his Wife, and made his Son ſole Executor, and died, who entered after the Death of his Father, and then he died Inteſtate, and his Widow took out Adminiſtration, and ſold the Term for a valuable Conſideration; and adjudged, that the Sale was good. *Moor* 748. *Handall & al'* verſus *Brown & al'.*

5. In Chancery, the Caſe was, the Father being poſſeſſed of a Term for ninety-nine Years, aſſigned the ſaid Term and Eſtate to Sir *R. M.* and others, to the *Uſe* of himſelf for Life, Remainder to his Son *Robert* for Life, Remainder to the *Heirs Males of the Body of Robert*, Remainder to ſuch Perſon to whom the Father ſhould aſſign the ſame by his Laſt Will, afterwards he aſſigned all his Uſe, Intereſt, and Truſt, to Sir *G. B.* and died, then *Robert* his Son entered and recovered againſt Sir *G. B.* paying him 500 *l.* and now he required, that Sir *R. M.* and others, to whom the Aſſignment of this Term was made, in Truſt, to aſſign all their Intereſt to him, which the Court decreed accordingly; becauſe, tho' this Limitation of the *Truſt of a Term to Robert in Tail Male*, is the ſame Thing as a Grant or Deviſe of the Term it ſelf to one in Tail, which cannot be by the Rules of Law, for in ſuch Caſe it veſts in the Grantee or Deviſee, and he may bar his Iſſue, and it will go to his Executors and not to his Iſſue; but if the *Remainder* of ſuch a Term for Years is limited over to another, as in this Caſe, 'tis to *Robert*; there the Donee for Life, or in Tail, cannot ſell the Term to prejudice him in Remainder, but ſuch Remainder ſhall be preſerved, both at Common Law and in Equity; the Caſe is the ſame where a *Truſt* of a Term for Years is limited in Remainder, as where the Term it ſelf is ſo limited. *Moor* 809. *Tatton* verſus *Mollineux.*

(C)

Deviſe of the Uſe thereof, and a Deviſe of the Uſe, with Remainder over.

1. THE *Uſe* of a perſonal Thing may be deviſed to one, and the Remainder to another, and in that Caſe the Property is veſted in the laſt Deviſee; as for Inſtance, *Fitz James*, who was Chief Juſtice of *England* in the Reign of *H.* 8. deviſed the *Uſe of his Plate and Jewels* to his Son, and to *the Heirs Males of his Body*; adjudged, that the Son himſelf had no Property, for that was veſted in his Heirs Males, and the Uſe was only in him. *Owen* 33.

2. But ſince that Time it hath been adjudged otherwiſe, for where the Father deviſed the Reſidue of his perſonal Eſtate, *&c.* to the *Earl of Craven, for the Uſe of William Whitmore*, his only Son, *and the Heirs of his Body*; and that if he died in his Minority, and *without Iſſue, then to the Iſſue of his Aunts*, and made his Son Executor, and the *Lord Craven* Executor during his Minority;

hority; the Father died; the Son deviſed all his Perſonal Eſtate to his Wife, and died upwards of 17 Years, and before 21, and without Iſſue; it was decreed, that becauſe the Reſidue of this Eſtate conſiſted in Money, Bonds, Cattle, Houſhold-Goods, Plate, Jewels, Arrears of Rent, *&c.* that the Limitation of ſuch Perſonal Things over to another, is void; for a Deviſe of the *Uſe of Money*, is a Deviſe of the Money it ſelf, and the Property of thoſe Things being veſted in the Son at the Age of 17 Years by Vertue of this Deviſe made to him by his Father, for at that Age he is no longer a Minor, as to his being an Executor, ſhall never be deveſted by any Limitation over in perſonal Things; 'tis true, it hath been allowed in Chattels Real. 2 *Ch. Rep.* 167. *Whitmore* verſus *Craven.* Adminiſtration. (L) 22. *S. C.*

3. So a Deviſe of *the Uſe* of ſeveral Books, Medalls and Pictures, to his *Wife for Life*, and after her Deceaſe, that the ſame ſhould *remain to her Son*, if ſhe be with-Child with a Son, if not, or if the Son ſhould die *without Iſſue Male of his Body*, that then the ſame *ſhould remain to the Uſe of Thomas Vachell*; it was decreed, that this Limitation over was void. 1 *Ch. Rep.* 129. *Vachell* verſus *Lemon.*

(D)

Deviſe of Money preſently, and Deviſe of it in Contingency.

1. THE Teſtator being poſſeſſed of Goods, deviſed them to his Son *when* he came to the Age of twenty-one, and if he died before the ſaid Age, then his Daughter ſhould have the ſaid Goods; the Son died before twenty-one, adjudged, that the Daughter ſhall have the Goods immediately, and not ſtay till the Son ſhould be twenty-one Years old, if he had lived. 1 *And.* 33.

2. *Money* cannot be deviſed from one to another; as for Inſtance, the Father having three Daughters, deviſed to them 540 *l.* equally to be divided, and if any of them died *without Iſſue*, then her Part ſhould go to the Survivor; one of them married, and *died without Iſſue*, and her Husband exhibited a Bill in Equity againſt the Executor, and the ſurviving Siſters, and had a Decree for 180 *l.* being the third Part of 540 *l.* to which his Wife was entitled by the Will, and he by the Intermarriage. 2 *Vent.* 349. *Broadhurſt* verſus *Richardſon.*

3. The Father being a Citizen of *London* deviſed a *Sum of Money* to his Son, which was more than his *Cuſtomary Part*; and if he died before twenty-one Years of Age, then he *deviſed it over to another*, it was decreed, that this *Deviſe over* was void for ſo much as was the Cuſtomary Part; for if the Son die before twenty-one Years are compleat, his Adminiſtrator ſhall have the *Cuſtomary Part*, and the Surplus ſhall go to whom it was deviſed. 1 *Ch. Rep.* 199. *Pate* verſus *Hatton.*

4. The Father diviſed 300 *l.* to be paid to his *Child*, which he ſhall have at his Death, and if he had none, *then to his own Siſter*; afterwards he had *three Children*, and by a Codicil he deviſed to each of them 200 *l.* a-piece, but did not ſay, that *it ſhould be for their Portions*, nor any Thing either to affirm the Will, or to make it void; it was decreed, that all *three Children* ſhould have a diſtributive and equal Share of the 300 *l.* and that each of them ſhould have 200 *l.* by way of Accumulation. 1 *Ch. Rep.* 301. *Pit* verſus *Pidgeon.*

5. The Teſtator deviſed 140 *l.* to the Daughters of *T. S.* who had five Daughters then living, and two more before he died; adjudged, that thoſe two ſhould have no Share of this Money; becauſe it ſhall be intended, that the Teſtator deſigned it for no more than were living at that Time when he made his Will.

6. Deviſe of a Sum of Money to *T. S. to be diſpoſed by him for certain Purpoſes, which he ſhould in a Private Note acquaint him withal*; afterwards the Teſtator died, without appointing how it ſhould be diſpoſed, and the Money was decreed to *T. S.* becauſe it was bequeathed to him, and it did not appear, that his Executor, or any Body elſe, ſhould have any Part of it. 1 *Ch. Rep.* 198. *Martin* verſus *Douch.*

7. The Teſtator deviſed a Sum of Money to a Woman, *at her Age of twenty-one, or Day of Marriage*, and then he added theſe Words, *to be paid to her with Intereſt*; ſhe died unmarried, and before ſhe was twenty-one Years old; adjudged, that the Money ſhall go to her Adminiſtrator; but if theſe Words had not been added, it had been a lapſed Legacy; and ſo it had been, if the Money had been deviſed to her *when ſhe came of Age*, or married, and ſhe had died before either of theſe Contingencies happened. 2 *Vent.* 342. 2 *Ch. Rep.* 195. *Cloberrie*'s Caſe.

Cheat. See **Information.** (B) 4.

Chriſtening. See **Clergymen.**

Church.

(A)

Who are to repair it, and of Bells and Ornaments, &c. and of disturbing in the Church. See *Mandamus.* (A) 41. *Recuſancy* per Totum. *Sequeſtration.* (A) *Treſpaſs.* (A) 9.

1. PRohibition, *&c.* upon a Libel in the Spiritual Court, by the Church-wardens of *Hailſham*, in the County of *Suſſex*, for Money impoſed on him dwelling in another Pariſh without his Conſent; the Defendants pleaded, that they, with the greateſt Part of the Pariſhioners, agreed to make a *Tax* for the Repair of the Church, according to the Quality and Quantity of the Poſſeſſions and Rents in the Pariſh, and that Notice was given thereof at the Church, *&c.* that on the Day, *&c.* the Church-wardens, and the greater Part of the Pariſh, made a Tax, that *every Occupier* of Lands, *&c.* ſhould pay for every Acre 4 *d.* that tho' the Defendant dwelled in another Pariſh, yet he occupied Lands in *Hailſham*, and ſo was a Pariſhioner, and averred, that the Pariſhioners of every Pariſh ought to repair their Church, and not the Church of another Pariſh; and upon Demurrer it was adjudged, that tho' the Defendant did dwell in another Pariſh; yet becauſe he had Lands in his own Poſſeſſion in *Hailſham*, he was in Law a Pariſhioner there; but if his Lands had been in Leaſe to a Farmer, in ſuch Caſe the Receiving the Rents would not have made him a Pariſhioner; but the Farmer is properly the Pariſhioner, and chargeable. 5 *Rep.* 66. *Jefferie's* Caſe.

1 Bro'nl. 115, 5. C. 2. After a Sentence in the Spiritual Court, upon a Libel for a Tax towards the Repairs of the Church, the Church-wardens, againſt whom the Sentence was given, appealed, and pending the Appeal, one of the Church-wardens gave the Defendant a Releaſe of all Actions, Suits and Demands; but notwithſtanding that Releaſe, the other Churchwarden, in the Name of both, proceeded to have the Sentence given againſt them reverſed, and for that Purpoſe he proſecuted the Appeal; upon which the Defendant moved for a Prohibition, ſuggeſting, that the Appeal was diſcharged by the Releaſe of one of the Church-wardens; thereupon the Churchwarden who proſecuted appeared, but he who gave the Releaſe, made Default; adjudged, that the Temporal Courts could not interpoſe in this Caſe; becauſe the Tax was proper to be determined in the Spiritual Court, and the Suit for it was at the Charge of the Pariſh, and in the Behalf of the Pariſhioners, and the Coſts were to go to them; therefore the Releaſe of this Church-warden could not be good. *Yelv.* 173. *Starkey* verſus *Barton.*

1 Roll. Rep. 146. 3. The Inhabitants of a certain Precinct, in which there was a *Chapel of Eaſe*, did reſort to the ſaid Chapel, and were married, chriſtened, and received the Sacrament in the ſaid Chapel, and had Chapel-Wardens there, but buried at the Mother-Church, which being in Decay, thoſe who lived within this Precinct, were taxed towards the repairing it, as Inhabitants of the ſaid Pariſh; whereupon they moved for a Prohibition, upon a Suggeſtion, that their Chapel was Parochial, and that Time out of Mind they had repaired it, by Reaſon whereof they had been diſcharged from repairing the *Mother-Church*; it was objected, againſt granting the Prohibition, that there were two Sentences in the Spiritual Court, by which the Pariſhioners of the Chapel were charged to pay towards the Repair of the Mother-Church, and tho' there were five Sentences to the contrary, yet they were all reverſed upon Appeals; adjudged, that tho' this Suggeſtion for a Prohibition was Matter of Fact, and triable by a Jury, 'tis ſtill in the Diſcretion of the Court, not to grant it, when it appears to them that the Fact is not true; but eſpecially in this Caſe, when the Delaying the Repairs may tend to the Decay of the Church: Now 'tis apparent to the Court, that the Inhabitants of the Precinct were to all Purpoſes Part of the Pariſhioners of that Pariſh where the Mother-Church was, and therefore they are liable to

* Palm. 532. S. P. * repair it with the Reſt. *Hob.* 66. *Aſhton* verſus *Caſtle-Brommidge.* 1 *Bulſt.* 16. *S. C. Cro. Car. S. C.*

4. The Defendant was preſented *ex Officio*, for not coming to his *Pariſh-Church*; he pleaded in the Spiritual Court, that this was not his Pariſh-Church, but that he had uſed to frequent another Pariſh-Church, and becauſe the Court refuſed this Plea, he moved for a Prohibition, and had it; becauſe the Eccleſiaſtical Court cannot determine which is his Pariſh-Church, for they cannot intermeddle with thoſe Precincts. *Trin.* 9 *Jac.* 1 *Bulſt.* 159.

5. Libel for a Rate for repairing the Church, the Defendant ſuggeſted for a Prohibition, that his Lands were over-rated, *viz.* 100 *l. per Annum*, when they were worth 60 *l. per Annum*, and no more, and a Cuſtom in the Pariſh, that they ought not to be rated for their Houſes and Lands, but only according to the Value of their Sheep-Walks. *Sed per Curiam*, the Rates for repairing the Church ought to be according to the Value of their Lands, and the Valuation thereof belongs to themſelves; and the Church being the Houſe of God, a Cuſtom in Preju-

 dice

dice of the Repairs thereof is void, for of Common Right, both Houſes and Lands are chargeable to it. 2 *Roll. Rep.* 463. *Holland* verſus *Kirton.*

6. In a Prohibition it was adjudged, that no Man ſhall be charged for his Land to contribute to the *Church Reckonings*, if he doth not *dwell in the ſame Pariſh*, or unleſs he conſent to it. *Moor* 554. *Penner* verſus *Crompton.*

7. The Defendant ſuggeſted for a Prohibition, that the Church-wardens had libelled againſt him in the Conſiſtory-Court of the Biſhop of *Glouceſter*, for a Rate made to repair the *Church Houſe, and for Relief of Poor Priſoners in the Marſhalſea, and for making new Chimes*, which are only Ornaments, and the Charge for ſuch Things ought not to be upon the Lands; but a Prohibition was denied, not upon the Merits of the Cauſe, but becauſe the Defendant came too late after a Sentence, and an Appeal to the Arches, in which Caſe 'tis allways denied, unleſs there is ſomething apparent in the Libel, of which the Spiritual hath no Juriſdiction. 2 *Lutw.* 1019. *Watkyns* verſus *Seaman.* *Poſtea* Prohibition. (F) 2. *S. C.*

8. Upon the Return of an *Habeas Corpus*, it appeared, that Dr. *Bruce* was committed upon the Statute 1 *Mar. cap.* 3. for diſturbing a Miniſter in the Church, in his Publick *Prayer and Preaching*; it was agreed, that ſo much of that Statute as concerned Diſturbance in *Preaching* is not repealed by the Statute * 1 *Eliz.* but as to the Diſturbance in *Prayer*, 'tis repealed; ſo that the Commitment for *both* is naught. *Allen* 50. *Dr. Bruce*'s Caſe. *See Paul* * *Moon*'s Caſe. *contra.*

* 1 Eliz. cap. 2. ſect. 9.

9. Treſpaſs for an Aſſault and Battery at *York-Caſtle, &c.* The Defendant, as to the Force, pleads Not guilty, and as to the Aſſault, *&c.* he pleads, that at *H.* in the County of *Lancaſter*, one *Jackſon* a Curate was performing the Funeral Rites, according to the Uſage of the Church of *England*, over the Body of *W. R.* then and there lying dead, and ready to buried, and that the Plaintiff did then and there malitiouſly diſturb him; whereupon the Defendant required him to deſiſt, which he refuſed; ſo to remove him, and to prevent any farther Diſturbance, *molliter manus impoſuit, &c. quæ eſt eadem*, and traverſed, that he was guilty in the County of *York*, or elſewhere out of *Lancaſhire*; and upon Demurrer to this Plea, it was inſiſted, that it was ill, becauſe the Defendant did not ſhew any Authority which he had to lay Hands on the Plaintiff, either as Conſtable, or Church-warden, or other Officer; nor doth he juſtify by the Authority or Command of any Officer whatſoever, or ſo much as to carry the Plaintiff before a Juſtice of Peace; and in this Caſe (if the Plaintiff is Faulty) there is a Remedy provided by the Statutes 1 *Ph. & Mar. cap.* 3. and 1 *Eliz. cap.* 2. But adjudged, that the firſt of thoſe Statutes extends only to *Preachers*, and the other, to all Men in Orders, who perform any Part of the Publick Service of the Church; but neither of them take away the Common Law; Now in this Caſe, every Perſon who was preſent, was concerned in the Service of God, which was then performing, ſo that the Plaintiff in diſturbing it, was a Nuſance to all of them, and as ſuch might be removed by any of them. 1 *Mod.* 168. *Glever* verſus *Hinde.*

10. Ruled, that an Information for not coming to Church, may be brought on the Statute 23 *Eliz.* reciting that Clauſe which hath Reference to the Statute * 1 *Eliz.* and that this is the ſureſt Way of declaring. 1 *Mod.* 191. *Warren* verſus *Sayer.*

* *By this Statute he is not bound to go Spiritual to his Pariſh Church, but upon reaſonable Excuſe, may go to another.* 2 Roll. Rep. 438. Brown's *Caſe.* *But the Court are Judges of the Reaſonableneſs of the Excuſe.* 2 Roll Rep. 455.

11. Adjudged, that the Spiritual Court may compel the Pariſhioners to repair their Pariſh-Church and may excommunicate all of them till repaired; but thoſe who are willing to contribute may be abſolved; but the Court cannot aſſeſs them towards it; neither can the Church-wardens; but the greater Part of the Pariſh may agree to a Tax, and if 'tis illegally impoſed, by a Commiſſion from the Biſhop to the Parſon, and to ſome of the Pariſhioners, to aſſeſs a Tax, yet if 'tis aſſented unto, and confirmed by the major Part of the Pariſh, the Spiritual Court may excommunicate thoſe who refuſe to pay. 1 *Mod.* 194. *Rogers* verſus *Davenport.*

12. The Church-wardens of *St. Edmund's Pariſh on the Bridge at Exceſter*, libelled againſt *Hawkins*, ſetting forth an *Antient Cuſtom* within that Pariſh, for the Church-wardens to adorn the inſide of the *Chancel* at the Publick Charge of the Owners and Occupiers of *Antient Houſes* there, by a Rate to be made by the Church-wardens, with the Conſent of the major Part of the Pariſhioners; that the *Chancel wanted Repairing and Ornaments*; that a Rate was made, *&c.* and confirmed by the Biſhop, that *Hawkins* was rated 17 *l.* for *Mills and Racks* which he had in the Pariſh, which was his due Proportion according to the yearly Value of Houſes there; the Defendant denied the Cuſtom, upon which they were at Iſſue, and there was a Verdict againſt him; it was moved in Arreſt of Judgment, that a Charge for * *Ornaments* is a perſonal Charge on the Inhabitants themſelves, and not on their Lands; 'tis true, if it had been for *Repairs*, then the Lands are liable to be rated; but neither the Inhabitants or their Lands are chargeable for repairing or adorning a *Chancel*, without a Special Cuſtom ſo to do, but the Perſon is bound of Common Right; 'tis true, here is a Cuſtom alledged and found, but they have not brought the Defendant within the Cuſtom; for that is for Owners of *Houſes*, *&c.* to repair, and they have rated the Defendants as Owners of Mills, which can never be intended to be Houſes; for in a *Precipe quod reddat*, a Mill cannot be demanded by the Name of an Houſe. 5 *Mod.* 389. *Hawkins*'s Caſe.

* 2 Roll. Rep. 262. Willmore's *Caſe.* 270. S. P.

3 Mod. 211. Citation. (A) 9. S.C.

13. Libel againſt the Defendant, for a Tax towards a Rate for new Caſting *the Bells*, which he refuſed to pay, *&c.* the Caſe was, he lived in the Dioceſe of *Litchfield*, but had Lands in his Poſſeſſion in *D.* within the *Dioceſe of Peterborough*, and was taxed as an Inhabitant there, in Reſpect of his Lands, and proſecuted in the *Biſhop of Peterborough*'s Court; adjudged, this is not a *Citing out of the* Dioceſe within the Statue 23 *H.* 8. *cap.* 9. becauſe he is an Inhabitant where he occupies Lands, as well as where he perſonally * reſides; and tho' he doth not live in the Pariſh of *D.* yet, having Lands in his Occupation, he is taxable, and Bells are more than Ornaments, for the Steeple is of no Uſe without them. 1 *Salk.* 164. *Woodward* verſus *Makepeace.* * 2 *Cro.* 321. *Cro. Car.* 79. *See Poph.* 197. 2 *Roll. Rep.* 270. *Latch* 103. *Winch* 53. 1 *Bulſt.* 20. 2 *Brownl.* 10. 3 *Cro.* 659.

* 4 Leon. Saer v. Bland. S. P. *for Tithes.*

14. Prohibition to the Spiritual Court, ſuggeſting, that they have a Parochial Chapel in another Pariſh, and that the Inhabitants of the * Chapelry have, Time out of Mind, had a Parochial Chapel, and Divine Service and Sacraments, and have *uſed* to be exempted from the Repair of the Parochial Church Bells, *&c. in Conſideration that they have repaired their own Chapel*, and that they have uſually repair'd the ſame, *&c.* the Prohibition was granted, becauſe that Court cannot try a Cuſtom; 'tis true, in the Caſe of *Chapel Bromidge*, *Hob.* 66. a Prohibition was denied; but it was, becauſe the *Right of Burial* was ſtill at the Parochial Church, and that was a Reſervation of their Antient Right; which was not ſo in this Caſe. 2 *Lev.* 102. *Brown* verſus *Palfry.*

15. In a Prohibition, the Plaintiff declared, that Time out of Mind, they had in *Bodicut* a Chapel Parochial, or a Church in *Bodicut*, in the Pariſh of *Adderbury*, in which, Time out of Mind, there hath been a Body of a Church, a Chancel, Bells, and all other Parochial Trophies, and Divine Service and Sacraments, *&c.* and that the Inhabitants of *Bodicut* never go to the Church of *Adderbury, nor have any Seats'* there, and that they have diſtinct Church-wardens, and make no other Uſe of the Church or Churchyard of *Adderbury, but for Burial only*, and that *Time out of Mind they have repaired* their Parochial Chapel of *Bodicut*, and the Inhabitants of *Adderbury* have been exempted from that Charge, and *ratione inde* the Inhabitants of *Bodicut* have, *Time out of Mind*, been diſcharged from repairing the Church of *Adderbury*, and yet the Defendant libelled againſt them to repair it, *&c.* Upon a Demurrer to this Declaration, it was inſiſted for the Defendant, that a general Preſcription, without ſhewing any Cauſe to exempt them from repair of the Pariſh Church, is not good; 'tis true, here is a Cauſe ſhewed, which is, the *Repair of their own Parochial Chapel*; but that cannot be a ſufficient Cauſe, becauſe 'tis for their own Eaſe, and therefore cannot diſcharge them from a Duty to which they are liable of Common Right; beſides, if there is any ſuch Cuſtom, it ſhould be pleaded in the Spiritual Court, and this by the expreſs Words of the Statute *Circumſpecte agatis*, which ſays, *De Eccleſia diſcooperta vel cœmiterio non clauſo non jacet prohibitio:* It was admitted on the other Side, that a general Preſcription, to be diſcharged from repairing, *&c.* is not good; but here is a good Cauſe ſhewed, (*viz.*) *Want of Seats* in the Parochial Church, and not going thither, unleſs to Bury; beſides, here is a Cuſtom alledged, and tho' the Repairs of Churches is within the Statute *Cirtumſpecte agatis*, yet when a Cuſtom is in Queſtion, 'tis a Temporal Matter, and muſt be tried in the Temporal Courts, becauſe there is an eſſential Difference between their Law, and the Common Law, in Cuſtoms; and the Court was of this Opinion, ſo adjudged, that Prohibition would lie. 2 *Lev.* 186. *Wiſe* verſus *Creek.*

16. When Church wants repairing, the Spiritual Court muſt proceed againſt the whole Pariſh; for they cannot rate a particular Perſon to repair it; but the major Part of thoſe who appear upon a general Summons ſhall conclude the Reſt; but if the Church or Chancel are both out of Repair, the Pariſhioners are only contributory to the Church; and tho' in a Libel the Word *Eccleſia* may include the Chancel, yet a Prohibition ſhall not be granted; and if any Part of the Money, collected for repairing *navem Eccleſiæ*, be laid out in repairing the Chancel, it will not be allowed in the Church-wardens Accompts; ruled likewiſe, that the major Part of the Pariſh may raiſe a Tax for the enlarging, as well as repairing the Church. 1 *Mod.* 236.

17. Libel againſt the Inhabitants of a Chapelry, within the Pariſh of *H.* for not paying towards a Rate for repairing the Pariſh Church; the Caſe was, the Inhabitants of this Chapelry had never yet contributed, tho' they always buried in the Mother-Church till the Reign of *H.* 8. and then the Biſhop conſecrated a Burial-Place for them, in Conſideration whereof they agreed to pay towards the Repairs of the Mother-Church; all this appeared in the Libel; adjudged, that by the Common Law, the Pariſhioners are bound to repair their Church; but by the Canon Law, the Parſon is to do it; and ſo he is in foreign Counties; in *London* the Pariſhioners repair both Church and Chancel, tho' the Freehold is in the Parſon; 'tis true, if thoſe of the Chapelry had always buried, chriſtened, *&c.* at the Mother-Church, it ſhould be intended to be coeval, and therefore not contributory to the Mother-Church; but here they buried at the Mother-Church till the Reign of *H.* 8. ſo that this Chapel muſt be erected for the Eaſe of thoſe of the Chapelry; and therefore they ſhall contribute. 1 *Salk.* 164. *Ball* verſus *Croſſe.*

Church-wardens.

(A)

See *Mandamus*.

1. THEY brought Treſpaſs for Taking away a Bell in the Time of their Predeceſſors, and concluded *ad damnum ipſorum: Et per Curiam*, the Action is well brought, for otherwiſe there would be no Remedy, becauſe the Capacity and Right of the preceding Church-wardens was determined; and this Difference was taken, (*viz.*) where they declare for Goods of the Church taken away in their own Time, and from their own Poſſeſſion, they may conclude, either *ad damnum ipſorum*, or *ad damnum parochianorum*; but where the Taking was in the Time of their Predeceſſors, they muſt conclude *ad damnum parochianorum*, and for this Cauſe the Judgment was arreſted. *Cro. Eliz.* 145, 173. *Hadnam* verſus *Green*. 1 Leon. 177. S. C.

2. Libel, *&c.* againſt *T. S.* for Taking the Organs out of the Church; and a Prohibition was prayed, becauſe the Libel was by the *Parſon*, when the Church-wardens may have an Action of Treſpaſs at Common Law, for Taking ſuch Things which belong to the Pariſhioners, and thereupon a Prohibition was granted. 1 *Roll. Rep.* 57. *Buckſale's* Caſe.

3. Libel in the Spiritual Court againſt a Church-warden to account for Money by him received and laid out, when in Office, the Year laſt paſt; he ſuggeſted for a Prohibition, that *per legem terræ*, he ought to account before the Miniſter of the Pariſh, and the ſucceeding Church-wardens and the Majority of the Pariſhioners, and that he accounted accordingly; it was inſiſted againſt the Prohibition, that the Eccleſiaſtical Judge might, *ex officio*, compel Church-wardens to account before him; for tho' they are a Corporation as to all perſonal Things concerning the Church, yet the ſucceeding Church-wardens ſhall not have an Action againſt their Predeceſſors, for any Thing done by them *ratione Officii*; beſides, they are Eccleſiaſtical Officers, and therefore properly under the Juriſdiction of an Eccleſiaſtical Judge: *Sed per Curiam*, a Church-warden is a tempora Officer employed in Eccleſiaſtical Affairs, and therefore a Prohibition was granted. 2 *Roll. Rep.* 73. *Biſhop's* Caſe. 2 Roll. Rep. 106. 107.

4. *T. S.* brought an Action on the Caſe againſt the Church-wardens, for falſly and malitiouſly Preſenting him in the Spiritual Court; the Church-wardens had a Verdict, and they moved for double Coſts, upon the Statute 1 *Jac.* *Sed per Curiam*, it was denied, becauſe that Statute doth not extend to Church-wardens, for Things concerning their Office in the Spiritual Courts. *W. Jones* 305. *Kerchevall* verſus *Smith*. Cro. Car. 285.

5. *Mandamus* to the Official of the Archdeacon of *London* to ſwear a Church-warden of *St. Ethelborough*, according *to the Cuſtom*, he having refuſed ſo to do, and to remove another which he had ſworn, and who was not duly elected; the Official returned, that the Perſon complaining was ſworn, but that he could not remove the other, and this was held a good Return, for he who was ſworn could not be removed by this Writ, therefore the other muſt try the Cuſtom to chuſe at Common Law, which cannot be abrogated by the Canon. *W. Jones* 439. *Evelin's* Caſe.

6. In a Prohibition upon an Excommunication for not anſwering on Oath to Articles exhibited againſt him, *&c.* and for not Taking the Oath of Church-warden, *to preſent upon all the Articles contained in a Book thereunto annexed*, amongſt which there were ſome that would oblige him to accuſe himſelf; it was adjudged, that the Oaths to be taken and adminiſtered in the Spiritual Court, are only *in cauſis matrimonialibus & Teſtamentariis*; and that ſince the Statute 13 *Car.* 2. an Oath is not to be adminiſtered, to preſent or accuſe himſelf, or to be ſworn to a Book, which contains ſuch Things *inter alia*; and that if a Man is excommunicated for not anſwering to Articles to which he ought not to anſwer, a Prohibition lies; and if he is not abſolved, upon Requeſt, and without Taking an Oath *parere mandatis Eccleſiæ*, an Attachment lies; and that Church-wardens ought to be ſworn to do what appertains to their Office, and no more. *Hardres* 364. *King* verſus *Lake*.

7. Libel in the Spiritual Court againſt Church-wardens, who ſuggeſted for a Prohibition, that they were choſen by a ſelect Veſtry appointed by the Biſhop of *London*, in the Pariſh of *St. Michael Crooked-Lane*, *contrary to Cuſtom*, and without the Conſent of the Pariſhioners; it was inſiſted againſt the Prohibition, that this was a void Cuſtom, that the Election of Church wardens muſt be according to the Eccleſiaſtical Law received here before the Canons in 1603, for as it belongs to the Common Law to enquire by Jury, ſo it belongs to the Eccleſiaſtical Law to enquire by Church-wardens, and therefore 'tis reaſonable, that they ſhould be elected according to that Law: But adjudged, that Church-wardens are Lay Corporations, and to many Purpoſes are temporal Officers, as it appears by the Statute 43 *Eliz.* concerning the Poor, that of common Right every Pariſh ought to chooſe their Church-wardens, but becauſe the Manner of chooſing them varies, therefore a Cuſtom may be alledged, and that is triable at Common Law only, and the pro-

per Iſſue in the principal Caſe would be, whether a ſelect Veſtry, or the whole Pariſh, ought to chooſe. *Hardres* 378. *Dawſon* verſus *Fowle*.

8. Upon an *Habeas Corpus* directed to the Mayor of *Briſtol*, they return, that *Paul Moon* was committed for diſturbing a Miniſter in Reading the *Common-Prayer* in a Church in *Briſtol*, by Vertue of the Statute 1 *Mar. cap.* 3. it was objected, that the ſaid Statute was made againſt Diſturbance in ſaying Maſs, *or ſuch Divine Service*; but the Common-Prayer is *not ſuch Divine Service*, for that was a Superſtitious Service, which this is not: *Sed per Curiam*, ſuch *Divine Service* extends to the Service now uſed in the Church, for the Word *Such* ſhall not relate to the *Service* it ſelf, but to the Authority by which it was eſtabliſhed. *T. Jones* 159. *Paul Moon's* Caſe. See *Dr.* * *Bruce's* Caſe *contra*.

9. Libel in the Spiritual Court againſt the Maſter and Wardens of a Company in *London*, for a Tax impoſed on their *Hall*, towards the repair of the Pariſh-Church; and upon a Prohibition it was ſuggeſted, that the *Wardens* ought not to be cited, for that the Tax was not ſet on them in their natural Capacity, but upon the Lands of the corporate Body; but the Prohibition was denied, for that their Lands are liable to this Tax, and the Spiritual Court hath the proper Cognizance of it, and they have no other Proceſs, but a *Citation*, which muſt of Neceſſity be of the Officers of the Corporation who are to pay the Tax, for the Corporation it ſelf is not viſible. *T. Jones* 187. *Thursfeild* verſus *Jones*.

1 Mod. 65. 10. Accompt by the Plaintiffs, who were Church-wardens, againſt the Defendants, the former Church-wardens, for a Bell; they pleaded, that it wanted mending, and that by the Aſſent of the Pariſhioners, it was delivered to a Bell-Founder, who kept it till he ſhould be paid; and upon Demurrer to this Plea, adjudged, that it was no Bar to the Accompt, but the Declaration was not good, becauſe it was to render an Accompt *de Bonis Eccleſiæ*, when it ſhould be *de Bonis Parochianorum*. 1 *Vent.* 89. *Tarlour, &c.* verſus *Rous*. 1 *Roll. Rep.* 426. *Methold* verſus *Wynn. S. P.*

11. The Church-wardens exhibited a Libel in the Spiritual Court, for the ſacrilegious Taking away Bells, *& pro ſalute animæ*; the Defendants pleaded the Act of general Pardon; and upon their refuſing to allow this Plea, they moved for a Prohibition, but it was denied, becauſe, tho' the Taking the Bells may be pardoned, yet they may ſue there *pro ſalute animæ*, and the rather, becauſe the Suit was againſt the *former Church-wardens*; 'tis true, the Succeſſors might have an Action at Common Law, but there they would recover only Damages, but in the Spiritual Court they Decree the Thing in Specie to be returned. *Sid.* 282. *Welcome* verſus *Lake*.

12. A Church-warden of *St. Martins* was indicted, for that he *falſe, corruptive & extorſive colore officii*, took a ſilver Cup for placing *W. R.* in the Office of a *Gallery-Keeper* in that Church; and upon a Motion to quaſh it, for that a Gallery-Keeper is not an Office, but an Employment, and it belongs to the Church-warden, and a Man may make him a Preſent to ſerve in this Employment, without being guilty of an Offence, but they would not quaſh it without a Trial, whether it was taken *corruptive*. *Sid.* 307. *The King* verſus *Eyres*.

13. Caſe, *&c.* for a falſe Return of a *Mandamus*, wherein *W. W.* and *H. B.* the Plaintiffs, declared on a Cuſtom in *Cherſey* in *Surrey*, for the Pariſhioners in *Eaſter-Week*, to chuſe two Perſons to be Church-wardens for the Year enſuing, and that the Plaintiffs were choſen according to the Cuſtom, and that the Defendant being ſurrogate to the Biſhop of *Winton*, refuſed to admit and ſwear them into the Office, whereupon they brought a *Mandamus*, upon which the Defendant falſly and malitiouſly returned a Cuſtom for the Vicar to chuſe one Church-warden, and therefore he could not admit both, *&c.* by Reaſon whereof they could not take upon them the Office, to their Damage of 40 *l.* upon Not guilty pleaded, the Plaintiffs had a Verdict; and afterwards it was objected, that they ought not to *join in this Action*, becauſe the Damage to one is not ſo to the other, nor is the Office of one the Office of the other, which is very true, if this had been an *Office of Profit*, and the Action had been brought for the *Profits*; but here 'tis brought for the falſe Return of a *Mandamus*, the Proſecution whereof was at the joint Charge of both the Plaintiffs, and therefore it was adjudged, that they might both join. 3 *Lev.* 362. *Ward* ver. *Brampſton*.

14. Libel, *&c.* for a *Church-warden's Rate to repair the Church*; the Defendant ſuggeſted for a Prohibition, that he had pleaded there, that this Rate was made *without the Conſent of the Pariſhioners*, and that the Plea was refuſed; the Court were of Opinion, that the Church-wardens might make a Rate themſelves, if the Pariſhioners, upon a Summons, refuſed or neglected to meet for that Purpoſe, becauſe, if the Church was not repaired, 'tis they, and not the Pariſhioners, who are to be cited. 1 *Vent.* 367. 1 *Mod.* 79, 194, 236. *S. P.*

15. In Treſpaſs, *&c.* the Defendant pleaded, that the Plaintiff was Impropriator of ſuch a Rectory, and that he was proſecuted in the Spiritual Court, and that by a Sentence there, the Profits of the Rectory were *ſequeſtred* for the *Repair of the Chancel, &c.* and upon a Demurrer to this Plea the Plaintiff inſiſted, that by the Statute 31 *H.* 8. the Profits of this Rectory impropriate were made * Lay-Fee, and for that Reaſon not ſubject to a *Sequeſtration by the Eccleſiaſtical Court*, and that an Impropriator could not ſue for Tithes there, till enabled by the Statute 32 *H.* 8. and the Statute 35 *H.* 8. gives the Ordinary a Remedy to recover *Procurations* and *Synodals*, which were ſuppoſed to be loſt by making the Rectories Lay-Fee; the Court inclined, that an Impropriator was not within their Juriſdiction, and that they muſt proceed againſt him for Repairs, not as a Parſon, but as a Lay-man; beſides, 'tis not poſitively alledged, that the *Chancel* was out of Repair, neither ſhould *all the Profits* be ſequeſtered, but only ſo much as would be proportionable for the Charge of Repairing, and that ought to be certainly expreſſed;

* Poſtea 17.

neither ſhould they give Sentence, that the *Sequeſtration ſhould remain in Force till the Judge take farther Order*, but until the Chancel had been repaired. 2 *Vent.* 35. 1 *Mod.* 258. 2 *Mod.* 254. See *Parry* verſus *Banks.* 2 *Cro.* 518. 2 *Roll.* 339.

16. The Church-wardens of the Pariſh-Church of *St. Peter in Hereford*, libelled againſt the Defendant, charging him with the Repairs of the Chancel of the ſaid Church, as Owner of the *Priory-Houſe*, alledging, that the Owner and Owners thereof have, Time out of Mind, repaired the ſaid Chancel; and in an Attachment upon a Prohibition, the Plaintiff declared, that there never was ſuch a *Cuſtom* as was ſet forth in the Libel, and that he had ſo alledged, and pleaded in the Eccleſiaſtical Court to hinder their Proceedings there to try ſuch a Cuſtom, which Plea the Judge refuſed to admit, but proceeded to give Sentence againſt the Plaintiff, upon the ſaid pretended *Preſcription*, whereas all ſuch Cuſtoms ought to be tried at Law; the Defendant traverſed the Proceedings after the Prohibition delivered, *& pro conſultatione habend'*, he pleaded, that all the Proprietors of the ſaid Meſſuage, called the *Priory-houſe*, have, Time out of Mind, repaired the ſaid Chancel, *& hoc paratus eſt verificare, &c. unde petit judicium & breve de conſultatione*; and upon a Demurrer the Conſultation was granted, becauſe the Spiritual Court may hear and determine this *Preſcription*, as they may a *Modus Decimandi*; and tho' the Parſon is of common Right to repair the *Chancel*, yet by *Preſcription* the Charge may be upon the Eſtate of a particular Perſon. 2 *Vent.* 238. *Williams* verſus *Bond.* See 1 *Brownl.* 16. 1 *Roll. Rep.* 126. *Poph.* 197. *Latch* 217.

17. In a Prohibition, the Queſtion was, where a Church is ſo much out of repair, that it muſt be rebuilt, whether the Biſhop of the Dioceſe may direct a Commiſſion to Perſons to tax and rate the Pariſhioners to rebuild it: And *per Curiam*, ſuch a Commiſſion is illegal; the Spiritual Court hath Power to compel the Pariſhioners to repair by Eccleſiaſtical Cenſures, but they cannot appoint in what Sum, for that muſt be ſettled by the Church-wardens. 2 *Mod.* 8. *Curtis* verſus *Davenant.*

18. In a *Prohibition*, *&c.* it was the Opinion of the Court, that where a Church is ſo much out of *Repair*, that 'tis neceſſary to pull it down, in ſuch Caſe, upon a general Warning or Notice given to the Pariſhioners, the major Part meeting, upon ſuch Notice, may make a Rate for pulling it down, and rebuilding it on the old Foundation; and tho' it may amount to more than will defray the whole Charge, yet 'tis good, and the Church-wardens are accountable for the Overplus; and that if any Pariſhioner refuſe to pay his Proportion, they may libel againſt him in the Eccleſiaſtical Court, but the Biſhop or his Chancellor cannot ſet a Rate on the Pariſh, it muſt be done by the Pariſhioners themſelves; a Prohibition was denied. 2 *Mod.* 222. *St. Mary Magdalen Bermondſey's* Caſe.

19. In *Treſpaſs* for Taking and carrying away four Load of Wheat; the Defendant juſtified, for that the Plaintiff is Rector of the impropriate Rectory of *H.* and that the Chancel was out of Repair, and that the Biſhop, *&c.* after Monition, had granted a *Sequeſtration of the Tithes* of the Rectory, for the *Repairing* the Chancel, and that the Defendants were Church-wardens of the Pariſh, *&c.* and that the Tithes in the Declaration belonged to the Plaintiff as *Rector*; and that by Vertue of the ſaid *Sequeſtration*, they took the ſame for the Repairing the *Chancel*, and had accounted to the Biſhop; and upon a Demurrer to this Plea it was adjudged ill; for *per Curiam*, the *Repairing* is no real Duty incumbent on the Impropriator; but 'tis a perſonal Charge in reſpect of the *Glebe*, and the Ordinary cannot intermeddle with the real Poſſeſſions, but muſt proceed againſt the Perſon by Eccleſiaſtical Cenſures, unleſs 'tis in the Caſe of *Appropriations*, and there he may ſequeſter; becauſe a Corporation cannot be *excommunicated*; 'tis true, the Repair of the *Chancel* is an Eccleſiaſtical Cauſe, but the Rectory and Impropriator are made *Lay* by the Statute * 31 *H.* 8. *cap.* 13. and therefore not to be ſequeſtred. 2 *Mod.* 254. *Walwyn* verſus *Awberie.* 1 Mod. 258. * Antea 14.

20. The Defendants lived in *one Dioceſe*, and occupied Lands in *another*, and being taxed in that Pariſh where they occupied the Lands for the *Bells of that Church*, and refuſing to pay, a Libel was exhibited againſt them in the Spiritual Court of that Dioceſe, where they occupied the Lands, and thereupon they ſuggeſted for a Prohibition the Statute 23 *H.* 8. *cap.* 9. which prohibits a *Citation* out of the Dioceſe where the Party dwelleth, except for any Spiritual Cauſe neglected to be done within the Dioceſe whereunto the Party ſhall be lawfully cited, and that they were not lawfully cited for this Tax, becauſe it was for *Church Ornaments:* And *per Curiam*, a Prohibition was granted, becauſe this is a *perſonal Charge*, to which the Inhabitants of the Place are only chargeable, but not if they uſe Lands in that Pariſh and dwell in another; but if the Tax had been for *Repairing* the Church, it had been otherwiſe, becauſe that is not a perſonal, but a real Charge upon the Land, let the Owner live where he will. 3 *Mod.* 211. *Woodward'* Caſe.

21. Libel againſt the Defendant, for refuſing to pay a Tax towards the Repair of the Church at *Hitchin*, he ſuggeſted for a Prohibition, that there was a *Chapel of Eaſe* in the ſame Pariſh to which the Inhabitants, *&c.* did go, and which they always repaired to; but it was inſiſted againſt the Prohibition, that of common Right the Pariſhioners ought to *repair* the Pariſh-Church, tho' there is a *Chapel of Eaſe*; but there being no Service for forty Years, nor *Burials* or *Baptiſm* at the Chapel, a Conſultation was granted. 3 *Mod.* 264. *Godfrey* verſus *Everſden.*

22. *Mandamus* to the *Archdeacon* of, *&c.* to ſwear *W. R.* Church-warden of the Pariſh of, *&c.* He returned, that the ſaid *W. R.* was a poor Dairy-man, *& minus habilis*, to execute the Office of a Church-warden; the Queſtion was, whether the Perſon who is to adminiſter the Oath of Office is likewiſe to judge of the Ability of the Perſon; and it was inſiſted that he was, becauſe a Church-warden is an Office of Truſt; he is made Overſeer of the Poor by the Statute 43 *Eliz. cap.* 2. without Election; he is accountable to the Pariſhioners at the Expiration of his Office, and therefore

therefore Care ought to be taken, that he is *habilis & idonea perſona*; that this Care is incumbent on the Archdeacon, and the rather, becauſe the Office of a Church-warden is ſpiritual; but adjudged, that he is a temporal Officer, and hath a temporal Truſt repoſed in him by the Pariſhioners, who choſe him by Vertue of a Cuſtom, and they are the proper Judges of his Ability, being more concerned in Intereſt than the Archdeacon, whoſe Duty it is to ſwear him when choſen, ſo a peremptory *Mandamus* was granted. 5 *Mod.* 325. *The King* verſus *Rice.*

23. The Church-wardens made a Rate for Repairing the Church, and libelled againſt the Pariſhioners for not paying it; and upon a Motion for a Prohibition it was adjudged, that the Pariſhioners, and not the Church-wardens, ought to make the Rate, and that they are bound to repair the Church, but not the Chancel. 1 *Salk.* 165. *Peirce* verſus *Prowſe.*

24. Prohibition was granted to ſtay a Suit in the Archdeacon of *Litchfield*'s Court, againſt Church-wardens, where the Libel was for Fees, for Swearing them and Taking their Preſentments; adjudged, that no Fees could be due but by Cuſtom. 1 *Salk.* 330. *Goſlin* verſus *Elliſon.*

Cinque Ports.

(A)

See *Cuſtom.* (A) 8.

1. *Cinque Ports* are thoſe *five Havens* which lie towards *France*, (viz.) *Haſtings*, *Rumney*, *Hithe*, *Dover*, and *Sandwich*, the Inhabitants whereof are to guard the Sea-Coaſts againſt Invaſions, and for that Purpoſe they have a Magiſtrate, who hath all the Juriſdiction in thoſe Parts, as the *Admiral of England* hath in Places not exempted, and he is called *Lord Warden of the Cinque Ports, and Governor of Dover-Caſtle*, and was firſt appointed to that Office by *William called the Conqueror*; they have likewiſe ſeveral *Privileges* which were granted to them by *King John*, and which they ſtill enjoy.

2. But thoſe *Privileges*, *Liberties* and *Franchiſes* may be ſeiſed and forfeited for a Miſdemeanor, as where the Mayor and Jurats of *Hithe* ſpoke contemptibly of a *Certiorari* delivered to them to remove an Indictment, and refuſing to allow it, ſaying, it was no Time of the Year for *green Plums*, alluding to the *Green Wax*, with which the Writ was ſealed; they were in Danger of loſing their Privileges for this Contempt. *Cro. Car.* 252, 264, 291. *Hopeſtil Tilden*'s Caſe. *Poſtea* Franchiſe. (A) 2. *S. C.*

3. Debt by two Plaintiffs, (*viz.*) *Hecker and Harriſon* againſt *Tyrrell*, as Heir, who pleaded *Riens per Deſcent*, upon which they were at Iſſue; and the Jury found, that the Defendant had Aſſets by Deſcent in the *Cinque Ports*, and ſhewed how, *&c.* thereupon the Plaintiffs had Judgment, and brought a *Certiorari* to remove the Record into Chancery, and from thence by *Mittimus* to the Conſtable of *Dover* to extend a Moiety of the Lands in the *Cinque Ports.* 1 *And.* 28.

4. A *Contract* was made between the Parties in *London*, afterwards one of them left the City and dwelt within the *Cinque Ports*; and an Action being brought againſt him upon this Contract, he prayed his Privilege to be ſued there, but it was denied, for tho' he might be ſued there, and not elſewhere, for a Matter ariſing within their Juriſdiction, yet where the original Cauſe ariſeth in another Place, he ſhall not have this Privilege. *Mich.* 29 *Eliz. Godbolt* 90.

Cro. Eliz. 911.

5. *Appeal, &c.* brought in *B. R.* by Original of a Murder done in *Sandwich* in the County of *Kent*, the Writ was directed to the *Sheriff of Kent*, who having brought in the Defendant by *Cepi Corpus*, he pleaded, that *Sandwich* (where the Murder was ſuppoſed to be done) is Parcel of the *Cinque Ports* * *ubi Breve Domini Regis non currit, qui quidem Portus de Sandwich non eſt in Com' Kanciæ*) and ſo prayed Judgment of the Writ, and pleaded over to the Felony; adjudged an ill Plea, for if it ſhould be good, there would be a Failure of Juſtice, becauſe thoſe of the *Cinque Ports* could not try the Defendant, he not being within their Juriſdiction, for after the Murder was done at *Sandwich*, he fled into *Kent* and was there taken; 'tis true, if he had pleaded, that at the Time of the ſuppoſed Murder he had been an Inhabitant, and commorant within the *Cinque Ports*, the Plea had been good, becauſe this had given a Juriſdiction to the Court there, who might have tried the Defendant, and given Sentence of Death, if he had been found guilty on the Appeal; but by this Plea the Defendant had not ſhewed, that the Court there had any Manner of Juriſdiction in this Caſe. *Yelv.* 12. *Criſp* verſus *Verrall.*

* 2 Lev. 86.

6. *Certiorari's* to remove Indictments taken in the *Cinque Ports*, muſt be directed to the *Mayor and Jurats* before whom they are taken, and not to the *Lord Warden*, becauſe they hold Plea of it as Juſtices of Peace, by Vertue of their Commiſſion, and not by their antient Charter. *Cro. Car.* 184.

7. *Certiorari* to remove a Judgment given in the Court at *Dimchurch*, being a Member of the *Cinque Ports*, which being removed into *B. R.* a *Scire facias* iſſued againſt the Defendant, to ſhew Cauſe why the Plaintiff ſhould not have Execution; and there being an *alias Certiorari* in this

Caſe, the Defendant objected againſt it, for that it was *ficut prius*, when it ought to be *ficut Alias*; but the Exception was diſallowed, and the Plaintiff had Execution. *Style* 9. *Rook* verſus *Knight*.

8. *Habeas Corpus* was directed to the *Lord Warden* of the *Cinque Ports*, to remove the Body of *T. B.* who had been a long Time in Cuſtody there, but no Return being made another *Habeas Corpus* was granted, and a Pain for the Contempt in not returning the firſt; for tho' 'tis uſually ſaid, that in ſome Places *Breve Domini Regis non currit*, that muſt be underſtood *Breve Regis ordinarium*, between Party and Party; but an *Habeas Corpus* is a Prerogative Writ, by which the King commands an Account of the Liberty of the Subject; thereupon this Writ was returned, (*viz.*) That Time out of Mind the Warden of the *Cinque Ports* had a Court of *Admiralty* belonging to his Office, and an Officer to determine Matters which appertain to the Court, *ſecundum leges Maritimas*, and that an Anchor and Cable were thrown in the Sea, and and caſt *ſuper arenas maris*; that the Priſoner took them up, and being cited to the Court, and deſired to reſtore them, he refuſed, and thereupon he was committed until he pay 40 *l.* whereupon the Party was remanded; for here was a Cauſe returned, (*viz.*) that the Man was cited in a Matter of which they had Juriſdiction, and being required to reſtore it, he refuſed; That Judgment was given againſt him *ſecundum leges maritimas*, this Court will intend the Judgment juſt; and if it was not, they cannot relieve him upon an *Habeas Corpus*. *Palm.* 54, 96. *Bourne*'s Caſe. 2 Cro. 543. *See* Hab. Corpus (A) pl. 5.

9. Prohibition to the Court of *Dover*, for that they held Plea there by *Plaint*, in Nature of a Writ of Partition between *Tenants in Common*, and proceeded to Judgment and Execution; for that Reaſon it was held too late to move for a Prohibition, he ought to bring a Writ of Error; but it was held, that *Tenants in Common* may be compelled to make *Partition* in thoſe Inferior Courts, tho' not by the Statute; becauſe that extends only to enjoin Partition *by Writ*. *Sid.* 165. *Hull* verſus *Norwood*.

10. Prohibition to the *Cinque Ports*, for that they held Plea there, partly by the *Chancery*, and partly by the *Admiralty*, in the ſame Cauſe, (*viz.*) an *Admiralty Proceſs* upon a *Chancery Bill*; 'tis true, they have thoſe diſtinct Courts there, but they cannot thus confound their Juriſdiction; 'tis true likewiſe, that in this Caſe the Defendant had appeared, and the Cauſe was ready for Sentence; but yet ſince a * *Prohibition* will lie to the *Cinque Ports*, 'tis not the Appearance of the Party, and Owning their Juriſdiction by ſuch Appearance that will exclude *B. R.* from Juriſdiction. *Sid.* 355. *Ting* verſus *Meariwether*. Hardr. 475. *Sir* John Williams *v.* Lifter. S. P.

11. *Certiorari* to the *Mayor, Jurats and Commonalty of Winchelſea*, to remove an Order by them made, who return, that Time out of Mind there have been in *Kent* five antient Towns, (*viz.*) *Haſtings*, *Sandwich*, *Dover*, *Rumney* and *Hythe*, always called the *Cinque Ports*, and in *Suſſex* two antient Towns, called *Rye* and *Winchelſea*, which are Members of the ſaid *Cinque Ports*; that the Town of *Winchelſea* hath been Time out of Mind incorporated by the Name of *Mayor, Jurats and Commonalty*; that all the ſaid *Cinque Ports*, with their Members, have been Time out of Mind Places for ordering the Preſervation of Shipping, and by Reaſon of their Situation have always and ought *to keep Beacons and Watchouſes*, and for the better Maintenance thereof, the Town of *Winchelſea* uſed to make Taxes and Rates on every *Occupier* of Houſe or Land within their Town or Liberty; that 1 *May* 32 *Car.* 2. they made a Tax of *6 d. per Pound for maintaining the ſaid Beacons and Watchouſes, &c.* The Objection was, that this Order did not ſet forth, that the *Beacons and Watchouſes were in Decay, or out of Repair, for* if they were not, then this Tax is unneceſſary; but adjudged, that it might be dangerous to the People to ſtay till the Beacons were in Decay, for then there would be known till repaired; and 'tis not to be intended, that the Inhabitants would charge themſelves with an unneceſſay Tax, eſpecially when the major Part of them concur in the Taxation. *Raym.* 448. *Town of Winchelſea*'s Caſe.

12. An *Habeas Corpus ad faciend' & recipiend'*, will not lie to the *Cinque Ports*, but an *Habeas Corpus ad faciendum & ſubjiciendum*, will. *Sid.* 431. 1 Mod. 20.

Citation. See **Prohibition.** (E) 33.

Ci

Citation out of his Diocese.

(A)

See *Church.* (A) 14.

Hardr. 279. S. P. 5 Mod. 450.

1. *Defamatory* Words were ſpoken in *London*, and a Libel was brought in the *Prerogative Court*, and the Defendant cited to appear there, upon which he moved for a Prohibition on the Stat. 23 *H.* 8. *cap.* 9. and *Coke* Chief Juſtice held the Prohibition ſhould go, unleſs it appeared, that the *Biſhop of London* had given Leave to the Archbiſhop to intermeddle with Matters in *London. Godb.* 191. *Francis* verſus *Powell.*

2. But in another Caſe, where the Chancellor of a Biſhop had tranſmitted a Cauſe *De modo decimando* to be heard in the *Arches*; and the Defendant being cited thither, he likewiſe moved for a Prohibition on the ſaid *Stat.* 23 *H.* 8. and the Civilians inſiſted, that tho' that Law did reſtrain the Archbiſhop to *call Cauſes* from the Ordinary, unleſs in ſuch Caſes as therein mentioned; yet it was left to the * abſolute Power of the Ordinary himſelf *to ſend Cauſes* to the Arches, without ſhewing any Reaſon; but this was denied by the Judges, who held, that the Statute was made for the Eaſe of the Subject, and not to enlarge the Juriſdiction of the Ordinary; for otherwiſe they might ſend the Subject from the remoteſt Part of the Kingdom to the Archbiſhop's Court. *Hob.* 185. *Jones* verſus *Jones.* 2 *Brownl.* 27. *Jones* verſus *Boyer. S. P.*

* *See* pl. 10.

3. The Dioceſe of *Wincheſter* extends to the *Borough of Southwarke*, as Part of the County of *Surrey*, and the Judge of the Audience of the Archbiſhop kept Court in *Southwarke*, and cited Men thither from the remoteſt Part of the Dioceſe, and excommunicated them if they did not appear, and would not abſolve them unleſs they tranſmitted their Cauſes into that Court; adjudged, that tho' the Archbiſhop hath a concurrent Juriſdiction with the Biſhop, yet this was expreſly againſt the Statute, and an apparent Injury to the Parties; for it deprives them of an Appeal, which had been proper, if the the Cauſe had began in the Biſhop's Court. *Hob.* 17. *Dr. James*'s Caſe. *Hard.* 379. *Stillingham* verſus *Scot. S. P.*

4. *Libel in the Arches*, againſt two Executors, and a Prohibition being granted upon the Statute 23 *H.* 8. for that they were cited out of the Dioceſe where they lived; for one of them dwelt within the Juriſdiction of the *Biſhop of London*, but the other within the Juriſdiction of the *Arches*, and for that Reaſon it was moved for a Conſultation, and it was granted, for otherwiſe there might be a Failure of Juſtice; for he who lived out of the Juriſdiction of the *Biſhop of London*, could not be ſued in his Court, and one of the Executors cannot be ſued without the other; therefore this is a Prerogative Caſe, and not within the Statute. 1 *Roll. Rep.* 328. *Moor* verſus *Cockein & al'.*

5. *Libel* in the Spiritual Court againſt the Defendant for *Incontinency*, without any Citation or Preſentment, and he not appearing, was *excommunicated*, and thereupon he prayed a Prohibition; but it was denied; for where that Court hath a Juriſdiction, tho' they proceed erroneouſly, a Prohibition will not lie; but the proper Remedy is by Appeal. *Trin.* 17. *Car. Coke* verſus *Tolls. Poſtea* Prohibition. (F) 8. *S. C.*

6. *Dr. Blackmore* was preſented in the *Archdeacon's Court of Canterbury*, and proſecuted there for not coming to Church in *Biddenden in Kent*; and he ſuggeſted for a Prohibition, that he was an Inhabitant *in Suſſex*, out of the Dioceſe, and that he was cited to appear in that Court contrary to the Statute 23 *H.* 8. The Court held, that if a Man is cited within the Dioceſe, coming thither to Trade, tho' he dwells out of the Dioceſe, ſuch Citation is not within the Statute. *Hardr.* 421. *Dr. Blackmore*'s Caſe.

7. *Prohibition*, the Suggeſtion was, that the Plaintiff was cited to appear at the Biſhop's Court at *Sarum*, whereas he lived at *London*; but a Conſultation was awarded, for the Suit being for Tithes for Lands in the Dioceſe of *Sarum*, it cannot be brought elſewhere. 1 *Lev.* 96. *Weſtcote* verſus *Harding.*

8. A *Prohibition niſi, &c.* for citing him out of the *Dioceſe of Worceſter*, to the *Arches*, in a Caſe where he was ſued for a *Divorce propter ſævitiam*, at the Day; the Defendant ſhewed Cauſe, that the Biſhop had *remitted it from the Court*; to which it was objected, that this *Remiſſion* ought to have been pleaded, becauſe the Exception in the Statute 23 *H.* 8. is of Caſes, *where the Biſhop of the Dioceſe doth require it, and the Canon, and Civil Law admits it*, and 'tis proper to be argued by the Civilians, whether their Law admits it; but adjudged, that the *Remiſſion* of the Biſhop ſhall be allowed upon a Motion, without pleading it. 1 *Lev.* 225. *Bolton* verſus *Bolton.*

1 Salk. 164. *See Church* (A) 14. S. C.

9. *Woodward*, and others, living in the *Dioceſe of Peterborough*, occupied *Land* in the *Dioceſe of Litchfield, &c.* and were taxed by the Pariſhioners *there* for the *Bells of the Church*, and upon Refuſal to pay what they rated, they were cited to appear and anſwer to the Libel exhibited againſt them in the Dioceſe of *Litchfield, &c.* but a Prohibition was granted; becauſe they

ought

ought to be ſued in the Dioceſe where *they lived*, and not where they occupied Lands. 3 *Mod.* 211. *Woodward* verſus *Makepeace.*

10. The Defendant ſubſtracted Tithes in the *Dioceſe of York*, and afterwards removed, and lived in the *Dioceſe of Lincoln*, and about ſeven Years after there was a Libel againſt him in the *Spiritual Court at York*, and being cited to appear there, he brought an Action on the Statute 23 *H.* 8. *cap.* 9. for being cited out of the Dioceſe where *he lived*; the Queſtion was, whether this Caſe was within the Statute; it was inſiſted, that it was not, becauſe 'tis expreſly provided by the Statute, that in five Caſes a Man may be cited out of his Dioceſe where he lives, (*viz.*) (1.) *In Default of the Ordinary*, (2.) *in Caſes of Appeal*, (3.) *if the Ordinary will not, or dare not cite the Party*, (4.) *if the Ordinary is Party to the Suit*, (5.) *or if at his Inſtance or Requeſt, the Cauſe is remitted:* Now the Ordinary where the Defendant lives has no Juriſdiction in this Caſe, becauſe the Libel was for ſubſtracting *Local Tithes*; 'tis true, if it had been for ſubſtracting Perſonal Tithes, then the Rule in the Civil Law is, that *Forum ſequitur reum*, and by Conſequence the Party ought to be ſued in the Dioceſe where he lived: But the better Opinion was, that this Caſe was within the Statute, which was made for the Eaſe of the Subject, againſt the Oppreſſion of *Apparitors*, who cited Men out of the Dioceſes where they lived, not only for Subſtraction of Tithes, but for * Defamatory Words; that the Ordinary of the Dioceſe where this *Defendant lives*, hath Juriſdiction in this Caſe; becauſe by Law the Defendant may be ſued *where he lives*, tho' 'tis for ſubſtracting * Tithes in another Dioceſe; and ſo is *Linch and Porter's* Caſe. 2 *Brownl.* 1, 2. 5 *Mod.* 450. *Machin* verſus *Moulton.*

*Antea 1.

*Quære *not for local Tithes.*

Clergy.

(A)

1. IN the King's Courts of Record, where *Felonies* are determined, the Biſhop or his Deputy ought to attend, that he may inform the Court, whether the Felon can read or not; and this he is to do as a Miniſter, not as a Judge; for the Court is ſtill to Judge of his Sufficiency, notwithſtanding the Information of the Ordinary, and may give Judgment againſt ſuch Information; all which was adjudged in *Serle and William's* Caſe. *Hob.* 290.

2. In a Prohibition, the Parſon ſet forth the Statute 18 *Eliz.* of Clergy; and that he was indicted at the *Aſſiſes for Manſlaughter, &c.* and convicted for the ſame, and at the next Aſſiſes was allowed his Clergy, but was not burnt in the Hand, by Reaſon of his Orders, but by the Judgment of the Court was diſcharged, by which Judgment he was purged and acquitted of the Felony; but that yet the Defendant pretending, that *he ſtill ſtood convicted of the Felony*, and thereby deprived of his Benefice, and ſo the Church void, (which it was not) had libelled againſt him before the *Chancellor of London*, and thereupon he prayed a Prohibition; adjudged, that the Parſon being convicted, and afterwards diſcharged by the Statute, could not be queſtioned again in the Spiritual Court for this Offence, to make the Church void by a Sentence of Deprivation; and that the Parſon might have the Benefit of this Statute, tho' he was not burnt in the Hand. *Trin.* 16 *Jac. Hob.* 288, 290. *Serle* verſus *Williams.* 2 Cro. 430.

3. One *Winter* was indicted for *Felony*, and refuſed to plead, but ſtood *Mute*, and *Popham* Chief Juſtice, allowed him the Benefit of Clergy; being of Opinion, that he ought to have it in all ſuch Caſes where he ought to have it, if he had pleaded and been found guilty. *Moor* 550. *Winter's* Caſe.

4. Indictment for Felony, upon Not guilty pleaded, it appeared upon Evidence, that the Defendant robbed another of the Goods in the Highway, *in one County*, and they were taken upon him in *another County*, and being there indicted, for Taking the Goods, the Jury found him guilty to the Value of 10 *l.* ſo that it was but *Petit Larceny*; but yet it appearing they were taken on the Highway, it was doubted upon the Statute * 25 *H.* 8. whether he ſhould not have Judgment of Death; becauſe by that Statute 'tis enacted, that he ſhall not have Clergy allowed, who is indicted in one County for Goods ſtolen there, if it appear upon the Evidence, that they were taken *by Robbery* in another County; but adjudged, that the Statute extends only to thoſe who ſhall demand their Clergy, and that it ſhall be denied to them demanding it, if it appear to be a Robbery; but in the Principal Caſe the Defendant was only found guilty of a *Petit Larceny*, ſo he had no Occaſion to demand his Clergy. *Moor.* 550. 1 And. 114. * cap 3.

5. Reſolved by all the Judges, that Clergy is not to be allowed *in Piracy*, for the Statute 28 *H.* 8. doth not make it Felony, but appoints the Manner of Trial of a *Pirate*; ſo that 'tis not Felony by our Law, but by the Civil Law, in which Clergy is never allowed; and the Statute 1 *Ed.* 6. which takes away Clergy in ſome Caſes, and allows it in others, doth not relate to this Statute 28 *H.* 8. *Moor.* 756.

6. *Dr. Lee* having Lands in *Level*, was choſen *Expenditor* by the Commiſſioners of Sewers, and upon a Motion for a Writ of Privilege, it was granted. 1 *Vent.* 105. *Dr.* Lee's Caſe. 1 *Mod.* 282. *S. C.* 1 *Lev.* 303. *S. C.*

Clergymen.

Of their Dues for Burials, Chriſtenings and Sacraments. (A)

Of Suits by and againſt them. (B)

(A)

Of their Dues for Sacraments and Burials, Marriages and Chriſtenings.

1. BY the Statute 2 *Ed. 6. cap.* 13. *All Offerings which are due to the Vicar for Sacraments, Marriages and Burials, and payable by the Laws and Cuſtoms of the Realm,* are confirmed; by which we may infer, that Offerings for Sacraments may be due by *Cuſtom*, but then ſuch *Cuſtom* is to be tried in the Temporal Courts; as for Inſtance, the Plaintiff ſuggeſted for a Prohibition, that by Law no Man ought to pay for *baptiſing his Child, &c.* againſt his Will; that Cuſtoms and Preſcriptions were triable at Law, that *W.* Curate of *Bridlington* had libelled againſt him for not paying a *Shilling for baptiſing his Child* ſetting forth in the Libel, that there was an antient Cuſtom in the ſaid Pariſh for the Parent of a Child born there and chriſtened in the Church by the Curate, or in any other Church by any other Miniſter, *&c.* to pay to the ſaid Curate *one Shilling*, and ſo brings himſelf within the Cuſtom; a Prohibition was granted. 2 *Lutw.* 1030. *Anderſon* verſus *Walker.*

2. *Prohibition, &c.* ſuggeſting a *Cuſtom* in the Pariſh of *Maſſam*, for twenty-four of the Chief Pariſhioners to make *Rates*, and for the Churchwardens to receive all Duties payable for *Burials, in the Church*, and upon Refuſal to pay it, then by a Warrant from *the twenty-four, &c.* to diſtrain, that *all the twenty-four*, with the Conſent of the Vicar, always *repaired the ſaid Church and Iſles*, and that the Church-wardens paid for the ſaid *Repairs*, and gave their Accompts to the *twenty four Pariſhioners*, and were diſcharged by them; that the Plaintiff's were Church-wardens, *&c.* that all Cuſtoms and Preſentations are triable at the Common Law, and that the Plaintiff was cited to the Spiritual Court to give an Account of the Premiſſes; adjudged a reaſonable Cuſtom, and thereupon a Prohibition was granted. 2 *Lutw.* 1027. *Batt* verſus *Watkinſon.*

3. *Prohibition, &c.* the Plaintiff ſuggeſted, that all *Cuſtoms, &c.* are triable at Common Law; that the Defendant had libelled againſt him, *&c.* ſetting forth a *Cuſtom* in the Pariſh of *Elington in Derbyſhire*, that every *Woman*, who is a Pariſhioner and Inhabitant there, and *marrying* with a Licenſe, their Husbands ſhould at the Time of *Marriage*, or ſoon after, pay to the Vicar 5 *s.* as an accuſtomed Fee, *&c.* and ſo brings his Caſe within the Cuſtom; and a Prohibition was granted to try it, for the Court held it an unreaſonable Cuſtom. 2 *Lutw.* 1059. *Thompſon* verſus *Davenport.*

4. Adjudged, that in Strictneſs no *Funeral Expences* are to be allowed againſt *Creditors*; but only for the *Coffin, Ringing the Bell, the Parſon, Clerk* and *Bearers Fees*; but not for Pall or any other Ornaments. 1 *Salk.* 296. *In Shelley's* Caſe.

5. A *French Proteſtant* had his Child *baptiſed* at the *French* Church in the *Savoy*, and *Dr. Lancaſter*, Vicar of *St. Martin*, and the Clerk libelled againſt the *French-Man*, for 2 *s.* 6 *d.* due to the Vicar, and 1 *s.* to the Clerk; and upon a Motion for a Prohibition, it was inſiſted againſt it, that this was an Eccleſiaſtical Fee, due by the Canon; but adjudged, that of Common Right nothing was due *for Baptiſm*; 'tis true, a Fee may be due by *Cuſtom*, but then a Cuſtom to have a Fee for chriſtening a Child when he doth not chriſten it, is ill; like the Caſe in *Hob.* Where a Man dies in one Pariſh, and is buried in another, the Miniſter of the Pariſh where he died, ſhall not have a burying Fee. 1 *Salk.* 332. *Burdeaux* verſus *Dr. Lancaſter.*

6. Upon a Motion againſt a Rule granted for a Prohibition to the Spiritual Court, to ſtay Proceedings there for a *Cuſtomary Fee of* 10 *l.* due to the Dean and Chapter of *Exceſter*, for *burying in the Cathedral Church*; adjudged, that at Common Law the *Burials* ought to be in the *Churchyard*, and that no Fee is due; 'tis true where Leave is required to bury a Man in the Church, the Parſon giving Leave may inſiſt on his own Price; and if there is a Cuſtom to pay what he demands, and the Cuſtom is denied, 'tis triable at Law, and a Prohibition ſhall go, *non propter defectum Juriſdictionis*, but *Triationis, &c.* 1 *Salk.* 334. *Dean and Chapter of Exceſter's* Caſe.

(B)

Of Suits by and againſt them. See *Parſon.* (A) per totum. *Tithes.* (R) 10.

1. UPON a *Fi. fa.* the Sheriff returned *nulla Bona*, but that the Defendant was *Clericus Beneficiatus in Ely*, whereupon a Writ iſſued to the Biſhop of *Ely*, and he returned *quod nulla Bona habuit Eccleſiaſtica*, and this Return was allowed, tho' in Truth he had a Benefice; if ſo, the Plaintiff might bring an Action againſt the Biſhop, for a falſe Return. *Sid.* 276. *Pickard* verſus *Paiton.*

2. On a Trial at Bar in a *Quare Impedit*, the Plaintiff proved, that he read the *thirty-nine Articles* on *the 5th of November*, whereas he was *inducted* on the *5th of September* before, and ſo not within *two Months* after his *Induction*, computing *twenty-eight Days* to the Month; 'tis true, this was held inſufficient, but he proved, that he read them in a *Porch of a Chapel of Eaſe* in the ſame within a Month, being kept out of the Church and Chapel by the Defendant, and this was held good. *Sid.* 163. *Brown* verſus *Spence.* 1 Lev. 101.

3. *Per Coke* Ch. Juſt. a Waſte or *Dilapidation* of an Houſe, which the Biſhop hath in Right of the Church, is a good Cauſe of Deprivation, and he ſaid, that he had ſeen a Record where it was moved in Parliament, that the Biſhop of *Durham* had cut and ſold ſeveral Timber-Trees, and the Parliament directed, that a Prohibition ſhould be againſt him in *B. R.* and he ſaid this was good Law. 1 *Roll. Rep.* 86. *Stockman* verſus *Whither.*

4. The *Vicar* ſued the Parſon impropriate for cutting Trees in the Church-yard, and the Suit being for Damages, a Prohibition was granted; but it was moved for a Conſultation, becauſe the Trees in the Church-yard belong to the *Vicar*, and therefore he may Libel in the Spiritual Court; 'tis true, for Taking the *Surplice*, or *Cups*, or *Bells*, an Action of Treſpaſs lies at Common Law; but tho' the Libel in the principal Caſe was for Damages, yet no Conſultation was awarded. 1 *Roll. Rep.* 255. *Bellamy's* Caſe.

5. The Caſe was, a *Vicar* cut down ſeveral *Timber-Trees*, and did not *repair* the Church with them, and this being ſuggeſted for a Prohibition, it was granted. 1 *Roll. Rep.* 335. *Knowle* verſus *Harvey.* 3 Bulſt. 158.

6. A Prohibition was granted, and directed to the Vicar of *C.* that he ſhould not cut down any Trees growing in the Church-yard, for the Defence of the Church. 2 *Roll. Rep.* 111. *Coſterd's* Caſe.

7. *Caſe, &c.* in which the Plaintiff declared, that there is a *Cuſtom* in *H.* that every Pariſhioner, *&c.* ſhould pay to the Parſon the *15th Cheeſe* of all the Cheeſes he ſhould make between *May* and *Michaelmas*, for all Tithes of Cheeſe, then he ſets forth, that he kept ſo many Cows, and made ſo many Cheeſes, and that every 15th Cheeſe amounted to ſo many, *&c.* which he offered to the Parſon, but he refuſed them, and ſuffered them to lie in the Plaintiff's Houſe for half a Year, *damnum ibidem facientes contra voluntatem ad damnum*, *&c.* the Defendant pleaded the general Iſſue, and it was found againſt him; and it was moved in Arreſt of Judgment, that this Action would not lie againſt the Parſon, becauſe the Cheeſe were *Bona peritura*, and if they periſhed, it was the Parſon's Loſs; but adjudged, that by the *Tender* (if it was at the Parſon's Houſe) the Property is altered, and if ſo, then the Continuance in the Plaintiff's Houſe, (if 'tis his Dwelling-houſe) is to his Damage, and the Action will lie. *Palm.* 341, 381. *Wiſeman* verſus *Denham.* *See* Tithes. (R) 10. *S. C.* cited. Godb. 329. Ley 69.

8. Upon a Bill in the *Exchequer*, to be relieved, and to recover the Payment of 100 *l. per Annum*, agreed to be paid to the Plaintiff by an *Order of the Veſtry*, made by the Defendants, and other Pariſhioners of *St. Bottolph's Biſhopſgate*, for a yearly *Lecture* in that Pariſh: The Plaintiff could not have a Decree, becauſe all the Parties to the Order were not made Defendants, and thoſe who were Defendants had paid their Proportion to the Salary. *Hardres* 333. *Henchman* verſus *Ayre.*

9. A Parſon exhibited a Bill in the *Exchequer* againſt one for Tithes, and againſt another for *Glebe*; and upon Demurrer to this Bill, becauſe brought againſt ſeveral Perſons for Things of diſtinct Natures, the Demurrer is good; but if it had been againſt ſeveral Pariſhioners for Tithes only, the Bill had been good, becauſe thoſe are of the ſame Nature. *Hardres* 337. *See* Chancery. (A) 15. *S. P.*

10. In *Treſpaſs*, the Caſe upon a Special Verdict was, upon the Statute for *repairing Highways*, by which 'tis enacted, that *all Perſons* who keep Carts and Horſes ſhould aſſiſt at certain Times, *&c.* and that Warning was given to the *Pariſhioners*, *&c.* that the Plaintiff was Parſon, and omitting to ſend out his Cart, *&c.* a Juſtice of Peace made a Warrant to diſtrain, *&c.* it was inſiſted for the Plaintiff, that *Clergy-men* are not comprehended under the general Words *Pariſhioners*; but adjudged, that the Clergy are liable to all publick Charges impoſed by Act of Parliament, unleſs particularly exempted; then it was objected, that this Act allows a *reaſonable Excuſe* to be made, and therefore the Juſtice ſhould have cauſed the Plaintiff to come before him, to know what excuſe he had before he made his Warrant to diſtrain, which is very true, but yet the Officer is not anſwerable for executing an illegal Warrant, for he is a Miniſter, and not a Judge; and this is not like the Caſe of *Nicholls* verſus *Walker*, where the Officers of one Pariſh diſtrained in another 2 Lev. 139.

Pariſh, which was out of the Limits of their Authority for a *Poor-Tax*, for the Matter in the principal Caſe was within the Juriſdiction of the Juſtice. 1 *Vent.* 273. *Webb* verſus *Batchelour.*

11. By *Holt* Ch. Juſt. where a Clergy-man, who had no Cure of Souls, was choſen Overſeer of the Poor, he ſhall have no Writ of Privilege, becauſe 'tis only extendible to their Spiritual Revenues, and if 'tis perſonal in any Caſe, it muſt be only as to Common Law Offices; the other three Judges againſt him. *See* Privilege. (B) 19. the Archdeacon of *Rocheſter* had ſuch a Writ of Privilege to diſcharge him from the Office of Expenditor of *Romney-Marſh*. *Mod. Caſes* 140.

Clerk of a Pariſh.

(A)

Palm. 379 2 Roll. Rep. 481. *Caſe of the Pariſhioners of* St. Thomas the Apoſtle. S. P.

1. THE Parſon libelled in the Spiritual Court, to have the Clerk eſtabliſhed according to the Canon, which gave the Parſon Authority to chooſe and Place the Clerk, and that the Pariſhioners diſturbed him, upon Pretence of a Cuſtom for the Veſtry to chuſe one; the Pariſhioners ſuggeſted this Cuſtom for a Prohibition, which was granted, for it was held to be a good Cuſtom, and that the Canon ſhall not take it away. 2 *Cro.* 670. *Jermyn* verſus *Hammond.*

2. Libel by a *Pariſh-Clerk* againſt the Church-wardens, for ſo much Money due yearly to him by *Cuſtom*, and to be levied by them on the Pariſhioners, *&c.* the Defendants ſuggeſted for a Prohibition, that there was no ſuch Cuſtom; it was objected, that this is now too late, it being after Sentence, eſpecially ſince the Cuſtom was not pleaded in the Spiritual Court, as it ought; for if it had, and they would have proceeded, then it had been proper to move for a Prohibition: But adjudged, where they have no original Juriſdiction, 'tis never too late for a Prohibition, and they can have no ſuch Juriſdiction in this Caſe, becauſe the *Clerk of the Pariſh* is not a *Spiritual Perſon*, neither is the Duty ſpiritual, but founded on a *Cuſtom*; and if there is ſuch a Cuſtom, 'tis triable at Law, for he may have an Action on the Caſe againſt the Church-wardens, for not making a Rate and Levying it; or if levied it, for not paying it. *Mod. Caſes* 252. *Parker* verſus *Clerke.*

Codicil.

(A)

1. THE Teſtator being ſeiſed in Fee, deviſed his Lands to his Wife, ſo long as ſhe ſhould live ſole, and after that Eſtate ended, then to his and her Heir, paying to his Wife 26 *l.* yearly, during her Life, and charged other Lands, of which he was ſeiſed in Fee, to pay Annuities to his younger Children, and with a Portion of 1000 *l.* to his Daughter; afterwards, by a *Codicil* annexed to his Will, he deviſed all his Lands, *&c.* to Truſtees, and their Heirs, to the Uſe of his Son and Heir, and his Heirs, for ſo long Time as he or they ſhould ſuffer the Wife and Children of the Teſtator quietly to enjoy the Annuities and Legacies; and if he ſhould interrupt or deny it, then he deviſed all his Fee-ſimple Lands to his Wife, and his two younger Sons, and their Heirs; adjudged, that this Deviſe to the *Uſe of his Son and Heir*, was good; and that he did not take by *Deſcent*, but by *Purchaſe*, becauſe the *Codicil* had corrected the firſt Part of his Will. *Moor* 726. *Digby*'s Caſe.

Co-Executors. See **Joint-Executors.**

Coin. See **Tender.** (A) 12.

Collation.

(A)

1. THIS is properly the Giving a Benefice to another by the *Biſhop of the Dioceſe*, whereof he is *Patron*, but it likewiſe ſignifies the Giving a Benefice which comes to him by *Lapſe*; and it differs from an *Inſtitution*, for that is performed by the *Biſhop* at the Preſentation of another Perſon who is the *Patron*, or hath his Right for a Time.

2. *Collation* can neither gain any Patronage, or be an *Uſurpation* againſt a *common Perſon*, *à fortiori*, not againſt the * *King*; but tho' Plenarty by Collation doth not put the *rightful Patron* out of Poſſeſſion, yet it puts him who hath *right to collate* out of Poſſeſſion, and it differs from a *Preſentation* as well as from an *Inſtitution*, for a Preſentation is the Offering a Clerk to the Church, but a *Collation* is Giving the Church to the Clerk. *6 Rep.* 29. *Green's* Caſe, and *6 Rep.* 49. *Boſwell's* Caſe. *S. P.* * Poſtea 3.

3. *Quare Impedit* againſt the *Archbiſhop of York*, and the Incumbent, *&c.* brought by the Queen; the Defendants pleaded, that the Predeceſſors of the Archbiſhop had collated to the ſame Church; and upon Demurrer it was inſiſted, that by ſeveral Collations the Queen was put out of Poſſeſſion, and muſt bring her Writ of Right of Advowſon; but adjudged, that a Collation cannot gain an Uſurpation or * Plenarty againſt the *King*, and by Conſequence cannot put him out of Poſſeſſion. *Leon.* 226. *Queen* and *Archbiſhop of York.* *Antea 21

Commendam.

Of a *Commendam Capere.* (A)
Of a *Commendam Retinere*, good. (B)
Of a *Commendam Retinere*, not good. (C)

(A)

Of a Commendam Capere.

1. A *Commendam Capere* cannot be for leſs Time than for Life, as for Inſtance, in a *Quare Impedit* to preſent to the Church of *Clifton*, *&c.* brought by the Grantee of the next Avoidance; the Defendant pleaded the Statute 20 *H.* 8. *of Pluralities*, and that *Clifton* was a Benefice, *with Cure above Value*, and that *B. B.* the laſt Incumbent thereof, took *another Benefice above Value*, and was inducted to it, ſo that *Clifton* became void, and it belonged to the King to preſent by *Lapſe*; then he pleaded the Statute 25 *H.* 8. *of Diſpenſations*, *&c.* and that he being *Biſhop of Rocheſter*, was elected Biſhop of *Coventry*, *&c.* and that he held the Rectory of *Southfleet* in *Kent in Commendam* with his Biſhoprick of *Rocheſter*, and that the Archbiſhop did grant, that he ſhould retain the ſaid Rectory, and *unum aliud vel plura Beneficia Eccleſiaſtica propria ſua authoritate caperet*, *&c. quamdiu viveret & eidem Epiſcopatus præeſſet. Provided*, that all his Benefices did not exceed 200 *Marks* in the King's Books, with an Averment, that the like Diſpenſations were had and uſed in the Court of *Rome*; then he pleaded the Confirmation of the ſame under the Great Seal, and that the King had preſented him, the ſaid Biſhop, to the Church of *Clifton*, being then void by Lapſe, *eandemq*; *Eccleſiam ſibi commendavit*, *&c.* upon Demurrer to this Plea it was adjudged, that this *Commendam* was void in Law, for theſe Reaſons; firſt, becauſe Power is given to the Biſhop *propria authoritate capere* one or more Benefices with Cure, *&c.* there being no Reſtraint made, whether the Benefices he ſhall take, be *then void* of an Incumbent, or not. (2.) Becauſe 'tis not provided by this Diſpenſation, that the Conſent of the Patron ſhall be firſt had, as it ought to be, before he can execute the *Commendam.* (3.) Becauſe this *Commendam is temporary* and incertain, for it may be for more than *ſix Months*, and leſs than *for Life*; for 'tis *quam diu viveret & Epiſcopatui Coventry præeſſet*, and ſuch a Diſpenſation cannot ſtand with the Rules of the Common Law. (4.) Becauſe there was no *Commendam* of this Form before the Statute 25 *H.* 1. nor hath any ſuch been allowed ſince that Time. (5.) This *Commendam* is void by the Statute of Pluralities, becauſe it doth not contain the Number of Benefices allowed by that Statute, but many more. (6.) If there 1 Roll. Rep. 451. Moor 898.

there had been no Law againſt Pluralities, yet ſuch a *Commendam* to take Benefices expreſly of *any Sort* or Number, ſo that the Value doth not exceed 200 *l.* is not warranted by the Statute 25 *H.* 8. becauſe, if he might take Benefices of *any Sort*, he might take them when *full* of an Incumbent, but a *Commendam* cannot be made to a Church then *full*, for there is no Difference between that and a *Preſentation*; the one *commits* the Church to the Parſon, and the other *preſents* the Parſon to the Church; and all the Canons which mention *Commendams* do likewiſe mention, that it muſt be *ad Eccleſias vacantes*, therefore this *Commendam* ſhould be *capere unum vel plura Beneficia quando vacaverint*, ſo that the Fault being in the very Conſtitution of it, as not warranted by the Laws of *Commendams*, makes it no *Commendam* at all; beſides, 'tis ſo far from providing that the Patron's Conſent ſhall be had, that 'tis expreſly excluſive of his Right, for 'tis *authoritate ſua propria capere Beneficia:* Now the Patron's Right of Preſentation, which is the firſt and moſt worthy Act in all Promotions to Benefices, was never yet ſubject to Church-men; and laſtly, this *Commendam being temporary*, brings with it theſe Abſurdities in the Law, for the Church is not abſolutely full, nor altogether void, for he hath not the Benefice wholly in him as Rector, ſo as he may be ſaid to be a Succeſſor or Predeceſſor to any Parſon which was before, or may follow; and a Benefice is ſo intire and indiviſible, that it cannot be commended by Parts, as the Cure without the Fruits, or thoſe without the Cure. *Hob.* 141. *Colt* verſus *Biſhop of Coventry.*

(B)

Of a Commendam Retinere, good. See *Grants of the King.* (B) 5.

1. A *Commendam Retinere* differs from a *Commendam Capere*, for the one may be temporary or for Years, but the other muſt be for Life, but in Propriety of Speech a *Commendam Retinere* is no *Commendam* at all, but only a Diſpenſation for the Perſon to retain and continue the Benefice in the ſame State and Perſon wherein it was, notwithſtanding ſome intervening Accident, as the Incumbent being made a Biſhop, for that which is our own, cannot properly be ſaid to be commended to our ſelves. *Hob.* 141. In *Colt* and *Biſhop of Coventry's* Caſe.

2. A *Prebend of Salisbury* was elected *Biſhop of St. David's*, but *before his Conſecration*, he obtained a Diſpenſation from the *Pope*, *retinere* all his Benefies in *Commendam*; adjudged, that the Diſpenſation was good, but it might have been otherwiſe, if the Diſpenſation had been granted *after the Conſecration.* 11 *H.* 4. 170, *Biſhop of St. David's* Caſe. *Evans* verſus *Aſcue. S. P.*

3. In a Prohibition againſt the *Biſhop of Carliſle*, he pretending himſelf *Parſon* or *Commendatory*, pleaded, that he was *Parſon or Commendatory* of the Church by the *Preſentation* of the *Counteſs of Arundel*, and yet ſhewed, that his Faculty and Diſpenſation was only ſo long as he ſhould continue *Biſhop of Carliſle*; adjudged, that this may well ſtand together, for he may be Parſon abſolute of the Preſentation of the Patron, and yet qualified by his Faculty to hold it but for a Time. *Trin.* 13 *Jac. Hob.* 107. *Wilſon* verſus *Biſhop of Carliſle.*

(C)

Of a Commendam Retinere, not good.

1. A *Parſon* who was actually *Incumbent* on one Benefice, was admitted and *inſtituted* to a Second, but before *Induction* he got a Qualification, and afterwards a *Diſpenſation* to hold two Benefices, and then he was *inducted* into the Second; adjudged, that this Diſpenſation came too late, it being *after the Inſtitution*, tho' before the *Induction* to the Second; becauſe, by the *Inſtitution*, the Church is *full* againſt all Perſons but the King; and by the Statute 21 *H.* 8. the firſt Benefice is void by the *Inſtitution* to the Second; but admitting it was not void before *Induction* into the Second, yet even in ſuch Caſe this Diſpenſation came too late, becauſe the Words of the Statute are, (viz.) *To purchaſe Licence to receive and keep two Benefices*, and the Diſpenſation is *recipere & retinere*, *&c.* now the Church being *full by Inſtitution*, he can neither *receive* that which was his own before, nor *retain* that which he cannot receive. 4 *Rep.* 79. *Digby's* Caſe. See the Caſe of *Commendam* in *Davis's Rep. contra*, where it was argued, that if a Parſon is *inducted* into one Benefice, and afterwards preſented and *inſtituted* to another, but *before Induction* obtains a Diſpenſation *Retinere* the firſt Benefice *for Life*, *in Commendam*, in ſuch Caſe the firſt ſhall not be void, becauſe there is no Injury done to the Patron, the Church being ſtill full of the Perſon who was preſented by him, and not void by Reaſon of this Diſpenſation; for a Diſpenſation *in Commendam retinere* is good only to him who was perfect Incumbent before, and at the Time it was granted, for 'tis abſurd for a Man to have a Diſpenſation to retain that which he had not before.

2. A Vicar was actually Incumbent on a Vicarage in the Dioceſe of *Oſſory*, and during the Incumbency, the Biſhop of that Dioceſe obtained a Diſpenſation *unum vel plura Beneficia retinere perpetuæ Commendæ titulo*, without any *Preſentation*, *Inſtitution*, *or Induction*, *&c.* which Diſpenſation was confirmed by the *Queen*, and after the Death of the Incumbent, the Biſhop retained the Vicarage, and took the Profits during his Life; the Grantee of the next Avoidance preſented

his Clerke after the Death of the Biſhop, and he was inſtituted and inducted, but *B. B.* the Plaintiff ſuppoſing, that the Church was never full of the Biſhop, but that the King had a Title by *Lapſe*, obtained a Preſentation from him, and being diſturbed, *&c.* brought a *Quare Impedit*; and it was inſiſted for him, that by the *Canon Law* a Biſhop could not hold a Benefice in his *own Dioceſe*, becauſe he could not *Viſit* himſelf; that this Diſpenſation was not warranted by the Statute 28 *H.* 8. becauſe ſuch was never granted by the *Court of Rome*, for thoſe were always *with the Aſſent of the Patron*; but this is to take Poſſeſſion of the Benefice without any *Preſentation*, *&c.* beſides by this Diſpenſation the Biſhop was never perfect Incumbent; becauſe as againſt a Common Perſon, the Church ſhall not be full before *Inſtitution*, ſo againſt the King, it ſhall not be full before *Induction*; but in this Caſe there was no *Induction*; to which it was anſwered, that the Biſhop holding the Vicarage by a *Canonical Title*, (viz.) *Virtute perpetuæ Commendæ*, that amounts to all thoſe Ceremonies of *Preſentation*, *Admiſſion*, *Inſtitution* and *Induction*; the Caſe was not adjudged. *Davis's Rep. Caſe of Commendam.*

Commitments.

(A)

Of Commitments in General.

1. ADjudged, that where a Commitment is made in Court to a proper Officer there preſent, in ſuch Caſe, if an *Habeas Corpus* is brought, the Officer muſt return the Truth of the Matter, otherwiſe he will be liable to an Action; but if he is committed by a *Warrant in Writing*, the *Warrant* muſt be returned, for otherwiſe it would be in the Power of the Gaoler to make the Caſe of the Priſoner otherwiſe than 'tis upon the Warrant; for if he may return what he will, he makes himſelf Judge, whereas the Court ought to judge, and that upon the Warrant itſelf. 1 *Salk.* 349. *In the Caſe of the King* verſus *Clerk, which ſee* Tit. *London.*

2. Upon an *Habeas Corpus* to the Keeper of *Newgate*, he returned, that the Defendants were committed by Secretary *Trumball* for High Treaſon, in aiding *Sir James Montgomery* to eſcape, who *was committed upon Suſpicion of High Treaſon*, to a *Meſſenger*, *&c.* adjudged, that the Treaſon of *Sir James Montgomery* ought to have been expreſſed in the Warrant of his Commitment, with an Allegation, that he did the Fact; becauſe the Defendants by breaking the Priſon, are guilty of the ſame ſpecifick Treaſon, and therefore they were bailed. 1 *Salk.* 347. *The King* verſus *Kendall and Roe:* As to the Power of a Secretary of State to commit, *ſee* 1 *Leon.* 70. 2 *Leon.* 275. 1 *And.* 297. 5 Mod. 78.

3. The Statute 35 *Eliz. cap.* 2. gives Power to the Juſtices, to examine a Perſon, whether he is a *Jeſuit* or not, and to commit, *if he refuſe to anſwer*; and now a *Secretary of State* committed one *Yoxley*, for refuſing to be examined, *&c. there to remain till he ſhould be delivered by due Courſe of Law*; and this was adjudged ill, becauſe not purſuant to the Statute; and the Court now examined him, and he anſwered, no Jeſuit, and was diſcharged. 1 *Salk.* 351. *Yoxley's* Caſe.

4. The Defendant was convicted upon an Indictment at the *Old Baily*, for buying and ſelling old Money, and fined 1000 *l.* and upon an *Habeas Corpus* directed to the Keeper of *Newgate*; the Return was, that *Bethell* was *committed to his Cuſtody*, by Order of the Court of Seſſions at the *Old Baily*, the *Tenor* whereof, was, *&c.* and ſo ſets forth the Conviction, and that he was fined 100 *l.* and that *ibidem* (*viz.*) *in cuſtodia* (of the Keeper of *Newgate*) *in Gaola remaneat ſub ſalva cuſtodia quouſq; finem perſolvet*; adjudged, that this Commitment was ill, becauſe it was not to the *Sheriff*, as it ought; for he is the immediate Officer to every Court of *Oyer* and *Terminer*; beſides, the Word *Committitur* is neceſſary to the Form of a legal Commitment; then the Queſtion was, whether he might be diſcharged, and the Court held not; and that before *Buſhell's* Caſe, no Man was diſcharged upon an *Habeas Corpus*, without bringing a *Writ of Error*, unleſs it appeared to the Court, that the Commitment was without Cauſe. 1 *Salk.* 348. *Bethell's* Caſe. *See Sheild's* Caſe. 5 Mod. 19.

5. The Return of an *Habeas Corpus* was, that the Defendants were taken by Vertue of a Warrant from the *Lord High-Steward*, *Treaſurer*, *Controller*, and Clerk of the *Green-Cloth*, directed *Portatoribus virgarum Hoſpitii* of the Queen, upon a Complaint made to the *Board of Green-Cloth*, of a Forcible Entry made by them into an Houſe in *Scotland-yard*, *in the Queen's Royal Palace of White-Hall*, riotouſly, and in Contempt of the Privileges of the Queen's Palace, and without Warrant from the *Green-Cloth*, and that they not giving Bail where committed by the Juſtices of the Peace of the Verge, to *Lovett*, the Porter of the Palace, to receive and keep them, till they gave Bail for their Appearance, *at the next Seſſions to be holden for the Verge*,

Verge, or until he ſhould receive farther Directions from the *Board of Green-Cloth*, *&c.* It was objected againſt this Return, that the *Board of Green-Cloth* hath only an Authority over the Servants of the Family, and this expreſly by the Statute 33 *H.* 8. *cap.* 12. by which their Power is created; beſides, this Privilege doth not extend to any Place where the Queen is not reſident, and it doth not appear, that ſhe did then reſide at her Palace of *White-Hall*; 'tis true, the Return is, that the Perſons commiting were Juſtices of Peace of the *Verge*, but then they ſhould have committed the Defendants as ſuch, (*viz.*) to a proper Officer, as a Conſtable, and not to a *Porter*; beſides the Concluſion of the Commitment is illegal, for 'tis *till they give Bail for their Appearance at the next Seſſions of the Court of Verge*, which may be a long while or never; it ſhould have been *until they ſhould be diſcharged by due Courſe of Law.* But by *Holt Chief Juſtice*, the Lord Steward hath only a Commiſſion for the *Houſhold*; that there is a Commiſſion of *Oyer* and *Terminer*, and a Commiſſion of the Peace for the *Verge*; that the Privilege doth not extend only to the Place where the Queen is actually reſident, but to any Place which is declared to be her Palace; and for this * *Burchet*'s Caſe was cited, who killed his Keeper in the *Tower*, and tho' the Queen did not reſide there, yet his Hand was cut off, and he was afterwards hanged. *Mod. Caſes* 73. *Elderton*'s Caſe.

Mich. 15 & 16 Eliz. Rot. 2. and 3 Inſt. 140. no Judgment entered, that his Hand was cut off, but it was in Fact true.

Commitment. See **Impriſonment.**

Common.

Of Common appendant and appertenant. (A)
Of Common, by Reaſon of Vicinage. (B)
Of Common in Groſs *&* *ſans nombre.* (C)
Of Common *ratione Comorantiæ.* (D)
By what Acts it ſhall be extinguiſhed. (E)
By what Acts it ſhall not be extinguiſhed, but apportioned. (F)
Actions brought by Commoners, good, and not good. (G)
Of Pleadings by Commoners, good, and not good. (H)

Common appertinant, *is a Liberty of taking Common by Beaſts commonable*; *as* Horſes, Oxen, &c. *being accounted fitteſt for the Plough, and as it is appertaining to ſome Freehold*; *for when at firſt the Lords made Feoffments to others, to hold of them in Soccage, the Lands could not be ploughed and manured without Cattle, and thoſe Cattle could not be ſuſtained without Paſture*; *therefore it was tacitly implied in all thoſe Feoffments, that the Feoffees ſhould have Common in the Waſte Lands of the Lord, as a Thing neceſſary and incident for their mutual Benefit, and for the Advancement of* Tillage, *which was much regarded in the Law.*

(A)

Of Common appertenant and appendant.

See *Preſcription.* (B) 14. *Extinguiſhment.* (A) per Totum. *Copyhold.* (B) 6.

1. ADjudged, that where a Man preſcribes to have *Common appertenant* to his Houſe, and to *twenty Acres* of Land, and if Iſſue is taken upon this Preſcription, and it appeareth upon Evidence to the Jury, that he hath but *eigheeen Acres*, or leſs, yet he hath not failed of his Preſcription; but if he had *twenty Acres*, and Part of them are *Freehold*, and the other Part *Copyhold*, then he hath failed, becauſe he cannot make one Preſcription for different Titles and Tenures; ſo it is, if Part of the Lands were Copyhold many Years ſince, and are now Freehold. *Cro. Eliz.* 531. *Gregory* verſus *Hills.*

2. *In Replevin*, the Defendant avowed, *&c.* and the Plaintiff replied in Bar to the Avowry, that *W. R.* was ſeiſed of a Meſſuage and twenty Acres of Land, *&c.* and ſo preſcribed to have Common appendant in the Place where, *&c.* for all Cattle commonable, *&c.* (*viz.*) when the Land

Land was ſowed by the *Conſent of the Commoner*, then he was to have no Common * till the Corn was cut and carried away, and then to have Common again till the Land was ſowed, by the like Conſent of the Commoner; it was objected, that this Preſcription was againſt Common Right, for it was to prevent a Man from ſowing his own Land, without the Leave of another; but adjudged good, for the Owner of the Land cannot plough and ſow it where another hath the Benefit of Common; but in this Caſe both Parties have a Benefit, and each of them have a qualified Intereſt in the Land. *Mich.* 30 *Eliz. Hawkes* verſus *Mollineux.* 1 *Leon.* 73.

* *So a Preſcription for the Paſture of two Geldings in* 1000 *Acres of Meadow,* 5. S. C.

from May-Day, *till the Graſs is cut, good.* 2 Cro. 27. Thomas *v.* Laſſells. Pleas. (E)

3. *Common Appendant* is of Common Right, and commenceth by Operation of Law, in favour likewiſe of *Tillage*, and 'tis *appendant* to *antient arable Lands*, and tho' it may be ſaid to be by *Preſcription*, yet a Man need not *preſcribe* therein, as may be ſeen in the Caſes following, where Common *appertenant* and *appendant* are uſualy taken the one for the other; as for Inſtance, *In Replevin*, the Defendant avowed for Damage-feaſant; the Plaintiff replied, and claimed Common by *Preſcription*, *&c.* adjudged, that 'tis not neceſſary to preſcribe for *Common appendant*, but to ſay, that he was ſeiſed in Fee of ſuch a Meſſuage, and that he hath Common of Paſture in the Place, *&c.* as belonging and *appertaining* to the ſaid Meſſuage. 1 *Brownl.* 177. *Johnſon* verſus *Thorogood.* 4 *Rep.* * *In Terringham's* Caſe. *S. P.*

See pl. 7. S. C.

4. *In Replevin*, *&c.* the Caſe was, that a Man *preſcribed* to have *Common appertenant* to the Manor of *B.* for *all his Beaſts Levant and Couchant* upon it, and that he granted that Common to *B.* adjudged, that the Grant was not good, it not being grantable over, becauſe he had the Common *quaſi ſub modo* for *all his Beaſts Levant and Couchant*, *&c.* but Common appertenant for a *certain Number of Beaſts*, may be granted over. 2 *Cro.* 15. *Drury* verſus *Kent.* See *pl.* 11. *S. P.*

5. A Man ſeiſed of two Yard-Lands, with the Appertenances, had Common of Paſture for four *Rother Beaſts*, *three Horſes*, and *ſixty Sheep*, and having ſold *Part* of the ſaid two Yard-Lands, the Iſſue between the Plaintiff in Replevin and the Purchaſer, was, whether he and all thoſe, *&c.* had Common in the ſaid two Yard-Lands, becauſe he had purchaſed Part of the Lands; it was adjudged amongſt other Things, that this was Common appendant. 1 *Brownl.* 180. *Morſe* verſus *Wells.*

6. In *Treſpaſs*, *&c.* the Caſe was, that the Feoffor being ſeiſed in Fee of Lands where there was a *great Waſte*, *Anno* 2 *H.* 4. granted to the *Prior*, *&c. of S.* Common for him and *all his Tenants*, *&c.* in the ſaid Waſte for all commonable Cattle for ever; adjudged, that tho' this Common was granted to the *Prior*, *&c.* within the Time of Memory, (*viz. Anno* 2 *H.* 4.) yet it may be ſaid to be *Common appertenant*, becauſe 'tis granted to him and *Tenants*, *&c.* And it may paſs by a Feoffment as Common Appertenant, together with the Tenements. *Cro. Car.* 482. *Sacheverell* verſus *Porter.*

* W. Jon. 396.

See Noy 3. Hob. 235. Cole *v.* Foxman. S. P.

7. In *Treſpaſs*, *&c.* the Caſe was, that *T.* was ſeiſed of an Houſe, and of forty Acres of Land, *ſeven Acres of Meadow*, and of *two Acres of Paſture*, and preſcribed to have Common of Paſture in thirty Acres of Land, *&c.* as *appertaining* to the ſaid Houſe, Lands, *Meadow and Paſture*; adjudged, that it was againſt the Nature of *Common appendant*, to be *appendant to Meadow or Paſture*; but if a Man hath Common for Cattle which ſerve for his Plough, and which Common is appendant to certain Lands, and of late an Houſe hath been built upon the Lands, and ſome Acres employed to *Paſture*, and ſome more to *Meadow*, and this for Maintenance of Tillage, which was the Original Cauſe of the Common; in ſuch Caſe 'tis appendant, and ſhall be intended for Cattle *Levant and Couchant* upon the Land, becauſe at the beginning it was *arable*; but in pleading he muſt alledge it to be appendant to *Land*; for if he preſcribe to have it as appendant to an Houſe, or to a Meadow, or Paſture, 'tis no good Title; in this Caſe the Common was adjudged to be *appertenant.* 4 *Rep.* 37. *Terringham's* Caſe.

8. In Treſpaſs, *&c.* the Defendant preſcribed for Common in the *Nether Cow Paſture*, ſetting forth, that one *Verney* was ſeiſed in Fee of a Meſſuage, and of the ſaid Cow Paſture, being the *locus in quo*, &c. and that he granted to the Defendant the ſaid *Meſſuage*, and *all Commons appertenant* thereunto, and averred, that the Farmers of the ſaid Meſſuage had uſed to have Common in the Field called the *Nether Cow Paſture*; adjudged, that the Common is extinct by the *Unity of Poſſeſſion in Verney*, and therefore cannot paſs as *appertenant to the Meſſuage*; but if he had granted the Meſſuage, and all Commons therewith uſed and enjoyed, it would have paſſed by thoſe Words. *Moor.* 467. *Saundyes* verſus *Olliffe.*

9. In a ſpecial Action on the Caſe, the Plaintiff declared, that he was of *the Site of the Manor of Tuſmore*, and ſo *preſcribed* to have Common for all Sheep *Levant and Couchant* upon the ſaid *Site*, and all other Lands and Tenements thereunto *appertaining*, and that the Defendant had put in *Conies*, *&c.* after a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had preſcribed to have Common appendant to a *Site of a Manor*; 'tis true theſe Words follow, *all other Lands and Tenements thereunto appertaining*, but he did not preſcribe in them; for he doth not ſay, that he was ſeiſed of other Lands and Tenements, ſo that he preſcribes only in the *Site*, (*viz.*) that he was ſeiſed of the *Site*, *&c.* and it doth not follow, that other Lands and Tenements are comprehended by that Word; but adjudged, that this being for Common appendant, he need not preſcribe at all; ſo the Declaration is good. *Palm.* 360. *Carvill* verſus *Holt.*

10. Error, *&c.* of a Judgment in Treſpaſs, for depaſturing his Cloſe with Sheep, *&c.* the Defendant juſtified, for that the Prior of *D. was ſeiſed in Fee* of a great Cloſe in *D.* and of the Paſturage thereof, for all Sheep *Levant and Couchant* in the ſaid Cloſe at all Times in the Year; and upon Iſſue joined, the Defendant had a Verdict, and the Error aſſigned was, that the Defendant did not entitle the Prior to this Common, either by Grant or Preſcription, which he ought to have done; for it being a *Profit apprender in alieno ſolo*, he muſt have a Title by one of thoſe Means, for he cannot have it by the Courſe of Common Law; but adjudged, that the Paſturage claimed for Sheep *Levant and Couchant* in the Plaintiff's Cloſe is *Common appendant*, and cannot be ſevered from the Soil by *Grant*, and then to *preſcribe* for it is not good. *Cro. Car.* 390. *Daniel* verſus *Earl of Hertford.* *See poſtea pl.* 11.

11. Adjudged, that where a Man hath *Common* appertenant to a Meſſuage and Lands, for a *certain Number* of Beaſts, he may *alien* the ſame; but if he have Common for all his Beaſts *Levant and Couchant* on ſuch Lands, he cannot by his Alienation ſever it from the Land. 2 *Lev.* 67. *Daniel* verſus *Hauſlip.* *See antea pl.* 10.

12. Upon a Demurrer, it was adjudged, that Tenants in *Burgage* in an antient Borough may have Common appurtenant to their Burgages by Preſcription, and ſo it was adjudged in *Miller* and *Spateman's* Caſe, and in the Principal Caſe. *Sid.* 462. *Miller* verſus *Walker.*

13. *In Treſpaſs, &c.* the Defendant pleaded, that *T. S.* long before the Treſpaſs, *&c.* was ſeiſed in Fee of *an antient Meſſuage*, with the Appertenances, and ſo preſcribes to have Common of Paſture in the Plaintiff's Cloſe for all *his Cattle Levant and Couchant on the ſaid Meſſuage*, with the Appertenances, and conveys to himſelf a Title from the Wife of the ſaid *T. S.* and juſtifies *utendo Communia prædict'*, and upon a Demurrer to this Plea, it was objected, that Cattle cannot be *Levant and Couchant on a Meſſuage.* *Sed per Curiam*, the Preſcription is good, for a Meſſuage may contain a * *Curtilage* and more, and that may be an Acre of Ground, upon which Cattle may be *Levant*; beſides, this is Common appertenant, which makes the Preſcription in this Manner better. *T. Jones* 227. *Scamler* verſus *Johnſon.*

* Poſtea 16.

14 Caſe, *&c.* againſt the Defendant, for *ſurcharging the Common*; he pleaded, that the Lord of the Soil gave him Licenſe *ponendi averia*, which he did, but did not alledge, that there was ſufficient Common left for the Commoners; and upon a Demurrer to this Plea, it was adjudged to be ill, for that very Reaſon. 2 *Mod.* 6. *Smith* verſus *Feverell.*

15. *In Treſpaſs*, for pulling down Hedges, the Defendant pleads, that he had Right of Common in the Place where, *&c.* and that the Hedges were made on his Common, ſo that he could not in *ea parte* enjoy it *in tam amplo modo* as he ought, upon which they were at Iſſue, and the Defendant had a Verdict; it was objected in Arreſt of Judgment, that the Iſſue was frivolous, for it was impoſſible for him to have Common where the Hedges were, and that he could not juſtify the throwing them down. *Sed per Curiam*, the Commoner may pull down the Hedges; 'tis true, the Lord hath an Intereſt in the Soil, but by abating the Hedges the Commoner did not meddle with the Soil. 1 *Mod.* 65. *Maſon* verſus *Cæſar.*

Mod. Ca. 114.

16. *In Replevin, &c.* The Defendant avowed for *Damage-feaſant* in his Freehold; the Plaintiff replied in Bar to this Avowry, that he was ſeiſed of ſuch a *Cottage*, and ſo preſcribed to have Common in the Lands of the Defendant, for all Beaſts *Levant and Couchant*, as appendant to his *Cottage*; and upon Demurrer to this Replication, it was held good, becauſe a *Cottage* contains a * *Curtilage*; and as to this Matter there is no Difference between a *Curtilage* and *Meſſuage*, and that the Fodderíng Cattle in a Court-yard is Evidence of *Levancy and Couchancy*; beſides every *Cottage* ought to have four Acres of Land, and this ſhall be ſuppoſed to have ſo many. 1 *Salk.* 169. *Emerton* verſus *Selby.*

* Antea 13.

(B)

Of Common by Reaſon of Vicinage.

1. COmmon by Reaſon of *Vicinage* is a Liberty, that the Tenants of one Lord in one Town have to take Common with the Tenants of the Lord of another Town; this is called Inter-commoning, and 'tis by turning their Cattle into their own Common or Fields, and if they ſtray into the Neighbours Common, they cannot be diſtrained. 31 *H.* 8. *Dyer* 48. 15 *Eliz. Dyer* 317.

2. Adjudged, that where two Lords of Manors have Common for their Tenants by Reaſon of Vicinage, that one of them cannot *Encloſe* againſt the other, but in ſuch Caſe the Tenants of one Manor cannot put their Cattle into the Waſte of the other, tho' they cannot be diſtrained when they come thither by Eſcape, by Reaſon of the Antient Uſage, which the Law allows. 4 *Rep.* 38. *In Terringham's* Caſe.

3. *Preſcription, &c.* for all Occupiers of *B.* that they *Habuerunt & habere conſueverunt* Common in ſuch a Town in *C. ratione Vicinagii*, without alledging *Time out of Mind:* Now tho' ſo much was implied, yet becauſe the *Preſcription* is the Ground for the Common by Vicinage, the Plea ought to ſet forth, that it was *Time out of Mind, &c.* but 'tis otherwiſe where one claims *Common appendant*, for in ſuch Caſe to *preſcribe* to it would make the Plea double. *Latch* 161. *Jenkyns's* Caſe. *Poſtea* Preſcription. (B) 14.

(C)

Of Common in Groſs, or ſans Nombre.

1. COmmon *in Groſs* is a Liberty to have Common in another Man's Lands, and this is for all Manner of Cattle, and without Number; and he who hath ſuch a Common may *agiſt* the Cattle of a Stranger, which he who hath *Common appertenant* cannot do.

2. The Plaintiff, as Lord of the Manor, exhibited his Bill in the Exchequer, concerning Common, *&c.* the Defendants in their Anſwer ſet forth a *Preſcription*, (*viz.*) that they, and all thoſe whoſe Eſtate they have in ſuch *Meſſuages*, Lands and Tenements have Time out of Mind had *Common* of Paſture in the ſaid Common, *&c.* it was ordered, that this Preſcription being denied by the Plaintiff, ſhould be tried at Law, becauſe Common *ſans Nombre* cannot be appendant to Meſſuages, or to any Thing but Lands; 'tis called Common *ſans Nombre*, becauſe 'tis for Beaſts *Levant and Couchant* on the Lands, which is ſometimes more or leſs. *Hardr.* 119. *Chichly*'s Caſe.

3. The Corporation of *Derby* preſcribed to have *Common ſans Nombre in Groſs*; it was held, that if a Man preſcribes for Common *ſans Nombre appertenant* to Land, he can put in no more Cattle than what are proportionable to his Land, for that ſtints him to a reaſonable Number; ſo if a Man preſcribes to have *Common ſans Nombre*, without ſaying *Levant and Couchant*, 'tis ill upon a Demurrer, but cured by a Verdict; but *Common ſans Nombre in Groſs* hath no Manner of Stint. 1 *Mod.* 6. *Corporation of Derby*'s Caſe. 1 Saund. 346.

4. Adjudged, that a *Preſcription* to have Common for his Cattle commonable is not good, becauſe he may in ſuch Caſe put in as many Beaſts as he will; but a Preſcription to have Common for his Cattle commonable, *Levant and Couchant*, *&c.* is good. *Say*'s Caſe. *March* 83. *Poſtea* Replevin. (A) 10. *S. P.*

5. Caſe, *&c.* for diſturbing him in his Common, in which the Plaintiff preſcribed, that the Mayor and Burgeſſes, *&c.* have Time out of Mind, had Common for themſelves, *& quolibet eorum*, and brings his Action as a *Burgeſs*, *&c.* Iſſue was taken upon a Traverſe of the Preſcription, and the Plaintiff had a Verdict; it was objected, that this Preſcription is not good, it being for Common, without alledging it to be *appertenant to any Land*; beſides, it ought not to be in the Name of the *Mayor and Burgeſſes*, but *quod quilibet Burgenſium*, *&c.* But adjudged, that this might be a Common in Groſs, and not belonging to any Land; as if a Man grant Common to *T. S.* for all his Cattle in ſuch a Place, this is a good *Common in Groſs*. 2 *Lev.* 246. *Stables* verſus *Mellon*. *See* Cuſtom. (C) 6.

(D)

Of Common Ratione Commorantiæ.

1. IN Treſpaſs, *&c.* the Defendant pleaded, that the Cuſtom of the Town of *S.* is, that every *Inhabitant in an antient Meſſuage*, is to have Common in the Place where the Treſpaſs was ſuppoſed to be done Time out of Mind, for all Cattle commonable *ratione commorantiæ & reſidentiæ ſuæ*, and that he was *Commorant* and *Inhabitant* in an *antient Meſſuage* in the ſaid Town of *S.* *&c.* and ſo juſtified; adjudged, that this Cuſtom is void and againſt Law; for there is but four Sorts of Commons, (*viz.*) *Appendant*, *Appertenant*, *in Groſs*, *and by Reaſon of Vicinage*, and this is neither of them; beſides no Man can have Right of Common, in Reſpect of an Houſe to which he hath no Manner of Title, but only a meer *Habitation*; for if he ſhould have ſuch a Right, then the Common would be ſo incident to his Perſon, that it could not be ſuſpended or extinguiſhed, which is contrary to the very Nature of a Common; and laſtly, the Law gives no Remedy or Action to him who claims a Common *Ratione commorantiæ*. 6 *Rep.* 60. *Gateward*'s Caſe.

(E)

By what Acts it ſhall be extinguiſhed. See *Extinguiſhment*. (A) per Totum.

1. WHere a Man hath *Common appertenant* in Land, if he *purchaſe Part of the Land*, the Common is extinguiſhed; ſo where he hath Common in many Acres, if he *Releaſe* his Right of Common *in one Acre*, it extinguiſheth the Common. 1 *Brownl. Morſe* verſus *Wells*. 8 *Rep.* 78. *Wiat Wild*'s Caſe *S. P.* 4 *Rep. Terringham*'s Caſe. *S. P.* *Cro. Eliz.* 593. *Rotheram* verſus *Green*. *S. P.* 2 *And.* 89. *S. C.*

2. *Copyholder for Life* had Right of Common in the Lord's Waſte, and afterwards the Lord granted the Copyhold Lands *to him and his Heirs cum pertinentiis*; adjudged, that he hath loſt his Common; for before he purchaſed the *Freehold* he had Common by Reaſon of the Cuſtom which annexed it to his Cuſtomary Eſtate, which being now deſtroyed by his own Act in Hob. 190. Yelv. 189.

accepting the Freehold, the Common is extinguiſhed, and ſhall not be revived without ſpecial Words, for the general Words, * *cum pertinentiis* will not paſs it. 2 *Cro.* 253. * *Marſham* verſus *Hunter. Lee* verſus *Edwards. S. P.* 1 *Bulſt.* 18. *S. P.* 2 *Cro. Forth* verſus *Ward. S. P. Moor* 667. *S. C.*

* *See* Appertaining. (A) 8. S. C.

*Yel. 189. S. C. 1 Brownl. 220. S. C. 2 Brownl. 209. S. C. Noy. 126. S. C.

3. *In Treſpaſs, &c.* the Caſe was, that the Abbot of *W.* was ſeiſed of a Common, as appendant to certain Lands of his ſaid Abbey, and this was out of another Abbey, (*viz.*) out of the Abbey of *S* afterwards both thoſe Abbeys were diſſolved, and the Poſſeſſions of Both were given to the King, who granted the Lands of one Abbey to one, and the Lands of the other Abbey to another; adjudged, that by the *Unity of Poſſeſſion* of both Abbeys in the King, the Common was extinct, and that the Grantee had no Right to it. 3 *Leon.* 128. * *Nelſon's* Caſe. *See* Unity of Poſſeſſion. (A) 7. *S. P.*

* *My Grandfather.*

4. In Treſpaſs, the Defendant juſtified for that *Godfrey* was ſeiſed in Fee of a Meſſuage, and of twenty Acres of Land, and ſo preſcribed to have Common as appertenant to the ſaid Meſſuage, and that the ſaid *Godfrey* made a Feoffment to *Bradſhaw*, who made a Leaſe thereof to the Defendant, with all Profits *thereunto belonging, or therewith uſed or enjoyed*; *per Curiam*, tho' the Common was extinct in the Hands of *Godfrey*, by *Unity of Poſſeſſion*, yet thoſe Words in *Bradſhaw's* Leaſe to the Defendant, (*viz.*) All Profits thereunto belonging, or therewith uſed, *&c.* were a good Grant of a new Common for the Time in the Leaſe. *Cro. Eliz.* 570. *Godfrey* verſus *Eyre.*

5. In Replevin, the Caſe was, one of the Defendants had Right of Common in a large Field, of which ſeveral Perſons were ſeverally ſeiſed of ſeveral Parts, and the Commoner *purchaſed* the Inheritance of *one Part*; adjudged, that his entire Common is extinct. 1 *And.* 159. *Kimpton* verſus *Bellamy.*

(F)

By what Acts it ſhall not be extinguiſhed, but be apportioned.

1. WHere a Man hath *Common appendant* for a certain Number of Cattle, and to a certain Parcel of Land, if he ſell Part of it, the Common is not extinguiſhed; but 'tis otherwiſe in *Common appertenant.* 1 *Brownl.* 180. *Morſe* verſus *Wells.*

2. A Man had Common by *Preſcription* to an Houſe, and *forty Acres of Land*, and he made a Feoffment in Fee to another of *Part of the Land*; adjudged, that the Common is not extinguiſhed, but ſhall be apportioned, and the Feoffee ſhall have Common for that Part which was purchaſed by him; for the Preſcription extends to the whole Land, and to every Parcel of it, and can be no more prejudicial to the Owner of the Land after the Alienation of Part, than it was before. 8 *Rep.* 78. *Wiat Wild's* Caſe. *Hill.* 15 *Jac. Hob.* 235. *S. P.*

(G)

Of Actions brought by a Commoner good and not good, and what Acts he may do, what not. See *Action on the Caſe.* (B) 4. per Totum. See (H) pl. 14.

Palm. 366. 2 Roll. Rep. 308, 344.

1. CASE by a Commoner againſt the Defendant for digging Clay on the Land where he had *Common*, in which the Plaintiff declared, that the Defendant on ſuch a Day did dig the Clay, and laid it upon the Ground, and afterwards *cepit & aſportavit* the ſaid Clay over the Common, *per quod* he loſt his Common, and could not uſe it in as ample Manner as he did before; the Defendant preſcribed for every Commoner, *&c.* to *dig Clay*, and Iſſue being taken upon this *Preſcription*, it was found againſt him, and the Jury gave *general* Damages; thereupon the Defendant brought a Writ of Error, and aſſigned for Error, that the Damages being given generally, the Plaintiff could have no Damage by *carrying* away the Clay; for tho' the Words *cepit & aſportavit* imply, that he had a Property in it, yet 'tis plain, he being a Commoner himſelf could have none in the Clay, and by Conſequence could not be damnified by *Taking* and carrying away; but adjudged, that by digging the Clay and laying it on the Ground, and carrying it afterwards over the Common, the Plaintiff was damnified, for by the digging the Graſs was deſtroyed, which would not renew in a long Time, either after the Pit was filled, or where the Clay was laid on the Ground; and he was damnified alſo by carrying it over the Common in Carts, or otherwiſe, and for theſe Things the Damages were given, and not for the taking the Clay. *Godb.* 344. *Bullen* verſus *Sheeves. Rep.* annexed to *Bendl.* 126. *S. C.*

2. A *Commoner* cannot generally *juſtify* the cutting and carrying away *Buſhes* from the Common; but he may *preſcribe* to do it; ſo he may juſtify, that *Time out of Mind* he and all thoſe, *&c.* have uſed to dig the Land to let out the Water, that he may in a better Manner take the

Common by his Cattle; but if the Lord *ſurcharge* the Common, he cannot drive away his Cattle, or diſtrain them Damage-feaſant, as he may the Cattle of a *Stranger*, but his proper Remedy is by Action on the Caſe. *Mich. 9 Jac. Godbolt* 192.

3. In *Treſpaſs, &c.* the Defendant juſtified the Taking the Cattle Damage-feaſant, ſetting forth a *Cuſtom*, that the Plaintiff, who was Lord of the Manor, had the ſole Right to the Place where, *&c.* until *Lammas-Day*, but that afterwards it was *Common* to the Tenants, and that the Lord could put in *three Horſes, and no more*; and becauſe after *Lammas, &c.* he put in more, the Defendant took them *Damage-feaſant*, Iſſue being taken upon this Cuſtom, it was found for the Defendant, but he could not get Judgment, the Court being divided in Opinion; for two Judges held, that the Defendant could not take the Cattle *Damage-feaſant*, becauſe he was but a *Commoner*, and the Place where, *&c.* is the Soil of the Plaintiff, and his Cattle cannot be *Damage-feaſant on his own Soil*; but the other two Judges were of Opinion, that the *Cuſtom* being found againſt the Lord, he was excluded by it for all his Cattle, *except three Horſes*, and that the Commoner had no other Remedy to preſerve his Right, but by Taking the Lord's Cattle, if he put in more than by the Cuſtom he ought; but the other two Judges doubted, becauſe the Defendant had not ſet forth an Uſage to diſtrain the Lord's Cattle Damage-feaſant. 2 *Cro.* 208. *Kenrick* verſus *Pargiter*. *Poſtea* Treſpaſs. (D) 7. *S. C.* Yelv. 129.

4. In *Replevin, &c.* the Caſe was, a Man had Right of Common for his Cattle *levant and couchant*, upon his Lands, *in a Field called* D. *when it was not ſowed with Corn*, and he put in his Cattle when *Part of it was ſowed*; adjudged, that he might ſo do, becauſe Part of the Field might be ſowed by Covin, on Purpoſe to hinder the Commoner from Taking his Commons. 1 *Brownl.* 189. *Truelock* verſus *Rigsby*. Yelv. 185.

5. *In Treſpaſs* for chaſing twenty of his Beaſts in a Cloſe called *D.* the Defendant juſtified for *Damage-feaſant* in his Freehold; the Plaintiff replied, that the *Lord De la War* was ſeiſed thereof in Fee, and granted Common of Paſture to *W. R.* and his Heirs, for twenty Beaſts in *D.* who conveyed the Common to *R. R.* who *licenſed* the Plaintiff to put in thoſe twenty Beaſts; upon Demurrer to this Replication it was objected, that he who had the Common could not *Licenſe* another to put in his Cattle, but he ought to take it by his own Cattle; but admitting he might licenſe another, yet he could not do it without Deed; the Caſe was not adjudged. 2 *Cro.* 575. *Monk* verſus *Butler*. 2 Roll. Rep. 146.

6. *Treſpaſs, &c.* for chaſing his Cattle in ſuch a Cloſe; the Defendant pleaded *Damage-feaſant* in his Freehold; the Plaintiff replied, and ſet forth a Grant made to him by the Defendant, of Common in the Place where, and that after the ſaid Grant the Defendant erected *a Stack of Corn* there, and that the Plaintiff put in his Cattle to uſe his Common, and the Defendant chaſed them, *&c.* and upon Demurrer it was adjudged, that the Grantee may uſe the whole Place for his Common; and if the Grantor ſet up a *Stack of Corn or Hay* on any Part of the Land, it tends to the Diminution of his Grant, and the Wrong begins by his own Act, of which he ſhall never take Advantage, and therefore cannot chaſe the Cattle from eating the Hay or Corn. *Yel.* 201. *Farmer* verſus *Hunt*. 2 Cro. 271.

7. Caſe, *&c.* in which the Plaintiff declared, that *Diu fuit & adhuc ſeiſitus exiſtit* of an Houſe, *&c.* and ſo preſcribed, that he, and all thoſe whoſe Eſtate he had in the ſaid Houſe, had uſed to have Common in the Waſte of *L.* and that the Defendant, *&c.* made *Coniberries* in the Waſte, *Quorum quidem præmiſſorum*, he loſt his Common, leaving out the Word *Prætextu*; after Judgment for the Plaintiff, a Writ of Error was brought, and the Error aſſigned was, that *Diu ſeiſitus* was not good, for that may be as well one Year as Forty; beſides, the Word *Prætextu* is left out, ſo that the Declaration is incertain, both in the Limitation of Time, and in alledging the Damages, for which Cauſes the Judgment was reverſed. *Godb.* 123, 347. *Sir Tho. Lee* verſus *Griſley*. *Poſtea* Seiſin. (B) 4. *S. C.*

8. In Replevin, the Defendant avowed the Taking the Cattle *Damage-feaſant* on his Common; and after a Verdict it was moved in Arreſt of Judgment, that the Avowry was ill, becauſe the Defendant did not ſhew, that he was damnified by the Cattle which he had diſtrained; for it might be, that there was ſufficient Common beſides; it doth not appear in this Caſe, whether they were the Cattle of a Stranger, or of another Commoner; 'tis probable they might be the Cattle of a Stranger, becauſe my *Lord Roll*, in anſwering this Objection, tells us, that a Commoner may diſtrain the Cattle of a Stranger Damage-feaſant on his Common, without alledging he was damnified by them; for in ſuch Caſe 'tis ſufficient for him to ſhew, that he hath a Title to the Common, that it may appear to the Court, that he had an Authority to remove the Nuſance. *Style* 428. *Brong* verſus *Moor*. *Poſtea* Diſtreſs. (C) 5. *S. C.*

9. *In Replevin* for Taking his Cattle, *&c.* the Defendant avowed, for that *A. B.* was ſeiſed, *&c.* and ſo preſcribes to have *Common appertenant*, and that the ſaid *A. B.* leaſed the Houſe to which the Common belonged to the Defendant, and ſo juſtified the Taking the Plaintiff's Cattle Damage-feaſant on the Lands where he had Right of Common; the Plaintiff replied, that *G. H.* was ſeiſed in Fee of another Meſſuage and two Acres of Land, *&c.* and laid a Preſcription in him to have Common appertenant, and that the ſaid *G. H.* leaſed the ſaid Meſſuage to the Plaintiff, and thereupon he put in his Cattle; the Defendant rejoined, that the Plaintiff, under Pretence of uſing the Common, had *ſurcharged* it, and thereupon he took his Cattle Damage-feaſant; and Iſſue being taken upon the *Surcharge*, there was a Verdict againſt the Plaintiff, that he had ſurcharged it; afterwards it was objected in Arreſt of Judgment, that this was an *immaterial Iſſue*, becauſe one Commoner cannot diſtrain the Cattle of another, tho' he may diſtrain the Cattle of a Stranger,

Stranger, who hath no Manner of Right to the Common; and ſo it was adjudged. 2 *Lutw.* 1238. *Dixon* verſus *James.*

10. *In Treſpaſs*, the Caſe was, one had encloſed two Acres of Common (when the whole Common was but three Acres) and this he pleaded was to enlarge the *Curtilage* of his Houſe (without ſaying it was an *antient Houſe*) and ſo juſtified by Vertue of the Statute *W.* 2. *cap.* 46. upon a Demurrer to this Plea it was objected, that it was ill, for the Reaſon before-mentioned; and for that the Defendant did not ſet forth, that his *Curtilage* was too ſtrait or little, but becauſe it did not appear, that it was for his neceſſary Reſiance or Abiding-Place. *Sid.* 79. *Nevill* verſus *Hamerton.* 1 *Lev.* 62. *S. C.*

11. *Treſpaſs* was brought by the *Lord* againſt a *Commoner*, for filling a Trench in a Common, which was digged there by the Order of the Lord; it was objected, that this Action would not lie, becauſe it was for the Improvement of the Common; but adjudged, that it did lie, for a Commoner cannot level the Mole-hills, nor cut Buſhes, nor dig or ſcower the Trenches in the Common, without a Cuſtom Time out of Mind ſo to do. *Sid.* 251. *Howard* verſus *Spencer.* See *Yelv.* 104. *S. P.* 2 *Cro.* 195.

(H)

Pleadings by Commoners, good, and not good.

1. ADjudged, that where a Man hath Common for an *hundred Sheep*, as appertenant to his Houſe and Lands, and he purchaſeth another Houſe and Lands, by Reaſon whereof he hath Right of Common in the ſame Place, for one hundred Sheep more, as appertenant to the ſame by *Preſcription*, if in Pleading he entituleth himſelf wholly for Right of Common for 200 Sheep, appertenant to both Houſes, he hath failed of his Preſcription, becauſe he ought to make two Titles and Preſcriptions for each hundred Sheep, and not have joined both in one, for theſe are diſtinct Commons. *Trin.* 5 *Mar. Dyer* 164, and 4 *Eliz. Dyer* 209.

2. *In Replevin, &c.* the Defendant made Conuſance as Bailiff to *W. R.* ſetting forth, that he had a *Leet in the Manor of D.* and that the Plaintiff was amerced at ſuch a Court, *for putting his Geeſe on the Common there*, for which Amerciament he diſtrained; but becauſe he did ſhew that Common was within the *Leet*, the Plaintiff had Judgment. *Cro. Eliz.* 448. *Wormleighton* verſus *Burton.* *Poſtea* Leet. (A) 7. *S. C.*

2 And. 67. contr. 3. In Treſpaſs, *&c.* the Defendant *preſcribed* to have Common; upon which they were at Iſſue, and the Jury found, that he had Common by Preſcription, *prout, &c. paying for it every Year, a Penny to the Plaintiff*; it was objected in Arreſt of Judgment, that the Defendant had failed in his Preſcription, becauſe he did not ſet it forth *entirely* as it was; but adjudged, that he had ſet forth as much as ſerved his Purpoſe, and the not alledging *the Payment of the Penny* is not material; becauſe, if it was not paid, it muſt be ſhewn on the other Side not to be paid. *Cro. Eliz.* 546, 563. *Lovelace* verſus *Reynolds.* 5 *Rep.* 79. *Gray's* Caſe. *S. P. Cro. Eliz.* 405. *S. C.* by the Name of *Gray* verſus *Fletcher.* See *pl.* 13. *S. P.*

2 Roll. Rep. 173. S. C. * *See* Keilw. 197, *and* 1 Saund. 227. 4. *In Treſpaſs, &c.* for Taking his Cattle, the Defendant juſtified for *Damage-feaſant* on his Freehold; the Plaintiff replied, that he was ſeiſed of a Meſſuage and ſuch Lands in *M.* in Fee, and ſo preſcribed to have Common in the Place where, *&c. pro* 25 * *Magnis Averiis*, every Year after *May-Day*, and therefore put in his Gelding, *&c.* it was objected in Arreſt of Judgment, that this Plea was not good, becauſe *incertain* what were *Magna Averia*; but adjudged, that it may be intended *Horſes, Oxen, Cows*, or other Beaſts, which are beſt known among the People there. 2 *Cro.* 580. *Standred* verſus *Shoreditch.*

2 Cro. 238. 1 Brownl. 188. 5. *In Replevin, &c.* the Defendant avowed for *Damage-feaſant* in his Freehold; the Plaintiff replied, that he was ſeiſed in Fee of a Meſſuage and fourteen Acres of Land, and ſo preſcribed to have Common in the Place where, *&c.* at all Times in the Year, as to the ſaid *Meſſuage* and Lands belonging; and Iſſue being taken upon this *Preſcription*, it was found for the Defendant, but he could never get Judgment, becauſe he did not ſet forth *in what Place* the *Meſſuage* and Lands were, to which the Common did belong, for that ought neceſſarily to be ſhewed, becauſe the *Viſne* muſt come from *that Place*, as well as from the Place in which the Common is claimed, eſpecially ſince Common may be *appendant or appertenant* to Land in another County, and then the *Viſne* muſt be of both Counties. *Yelv.* 177. *Broxholme* v. *Thorold. Poſtea* Ve. fa. (A) 14. *S. C.*

6. Caſe, *&c.* in which the Plaintiff declared and preſcribed to have Common in four Acres, for certain Beaſts, from the *firſt of Auguſt to the Feaſt of all Saints*, and that the Defendant had encloſed the ſaid four Acres, *&c.* upon Not guilty pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Plaintiff ought to have preſcribed for Cattle *levant and couchant: Sed non allocatur*, becauſe he had preſcribed generally. 2 *Roll. Rep.* 379. *Colſon* verſus *Perry.*

7. In Replevin, the Defendant avowed for *Damage-feaſant* in his Freehold; the Plaintiff in his Replication ſet forth a Preſcription to have Common in any Place of the Field: *After the Corn was cut and carried away, and until it was ſowed again*; and then ſets forth, that *ante tempus quo* the Field was ſowed, *and after the Corn was cut and carried away, &c.* he put in his Cattle, *&c.* and upon Demurrer this Replication was held ill, becauſe the Plaintiff had not alledged in what Year the Corn was ſown; for being confined by his Preſcription to a certain and determi-

nate

nate Time in which he was to have Common, he ought to ſet forth that Time in a particular Manner, and then to ſhew, that he was within it; therefore 'tis too incertain and general to ſay, *That before the Time, quo* the Corn was ſown, and after it was cut, he put in his Cattle. 2 *Cro.* 637.

8. *In Treſpaſs, &c.* the Defendant pleaded, that *W. R.* was ſeiſed in Fee of the *Place where, &c.* and of the *Manor of C.* of which the *Place where, &c.* was Parcel, and of a Meſſuage and two Yard-lands in Right of his Wife, Remainder to the ſaid *W. R.* and that they both joined in a Fine of the ſaid Meſſuage and two Yard-Lands to the Defendant and his Heirs, with Common for four Horſes, *&c. in the ſaid Manor, &c.* and upon Demurrer it was objected, that this Plea was not good, becauſe he did not ſet forth, that it was *Waſte* or *Common*, for he cannot claim Common, unleſs 'tis in Lands commonable; but adjudged that the Plea was good, becauſe the Grant was generally to take Common in the Manor and Lands in *C.* and it was not reſtrained to any Waſte or commonable Lands. *Cro. Car.* 345. *Stringer*'s Caſe.

9. In Treſpaſs for Breaking his Cloſe at *Belton*, the Defendant pleaded in Bar, that the *Locus in quo, &c.* is an Acre of Land, called *Blackacre in Belton*, and that 'tis his *Freehold, &c.* The Plaintiff, in his Replication, made a *new Aſſignment of the Place*, (*viz.*) that the Treſpaſs was done in a Place called the *Mill-field in Belton* and in the *Blackacre in Belton*; the Defendant rejoins in Bar to the new Aſſignment, for that the Place called *Mill-field* was a common Field, and that at the Time of the Treſpaſs one *G. I.* was ſeiſed in Fee of an antient Meſſuage in *Belton* aforeſaid, and ſo preſcribes to have *Common appertenant* in *Mill-field, for all commonable Cattle levant and couchant* upon the ſaid ſix Acres, *every Year that the ſaid Field was ſowed with Corn; and after it was cut and carried away, until it was ſowed again*, and ſo brings himſelf within the Preſcription, and juſtifies the putting in his Cattle; and upon Demurrer it was objected, that the Defendant had not alledged, that the Cattle which he put in were *commonable*. 2 *Lutw.* 1467. *Ward* verſus *Boſworth.*

10. *In Treſpaſs, &c.* the Defendant juſtified for Damage-feaſant; the Plaintiff, in his Replication, preſcribes for Common *until the Field was ſown, and after it was ſown, & poſt Blada meſſa, until it was ſown again*; and upon Demurrer it was ſaid, that this Preſcription was unreaſonable, (*viz.*) to have Common in Land ſown; but adjudged, that the Common was not claimed by this Preſcription until after the Corn reaped. 1 *Vent.* 21. *Walter* verſus *Channer.*

11. In Treſpaſs, *&c.* the Defendant ſets forth a Preſcription for Common, (*viz.*) That for two Years together he uſed to have Common in *the Place where*, &c. *after the Corn reaped and carried away, until it was ſown again*, and in the third Year, to have Common for the whole Year; and that the Year in which the Treſpaſs was ſuppoſed to be done, was one of the Years in which the Field was ſown, and that *poſt grana meſſa, &c.* he put in his Cattle, and traverſed, that he put them in *Aliter vel alio modo*; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Defendant did not anſwer the *Time* wherein the Treſpaſs was alledged, for *aliter vel alio modo* will not do it, becauſe thoſe Words do not refer to the Manner of putting in his Cattle. 1 *Vent.* 92. *Miller* verſus *Ward.*

12. In Treſpaſs for Chaſing his Cattle, *&c.* the Defendant juſtified for Damage-feaſant, and that *leniter chaciavit, &c.* the Plaintiff in his Replication, entituled himſelf to have Common for Sheep, *&c.* The Defendant, in his Rejoinder, ſet forth, that the Place where, *&c.* was Parcel of a great Waſte, wherein the Plaintiff had *Common appertenant* to his Houſe, and that the Lord enclоſed the Waſte, but that the Plaintiff had ſufficient Common for all his Sheep *levant and couchant, &c.* and upon Demurrer it was objected to the Rejoinder, for that the Defendant had ſet forth, that the Plaintiff had ſufficient Common for his Sheep *levant and couchant*, when it ſhould be, that he had ſufficient Common, *ad Tenementa prædicta ſpectan'*; but adjudged, that by *Levant and Couchant*, ſhall be intended as many as the Land will maintain. 1 *Vent.* 54. *Leech* verſus *Widſley.* Traverſe. (A) 10. *S. C.* 1 Lev 283. Raym. 189.

13. Error of a Judgment in *Replevin in Durham*, the Defendant avowed, that *Sunderland* is an antient Borough, *&c.* and ſets forth a Cuſtom, that every *Free-man* inhabiting there, hath Common in the Place for *two Horſes and four Cows*, and every *Stallinger* (who is an inferior Burgeſs) hath Common for *one Cow*; and becauſe the Plaintiff being a Stranger, put his Beaſts there, *&c.* the Defendant avowed the Taking, *&c.* The Plaintiff traverſed the Cuſtom, upon which they were at Iſſue, and the Jury found the Cuſtom as aforeſaid; but farther they found, *that the Wife of every Freeman or Stallinger* have the ſame Cuſtom after the Death of their Husbands, and that the *Copyholders*, Free-men and Stallingers, have Common alſo for Cows, *Heifers, Oxen, Bullocks*, Horſes, and all to their Stints, *&c.* it was objected, that the Common found by this Verdict varies from the Common pleaded, (*viz.*) for *Oxen, Heifers, and Bullocks*; but adjudged, that the Jury having found the Cuſtom expreſly at firſt, the farther Finding is void. 2 *Lev.* 252. *Hinks* verſus *Clerke.* See *pl.* 3. *S. P.*

14. *In Replevin*, the Defendant avowed *Damage-feaſant* in his Common, and made a Title to Common in the Place where, *&c.* and becauſe the Beaſts were there *Damage-feaſant*, he took and impounded them; and upon a Demurrer to this Avowry it was adjudged ill, becauſe the Commoner did not ſet forth any Special Damage to himſelf, or that he could not have Common *in tam amplo modo quo debuit & conſuevit*, for a Commoner cannot Diſtreſs the Beaſts of a Stranger, without ſome particular Damage, no more than bring an Action on the Caſe, without alledging, that he is damnified in his Common. 3 *Lev.* 104. *Woolton* verſus *Salter.*

Conditions.

What it is in Deeds, and how it differs from a Limitation. (A)
What is not a Condition in a Deed, but a Covenant, Limitation, &c. and *e-contra*. (B)
What Words make a Condition in Wills. (C)
What Words do not make a Condition in Wills to defeat an Eſtate, but a Limitation. (D)
Of Conditions conſiſting of ſeveral Parts, and of copulative and disjunctive Conditions, and where one Part becomes impoſſible to be performed. (E)
Where a Condition ſhall be extinguiſhed, apportioned or ſuſpended, and where it qualifies an Eſtate, and is not a Limitation wholly to determine it. (F)
What is a good Performance of Conditions and Covenants, and what not, and what ſhall be a Breach thereof. (G)
Of Conditions againſt Law, and of void Conditions. (H)
Of precedent and ſubſequent Conditions. (I)

(A)

What it is in Deeds, and how it differs from a Limitation. See *Limitation. Proviſo.* Poſtea. (F) 7.

1. LANDS were given *ad ſolvendum* 20 *l.* or *ad erudiendum filium*, or an Annuity granted *pro conſilio impenſo & impendendo*, theſe are all Words which make a *Condition*; but where Lands were given to *Repair a Bridge*, or the like, thoſe Words do not make a Condition, but a Tenure. *Plow. Com.* 142. In *Browning* and *Eeſtion's* Caſe. *Poſtea* Reſervation. (A) 1. *S. C.*

See Plurality (A) 7. *where the Words* Sub modo *did not make a Condition.* * Dyer 138. 4 Leon. 2.

2. 'Tis put for a Rule in *Mary Portington's* Caſe, that there are proper Words, both of *Conditions* and *Limitations*; thoſe of *Conditions* are, *ſub conditione, Ita quod, Si contingat proviſo, &c.* but the Words *ad effectum* * *ea intentione, ad ſolvend', &c.* do not make a Condition in Feoffments or Grants, tho' 'tis otherwiſe in the Caſe of *Wills:* The apt and legal Words to make a Limitation, ſo as to determine the Eſtate before Entry, are *quamdiu*, as where a Rent was granted out of the Manor of *Q. Quamdiu*, the Grantor ſhall remain there, *Dum and Dummodo*; as where a Leaſe was made of Land to continue *whilſt* the Leſſee ſhould pay 20 *l. per Annum*, or *until* he be promoted to a Benefice, *quouſque*, as where a Feoffment in Fee was made, *habendum quouſque* the Feoffor had paid a certain Sum of Money to the Feoffee; ſo where a Leaſe was made of Lands, *habendum* for ſo many Years, *if* the Leſſee ſhall ſo long live. 10 *Rep.* 42. 1 *Rep.* 104. in *Shelley's* Caſe. *S. P. Paſch.* 13 *Eliz. Dyer* 300. *S. P.*

3. Feoffment in Fee to the Uſe of himſelf for Life, and afterwards to *A. R.* whom he intended to marry, *until the Iſſue of that Marriage be of full Age*; and after the Son ſhould be of that Age, then to his Mother during her Widowhood; the Husband died without Iſſue, the Widow continued unmarried and entered on the Land; adjudged againſt the Heir at Law, that her Entry was lawful, for if a Feoffment is made to *W. R.* and his Heirs, *habendum until T. W.* pay 100 *l.* and the ſaid *T. W.* dieth before he pay the Money, the Feoffee and his Heirs ſhall have the Land for ever. *Paſch.* 13 *Eliz. Dyer* 301.

Cro. Eliz. 202.

4. *In Ejectment, &c.* the Plaintiff declared on a Leaſe made of the Manor of *L.* the Defendant pleaded, that before the Leſſor of the Plaintiff had any Thing in the ſaid Manor, the Biſhop of *R.* was ſeiſed thereof, *&c.* and leaſed the ſame to the Defendant; the Plaintiff replied, that true it is, the Biſhop made ſuch a Leaſe, but that the Leſſee *covenanted* he would not * diſturb any of the Tenants, *&c.* doing their Duties according to the Cuſtom of the Manor, and then ſhewed, that the Defendant had put out one *W. R.* a Tenant of the Manor, *&c.* and that the Biſhop *entered for a Condition broken*, and made the Leaſe to the Leſſor of the Plaintiff; and upon Demurrer to this Replication it was objected, that the Entry of the Biſhop was not lawful, for this was not a *Condition*, but a *Covenant*, becauſe it came on the Part of the Leſſee, and every Condition ought to be the Words of the Leſſor; but adjudged, that the Leaſe being the Deed of both, every Word is ſpoken by both, and ſo this ſhall be a *Condition*, tho' it ſounds in *Covenant*; as where the Leſſee covenanted to grind all his Corn at the Mill of the Leſſor, the ſame was held to be a *Condition.* 1 *Leon.* 244. *Thomas* verſus *Ward.*

* *See* Covenant. (F) 10. S. P.

5. Leaſe for Years, *Proviſo* that it ſhall not be lawful for the Leſſee to *alien the Term* without the Aſſent of the Leſſor; the Leſſee *deviſed* the ſame Term to his Son, without the Aſſent of the Leſſor; adjudged,

adjudged, this was a *Condition precedent*, and nothing paſſed till the Aſſent of the Leſſor was obtained. *Cro. Eliz.* 60. *Knight* verſus *Moor*.

6. Upon a Special Verdict in *Ejectment*, the Caſe was, Leſſee for *forty Years* of an Houſe, upon this Condition, *That* if ſhe lived ſo long a Widow, and dwelt in the Houſe; ſhe continued unmarried all her Life-time, and lived in the ſaid Houſe, and there died within the *forty Years*; adjudged, that the Words, *upon Condition that if*, were void, becauſe they were * inſenſible, for they neither made a Condition, or Limitation, and 'tis no more, than if a Leaſe for Years is made, rendring Rent, *upon Condition, that if* the Rent is behind, and ſays no more, this is inſenſible, for it may be intended, that the Leſſee ſhall forfeit ſome Penalty, or that the Leſſor may re-enter, but 'tis incertain which, and therefore void. *Cro. Eliz.* 414. *Hardy* verſus *Sayer*. *Poſtea* Limitation. (B) 4. *S. C.* Poph. 99. Moor 400. Owen 107. Gouldsb. 178. * *See* Sheriff. 42. S. P.

7. A Leaſe was made, in which were theſe Words, (*viz.*) that it ſhould not be lawful for the Leſſee to ſell, give, or diſpoſe his Term or Eſtate, *&c.* without the Licence of the Leſſor, *upon Pain of forfeiting the Term*; the Leſſor and Leſſee died, and afterwards the Executors of the Leſſee ſold the Term without Leave of the Heir of the Leſſor; adjudged, that theſe Words made a Condition, but that the Term was not forfeited, becauſe the Reſtraint was only during the Lives of the Leſſor and the Leſſee. *Mich.* 3 *Ed.* 6. *Dyer* 65.

8. The Word *Pro* hath the Force of a Condition when the Thing granted is *Executory*, and where the Conſideration of the Grant is a *Service*, or ſome ſuch Thing, for which there is no Remedy, but the Stopping the Thing granted, as where an Annuity is granted *pro conſilio impenſo & impendendo*, or for executing the Office of a *Steward*, in ſuch Caſe the Failure of giving * Councel, or performing the Service, is a Kind of Eviction of the Annuity, for the Grantor hath no Means either to exact the Counſel, or to have a Recompence for the Failure, but to ſtop the Annuity; and in theſe Caſes the Condition is not *precedent*, and therefore the Performance thereof need not be averred. *Hob.* 40. In *Cowper* and *Andrews*'s Caſe. 7 *Rep. Ughtred*'s Caſe. *S. P.* Moor 863. Godb. 237. 1 Roll. Rep. 120. S. C. * *See* 3 Mod. 191.

9. Leaſe for eighty Years of the Manor of *Tavernam*, *&c.* excepting all Woods and Underwoods growing, or to grow in the Wood called *Tavernam Wood*, and excepting all Timber-Trees of *Oak*, *Aſh*, and *Elme*, growing *on any Part of the Premiſſes*, with free Ingreſs and Regreſs: The Leſſor covenanted, that the Premiſſes were free from Incumbrances, and the Leſſee covenanted to repair the *Fences*, and alſo if he diſturbed the Leſſor, or his Aſſigns, to fell, cut, or carry away any of the Wood or Underwood excepted, that then it ſhould be lawful for the Leſſor to re-enter, *&c.* one Queſtion was, whether this was a *Covenant or a Condition*, ſo that upon a Diſturbance the Leſſor might enter and defeat the Eſtate; it was inſiſted, that it was not a *Condition*, becauſe they were the Words only of the *Leſſee*, and every * *Condition* is created by the Words of the Leſſor; 'tis true, if the Words had been, if the Leſſee diſturb, *&c.* then the † *Leaſe ſhall be void*, this had been a *Condition*, becauſe the Plaintiff could have no Remedy by Action upon a void Leaſe, but 'tis otherwiſe where the Leſſee covenants, it ſhall be lawful for the *Leſſor to* ** *re-enter*, becauſe in ſuch Caſe he may have a Remedy by Way of Action upon the Deed: But adjudged this was a *Condition*, becauſe where Words are indefinite and proper to defeat an Eſtate, they ſhall be taken to have the Force of a *Condition*. *Palm.* 503. In *Heyward* and *Fulcher*'s Caſe. Heyward v. Guppie. * 2 Rep. 70. b. † *'Tis ſo in* Browning *and* Beeſton's *Caſe*. Antea (A) 1. ** *'Tis ſo in* Cromwell's *Caſe*.

10. In the Caſe laſt mentioned, the Breach aſſigned was, for diſturbing the Leſſor to cut a *Branch of a Timber-Tree*, which did not grow in *Tavernam Wood*, but in another Part of the Lands demiſed; now it was objected, that this was not a Breach of the Condition, becauſe the Leſſee covenanted only not to diſturb the Leſſor, to cut and carry away the *Wood and Underwood* growing in *Tavernam Wood*, and here the Diſturbance was alledged in cutting a Bough of a *Timber-Tree growing out of that Wood*; 'tis true, all *Timber-Trees* are excepted, but the Leſſor himſelf ſeems to have diſtinguiſhed between *Wood and Trees*, for the Diſturbance goes only to the Wood in *Tavernam Wood*, and the Exception ſtands by it ſelf as to the Timber-Trees; now admitting this to be a Condition, and to go to the Deſtruction of the Eſtate, it muſt for that Reaſon be taken ſtrictly, and extend only to that which is uſually known by the Name of *Wood*, which *Trees* are not: But adjudged by Three againſt the Chief Juſtice, that *Wood and Underwood* are the general Words, and comprehend *Timber-Trees as well as Wood*, ſo that *Wood* may be properly ſaid to be the *Genus*, and *Timber* to be the *Species* of Wood. *Palm.* 503.

11. *A.* being ſeiſed of a Manor and Lands in Fee (and *B.* being in Poſſeſſion of Part of it) made a Feoffment to *D. &c.* to the Uſe of himſelf in Tail Male, Remainder to *E.* in Tail; *provided*, that *F.* or in whom the Inheritance in Tail of *all the Premiſſes* ſhall happen to be, ſhall pay to the Daughter of the Feoffor 200 *l.* adjudged, that the Remainder-Man in Tail is not bound by this Condition, for that was, that he who ſhould have the Inheritance in Tail of *All* the *Premiſſes*, ſhould pay, *&c.* now he had only Part thereof, becauſe *B.* who had a Leaſe for Years of Part, never attorned, ſo that the Land in his Poſſeſſion did not paſs, and a *Condition ought to be taken ſtrictly*. *Poph.* 103. *Slaning*'s Caſe.

(B)

What is not a Condition in Deeds but a Covenant, Limitation, &c. and econtra. See *Pennant's* Caſe. *Notice.* (A) 4. *Proviſo.* (C) 4. *Rent.* (L) 12.

1. NEither the Word *Proviſo*, or any other Word, makes a Condition, unleſs 'tis *reſtrictive*, as that he ſhall *not do* ſuch an Act; for if 'tis not reſtrictive, 'tis rather a *Limitation* than a *Condition*; therefore where Lands were given in Tail, upon Condition, that if the Donee died without Iſſue, that the Donor may re-enter, this is not a *Condition*, becauſe nothing is reſtrained; ſo if it be upon *Condition*, that if the Leſſee commits Waſte, that the Leſſor may re-enter, this is *no Condition*, for the Reaſon before-mentioned, for nothing is *reſtrained* but what the Law reſtrains before the Leaſe made; but if it had been upon Condition, that if the Leſſor ſhould recover in Waſte for Part, that he might enter into the Whole; there 'tis otherwiſe, becauſe 'tis reſtrictive, and ſo is *Bejuſhin's* Caſe, for there Lands were let to Husband and Wife for Life, Remainder to their eldeſt Son, *&c. provided he would dwell in the Houſe*, &c. now, becauſe thoſe Words were not compulſory, but left the Son at Liberty to dwell there or elſewhere, therefore they were not properly a Condition. *Plow. Com.* 34. In *Bejuſhin's* Caſe. 27 *H.* 8. *Dockwra's* Caſe. *S. P.*

2. Leaſe for Life, *&c. provided*, that if the Leſſee die within ſixty Years then next following, that in ſuch Caſe his Executors ſhall have his Right until the ſixty Years are expired; adjudged, this was not a *Condition* but a *Covenant*. 5 *M. Dyer* 150. *Parker's* Caſe. *Poſtea* Proviſo. (B) 1. *S. C.* See *Cro. Eliz.* 634. *Archdeacon* verſus *Jenner. S. P.* See *Poph.* 116.

3. Tenant for Life ſurrendered to the King *ea intentione*, that he ſhould give her other Lands in Recompence; the King granted thoſe Lands to another, and gave the Tenant for Life other Lands, which being upon a defeaſible Title, were afterwards evicted, and then the Tenant for Life entered upon the Grantee by Vertue of the Condition created by thoſe Words *ea intentione*; adjudged, that it was not a *Condition*, but only a Truſt or Confidence; for to make it a Condition, there muſt be theſe Words, (*viz.*) And *if he fail, &c.* then it ſhall be lawful for the Surrenderor to re-enter. *Hill.* 4 *Mar. Dyer* 138. Counteſs of *Surrey's* Caſe.

4. The Father having two Daughters *covenanted to ſtand ſeiſed, &c.* to the Uſe of his eldeſt Daughter in Tail, *upon Condition, that ſhe paid to her Siſter* 300 *l. within a Year after his Death*, or ſhe came to the Age of eighteen Years, and if ſhe failed in Payment, or died without Iſſue, then to the Uſe of the youngeſt Daughter in Tail; the Father died, the eldeſt Siſter married, and had Iſſue born alive, and afterwards ſhe died without Iſſue, but *before the Day of Payment*; adjudged, that the Husband was *Tenant by the Curteſy, &c.* becauſe the Eſtate of his Wife was not determined by the Non-payment of the Money, for ſhe died without Iſſue before the Day of Payment, ſo that the *Condition* was not broken, if it had been a *Condition*, which it was not, but rather a *Limitation* of the Eſtate; neither did her Eſtate ceaſe, or was cut off by ſuch Limitation, but it determined by her Dying without Iſſue, ſo that the Eſtate-tail was ſpent. 1 *Leon.* 167. *Samms* verſus *Payne.*

5. The Father being ſeiſed in Fee, covenanted to *levy a Fine* to the Uſe of himſelf for Life, without Impeachment of Waſte, and after his Deceaſe to the Uſe of *John*, his Son, for Life; and after his Deceaſe, to the Uſe of the firſt Son of *John* in Tail Male, and ſo to the fourth Son ſucceſſively; and *if it fortune, that the ſaid fourth Son die without Heirs Males of his Body*, then to the Uſe of *H. Holcroft* in Tail Male, with divers Remainders over; *John*, the Son, died without Iſſue Male; the Queſtion was, whether any Uſe ſhould ariſe to *H. Holcroft*, and adjudged, that it ſhould, becauſe that Clauſe, *if the fourth Son die without* Iſſue, was not a *precedent Condition* to the Eſtate of *H. Holcroft*, but a Limitation of the Eſtate; 'tis true, in Strictneſs, that Clauſe cannot be ſatisfied, unleſs a fourth Son had been born, and afterwards he died without Iſſue; and if there never was a fourth Son, then 'tis impoſſible he ſhould die who never was alive; but the Judges regarded the *Intention* of the Party more than the preciſe Words. *Moor* 487. *Holcroft's* Caſe.

Conditions to defeat an Eſtate and Cuſtoms, and Penal Laws, muſt be taken ſtrictly, as where the Cuſtom is, that a Copyholder for Waſte done, ſhall forfeit his Eſtate; if a Stranger doth the Waſte, 'tis no Forfeiture. 4 *Leon.* 241.

2 Mod. 317. 6. *Leſſee for Years* brought an Action of *Treſpaſs* for Breaking his Cloſe and Beating down his Hedges, *&c.* The Defendants juſtify, for that one *Martin* being ſeiſed in Fee of the Lands, *&c.* made a Leaſe thereof to the Plaintiff, excepting the Trees, with Liberty to fell, take, and carry them away, *Repairing the Hedges and filling up the Holes*, and that *Martin* had granted the Trees and that Liberty to the Defendants, *&c.* and upon Demurrer to the Plea it was objected, that it was ill, becauſe the Defendant had not ſhewn, that he *filled up the Holes and repaired the Hedges*; that this Liberty being granted, *he Repairing the Hedges, &c.* thoſe Words make a *Condition*, which not being performed, the Agreement is deſtroyed, and by Conſequence the Liberty gone: *Sed per Curiam*, this is not a * *Condition*, but a *Covenant*, for the Breach whereof, *in not Repairing the Hedges*, the Plaintiff might have an Action; 'tis like a Covenant for quiet Enjoyment, *paying* the Rent, where the Word *Paying* doth not make the *Covenant*

* Tomkins *v.* Tomkins. *Bond with a Condition, That Leſſee may*

the Leſſee ſhall enjoy the Land for the Rent; *thoſe Words do not make a Condition, but a Covenant, upon which the bring his Action.* 4 Leon. 50. 1 Sid. 280. contra, *and* 2 Mod. 34.

conditional, but a *reciprocal Covenant*, for which each hath a *mutual Remedy*. *T. Jones* 205. *Warren* verſus *Arthur*. See *March* 9. 2 *Roll. Rep.* 466.

(C)

What Words make a Condition in Wills. See (D) pl. 9.

1. *Conditional Deviſes* as well of Lands as of Goods, are allowed by our Law, and where *Lands* are deviſed upon Condition, and that Condition is not performed, the *Heir* ſhall enter for a Forfeiture, unleſs ſuch Deviſe be to the Heir himſelf, as where Lands are deviſed to *W. R.* and his Heirs, *upon Condition*, that he pay to *R. L.* 100 *l.* in ſuch Caſe, if the Money is not paid, the Eſtate is determined, and the *Heir* may enter; ſo where *Goods or Chattels* are deviſed upon a Condition, and 'tis not performed, the Executor ſhall take Advantage of it, and ſhall keep the Goods till the Condition is performed.

2. Thoſe Conditions which put Reſtraints upon Mens Eſtates, muſt be taken *ſtrictly*, as for Inſtance, a Leaſe for Years was made, *upon Condition, that the Leſſee ſhould not alien the Lands to W. R.* and he ſold them to *W. W.* who ſold them to *W. R.* adjudged no Breach of the Condition, becauſe it ought to be taken ſtrictly; for tho' the Lands were ſold to *W. R.* yet it was not done by the Deviſee. *Dyer* 45.

3. 'Tis true, there was a contrary Judgment a few Years afterwards, (*viz.*) Leſſee for Years upon Condition, that if he *leaſed* it for more than one Year, that the Leſſor, *&c.* might enter; he did not *Leaſe* it, but he *deviſed* it to his Son, this was adjudged a Breach of the Condition. *Gouldsb.* 184. *Cole* verſus *Taunton*.

4. The Teſtator deviſed his Lands to his eldeſt Daughter in Fee, *That ſhe pay* to her youngeſt Siſter an Annuity of 30 *l.* adjudged, this is a *Condition*, and the youngeſt Siſter may enter into a *Moiety* of the Lands if the Condition is not performed, for otherwiſe ſhe hath no Remedy for her Annuity. *Cro. Eliz.* 146. *Crickmere* verſus *Paterſon*. *Poph.* 12. *Ward* verſus *Browning*. *S. P. Poſtea* Notice. (A) 12. *S. C.* See *Owen* 92. * *Bodenham* verſus *Herlakenden*. *S. P.* 1 Leon. 174. Gouldsb. 134. * Gouldſ. 75. S. P.

5. A Deviſe to one, *paying* to another ſo much Money generally, makes a *Condition* in a Will; and if ſuch *Condition is expreſs*, then 'tis not qualified with a *Clauſe of Diſtreſs*, as for Inſtance, Deviſe of ſeveral Houſes, *upon Condition that the Deviſee pay* a yearly Rent out of the ſame to his Wife for her Life, and if the Rent be not paid within ſix Weeks after it becomes due, then ſhe may *diſtrain*, *&c.* adjudged, that this Clauſe of Diſtreſs had not qualified that Condition which was annexed to her Eſtate, but that it was determined upon the Breach thereof, and that the *Heir* of the Teſtator might enter for ſuch Breach. *Dyer* 348.

6. Deviſe of Lands for a certain Term of Years, *yielding and paying* to another 20 *l.* yearly, and every Year, at *Michaelmas*; adjudged, this was a *Condition*, and that the Heir might enter if it was not performed. *Cro. Eliz.* 454. *Fox* verſus *Catlin*.

7. But if it had been a *Condition by Implication*, then a *Clauſe of Diſtreſs* would have taken away the Force of ſuch *Condition*, and have made the Word *Paying* to be no *Condition* at all, as a Deviſe to *W. R.* for Life, *paying* to *R. L.* an annual Rent; and if 'tis behind, then that the Lord of the Manor may *diſtrain*, this is no Condition, becauſe the Clauſe of the Diſtreſs qualifies it, or rather makes it no Condition at all, ſo that there is a plain Difference between *paying*, and upon *Condition to pay*; the firſt being a *Condition by Implication*, and the laſt an *expreſs Condition*. *Lane* 56. *Street* verſus *Beale*. *Poſtea* Legatee. (C) 9. *S. C.*

8. The Teſtator having made a Leaſe of his Lands for a *Term of Years*, *rendring Rent*, deviſed the Reverſion to *W. R.* in Fee, and by his Will declared, that his Intention was, his Executors ſhould have the Land during the Term, upon Condition, that they give Bond to the ſaid *W. R.* within ſix Months after his Deceaſe, *by the Advice of the Overſeers of his ſaid Will*, to pay him 34 *l. per Annum* during the ſaid Term; the Executors ſhewed the Will to the Overſeers, but they *adviſed no Bond*, nor was any given by the Executors; adjudged, this was a Condition by which the Term was veſted in the Executors, but that it was in *W. R.* till the Condition was performed, which not being done, he in Reverſion ſhall have the Rent. *Winch* 69. *Treherne* verſus *Cleybrooke*. Winch 26.

(D)

What Words do not make Conditions in Wills to defeat an Eſtate, but Limitations. See *Implication*. (A) 11.

1. DEviſe to his Wife for thirty Years, *to the Intents and Purpoſes* following, (*viz.*) *I Will that ſhe, out of the Profits, pay yearly* 30 *l. to W. R.* during the Term; and having appointed her to pay ſome other Legacies, he directed, that *ſhe* ſhould be bound to the ſaid *W. R.* to perform the Will; ſhe paid the Legacies when ſhe ſhould have paid the Money to the ſaid *W. R.* and he was to pay it over to the Legatees, and for that Reaſon the *Heir* at Law entered for a Breach of the *Condition*; but adjudged, that it was not a Condition, but a Declaration of his Intention. 1 *And.* 50. *Hobert* verſus *Spenſer*. *Dyer* 163. *S. C.*

2. So a Deviſe of an Annuity of 5 *l.* to his Son, *towards his Education and bringing up in Learning*; this is not a *Condition*, for if he is not educated in Learning, yet he ſhall have this Annuity, becauſe the Words, *towards his Education, &c.* ſhew the *Intention* of the Teſtator, and the Conſideration for the Payment of the Annuity, for he muſt neceſſarily know, that 5 *l. per Annum* was not ſufficient Maintenance for a Scholar. 3 *Leon.* 65.

Poph. 6. Moor 514. 3. Deviſe, *&c.* in Fee, upon *Truſt and Confidence*, that the Deviſee out of the Profits *build a Free-School*, and pay ſo much Money to the Maſter and Uſher, *&c.* the Profits were diverted to another Uſe, and no Free-School built; adjudged, this was an expreſs *Truſt*, and no *Condition*, for the Breach whereof the *Heir* might enter. *Moor* 494. *Gibbons* verſus *Marltiward. Poſtea* Feoffment. (B) 4. *S. C.* See 2 *And.* 50. *Cro. Eliz.* 238. 2 *Leon.* 152. *S. P.*

1 And. 179. 2 Leon. 33. Owen 54. 4. Leſſee for Years, rendring Rent, with a *Covenant to Repair, &c.* afterwards the Leſſor *deviſed* the ſame Houſes to the ſame Leſſee for a longer Term of Years, rendring the like Rent, and *under the like Covenants* as in the Leaſe, the Remainder over to another in Fee; the Leaſe expired, and the Leſſee held in by Vertue of the Deviſe, but did not *repair* the Houſes; adjudged, this was not a Condition, for the Words (*under the like Covenants*) do not make a *Condition*, tho' in a Will, but are rather void. *Hill.* 30 *Eliz. Gouldsb.* 74. *Mitchell* verſus *Ruddall. Poſtea* Covenant. (A) 1. *S. C.*

Cro. Eliz. 376. Owen 112. 5. The Teſtator deviſed his Lands to his youngeſt Son, *when he ſhould attain the Age of twenty-four Years, upon Condition* to pay 20 *l.* to his Siſter, and *if he die before twenty-four Years*, then the eldeſt Son to have the Land, *upon Condition* that he pay 20 *l.* to his Siſter, and if the Sons failed to pay the 20 *l. then the Lands ſhould remain to their Siſter*; the Father died, the *youngeſt Son* entered after he had attained the Age of twenty-four Years, and did not pay the 20 *l.* to his Siſter, and the eldeſt Son taking this to be a *Condition*, entered for a Breach thereof; but adjudged, that it was a *Limitation* and no Condition, becauſe the eldeſt was to have nothing in the Land, unleſs the youngeſt had died before twenty-four Years, and it plainly appears that the Daughter was to have it, if the 20 *l.* was not paid, ſo that ſhe being next in Remainder, ſhall take Advantage of it, and not the Heir at Law. *Gouldsb.* 153. *Wiſeman* verſus *Baldwin.*

6. The Father being ſeiſed in Fee, and having three Sons, deviſed Part of his Lands to his Wife for Life, upon Condition that ſhe ſhould educate his Children in Learning, *&c.* Remainder to his youngeſt Son in Tail; the Father died, and ſo did the youngeſt Son without Iſſue, and the Reverſion came to his eldeſt Brother, and the Condition was not performed by the Wife; adjudged, this was not a *Limitation*, becauſe there were expreſs Words of *Condition*, but that the Deviſe over in Remainder had deſtroyed the Condition; for if it had not, then the eldeſt Son muſt have entered to defeat the Eſtate of the Wife, for he is to take Advantage of a Condition broken, but in this Caſe he could not defeat that Eſtate without defeating the Remainder thereof, that being deviſed over, had deſtroyed the Condition. 3 *Mar. Dyer.* Dr. *Butts*'s Caſe.

Moor 271. 2 Leon. 38. 7. So where the Teſtator deviſed Part of his Lands to his eldeſt Son in Tail, and another Part to his youngeſt Son in Tail: *Provided, If any of his Children alien or Leaſe his Part, before they ſhall be thirty Years of Age*, then the other ſhall enter; the Father died, the eldeſt made a Leaſe of his Part before he was thirty Years old, and the youngeſt Son entered upon him, and ſold it before he was thirty Years of Age, and thereupon the eldeſt Son re-entered on the Vendee; but adjudged he could not, becauſe the Proviſo extends only to the immediate Eſtate deviſed, and not to any new Eſtate which might ariſe upon Breach of the Condition, as this did to the youngeſt Son; and therefore when he entered for the Breach thereof, the Land was diſcharged of the Condition, for otherwiſe it would go and return upon every Leaſe or Alienation, before the Parties were thirty Years old. *Owen* 855. *Spittle* verſus *Davis.* 2 *Leon.* 82. *Large*'s Caſe. *S. P.*

Plowd. Com. 2. Part 1. S. C. *by the Name of* Nevis *v.* Lark. 8. Upon a Special Verdict in Ejectment, the Caſe was, the Teſtator deviſed his Lands to *W. R.* in Tail, with ſeveral Remainders over in Tail; then follows this Clauſe, *If any of the ſaid Perſons on whom my Lands are entailed, or their Heirs, do mortgage or ſell the ſame, or any Part thereof*, &c. *then he or they ſhall be diſcharged of the ſaid Entail of my Lands, and it ſhall be of no Force as to him or them, but ſhall immediately deſcend to the next in Tail*, &c. one *Scholaſtica* had theſe Lands by a Forfeiture of the firſt Eſtate limited in this Will, and afterwards ſhe and her Husband levied a Fine, *&c.* and he in the next Remainder entered; adjudged, that this is a Limitation, and that the Eſtate of every one in Remainder is ſubject to ceaſe upon an Alienation, and that the next in Remainder may enter. *Moor* 543. *Sharrington* verſus *Minors. Poſtea* Limitation. (B) 2. *S. C.* Remainder. (F) 1.

9. Deviſe to his Wife and her Heirs, upon Condition that ſhe, *by the Advice of Counſel, ſhould aſſure the Lands* in ſome convenient Time, to certain *Charitable Uſes*, (which in Truth were prohibited by the Statute 31 *H.* 8, as Superſtitious) adjudged, that tho' the Uſes were prohibited by Law, yet if the Condition is not performed, the Wife ſhall forfeit the Eſtate, becauſe it might have been ſettled to thoſe Uſes by Advice of Counſel, for they might have adviſed the Purchaſing a Licence ſo to do. *Cro. Car.* 24. *Parks*'s Caſe.

2 Ch. Rep. 26. 2 Lev. 21. Raym. 236. 1 Mod. 86. 300. 10. In a Special Verdict in Ejectment, the Caſe was upon a Will, (*viz.*) The Teſtator deviſed the Lands to his Wife for Life, and after her Death to his Grandchild *Ann Knolls* (*the Defendant*) and the Heirs of her Body, *provided, and upon Condition ſhe marry with the Conſent of his Wife, and of the Earl of* W. *and the Earl of* M. *or the major Part of them; and if ſhe marry without ſuch Conſent, or die without Iſſue, then to* G. P. (the Leſſor of the Plaintiff) *&c.* after the Death of the Teſtator; the Lady *Ann Knolles* married *Fry* without the Conſent of any of the Perſons before mentioned; and it was found, that ſhe was of the Age of fourteen Years, and had no *No-*

tice of the Will: Adjudged, that this *Proviſo* in the Will made a *Limitation* of the Eſtate to let in the Remainder-Man; for if it ſhould be a *Condition*, then none could enter for a Breach of it but the *Heir*, which ſeems to be againſt the Intent of the Teſtator; for tho' the Word *Condition* is in the Clauſe, yet a *Remainder being limited* over, that makes it a *Limitation*, and in this Caſe 'tis a *Limitation* which determines her Eſtate, for ſhe had an Eſtate-tail ſubject to two Limitations, the one in Law, (*viz.*) *her Dying without Iſſue*, the other in Fact, (*viz.*) *marrying without Conſent*, and both are coupled together; and ſhe having done the laſt, her Eſtate is determined and transferred to the Remainder-Man, without Entry or Claim; neither is it neceſſary that ſhe ſhould have any *Notice of the Will*, becauſe there is no Perſon who can be reaſonably ſuppoſed to be bound to give it; the *Heir* is not obliged to do it, for he is diſinherited; the *Executors* of the Will are not concerned, nor the Truſtees, nor the Remainder-Man, for he is no more bound to give it, than ſhe is to take Notice; and as to the Infancy of the Defendant, that is not material, for *Infants are bound by Conditions in Fact*; beſides, this Reſtraint is laid upon her in a Matter proper to her Circumſtances, that being an Infant, ſhe might adviſe with her Friends about her Marriage. 1 *Vent.* 199. *Fry* verſus *Porter.*

(E)

Of Conditions conſiſting of ſeveral Parts, and of copulative Conditions and diſjunctive, and where one Part becomes impoſſible to be perfozmed. See *Death of either Party.* (A) 4. *Election.* (B) 1.

1. THE Father made a Feoffment in Fee, and entered into Bond with the Feoffee, conditioned, that *he and his Son* would do all ſuch Acts for the better Aſſurance of the Lands, *&c.* as the Obligee ſhould deviſe, and he deviſed, that both of them ſhould execute a Releaſe; the Father ſealed and delivered it, but the Son would not, and thereupon an Action of Debt was brought againſt the Father, and it was adjudged againſt him, for he had undertaken, that his Son, tho' a Stranger, ſhould execute it, and therefore it was at his Peril, if he refuſed. 2 *Rep.* 19. *Manſer's* Caſe. *See* Covenant. (B) 3. *S. P.* 4 Leon. 62. S.C.

2. Debt upon Bond, conditioned to deliver up a Bond to the Plaintiff, wherein he and the Defendant were bound to pay *W. R.* 5 *l. and alſo*, that the Defendant ſhould procure Satisfaction to be acknowledged on a Judgment had on that Bond, *and alſo* ſhould deliver true Notes of the Bills of Charges which concern the ſame, *&c.* the Defendant pleaded, that there were no Bills of Charges for or concerning the ſame, but did not anſwer the other Parts of the Condition; adjudged, that he ought to have performed the Reſidue of the Condition *in convenient Time*, for where, by the Condition of a Bond any Thing is required to be done to the Obligee, which in its own Nature is tranſitory, as to pay a Sum of Money, *&c.* and *no Time is limited when it ſhould be paid* there, tho' the Place of Payment is directed, the Thing muſt be done in a *convenient Time*, but where the Condition of a Bond is for the Obligor to make a Feoffment to a *Stranger*, and *no Time is appointed* when it ſhould be made there, tho' the Concurrence of the Obligor and the Obligee are both requiſite, yet the Obligor ſhall not have convenient Time during his Life to make the Feoffment, but he ought to do it preſently, becauſe he hath undertaken to do it to a Stranger, and it may be done without the Concurrence of the Obligee, but when he himſelf is Party, or the Thing cannot be done without his Concurrence, there the Obligor ſhall have Time during his Life, if the Obligee doth not haſten him to do it by Requeſt; but when the Thing which the Obligor is bound to do doth not concern the Obligee, nor is for his Benefit, but is to be done by the ſole Act and Labour of the Obligor himſelf, and no Time is limited when the ſame ſhall be done, there he hath any Time during his Life to do it, if not haſtened before by Requeſt. *6 Rep.* 30. *Booth's* Caſe.

3. Where the Condition of a Bond is poſſible to be performed at the Time when it was made, and afterwards becomes impoſſible, either by the * Act of God, or of the Law, or of the Party, there the Bond is ſaved; but if the Condition be impoſſible to be performed at the Time of making it, there the Obligation is ſingle, and ſtands as it were without any Condition, as for Inſtance, if a Man enter into a Bond conditioned, that the Obligor ſhall go from *London* to *Rome* within three Hours, in this Caſe the Condition is void, becauſe impoſſible to be performed at the Time when it was made, and the Obligation ſtands ſingle and good without any Condition. 10 *Rep. Lord Stafford's* Caſe. * Palm. 554.

4. Debt upon Bond, conditioned to pay ſo much Money, when, and at ſuch Time as the Obligee had a Son, *who ſhall, or can ſay the Lord's Prayer in Engliſh*; the Defendant pleaded, that after the Date of the Bond, the Plaintiff had not any Son *who ſaid, or could ſay*, the Lord's Prayer in *Engliſh*; the Plaintiff replied, that at ſuch a Day and Place he had a Son *who could ſpeak the Lord's Prayer in Engliſh*; and upon Demurrer to this Replication it was objected, that what was alledged by the Plaintiff was not ſufficient to ground an Iſſue, for to ſay he had a Son *who could ſpeak the Lord's Prayer in Engliſh*, is only an Allegation of a ſecret Power which he had to ſpeak, which Power was not reduced into Act, and therefore not iſſuable; but adjudged, that it was iſſuable, for the Condition being in the Diſjunctive, (*viz.*) That he had a Son *who ſhall or can ſay* the Lord's Prayer in *Engliſh*, the Plaintiff may alledge the one or the other at his Election,

Election, and his Power of Speaking ſhall be proved by thoſe who heard him recite the Prayer. *Cro. Eliz.* 727. *Lane* verſus *Golman.*

5. In Treſpaſs, *&c.* the Defendant pleaded, that a Feoffment was made to him of the Lands in which the Treſpaſs was ſuppoſed, *&c.* and ſo juſtified; the Plaintiff replied, and confeſſed the Feoffment, but that it was made to the Defendant, upon Condition to be void, if the Plaintiff paid to him 200 *l.* at ſuch a Day, *and* ten Pounds for every Fodder of Lead which he ſhould deliver to the Plaintiff by the Defendant, or by his Means, *and* ſhould make a ſufficient Leaſe to the Defendant of a certain Field (Parcel of the Land mentioned in the Feoffment) for twenty-one Years, and then he ſhewed that he had paid the 200 *l.* and 10 *l.* for every Fodder of Lead, and that he could not make a Leaſe of the Field for twenty-one Years, for that the Defendant continued in the Poſſeſſion thereof; adjudged, that he need not have alledged that Part of the Condition concerning the making the Leaſe, becauſe it was impoſſible to be performed; for where a Condition conſiſts of ſeveral Parts, and ſome are poſſible to be performed, and ſome impoſſible, 'tis ſufficient to alledge the Performance of that which is poſſible; but if the Condition be altogether impoſſible to be performed, 'tis void. *Cro. Eliz.* 710. *Wigley* verſus *Blackwell.*

6. Debt upon Bond, conditioned, that *the Plaintiff ſhould enjoy ſuch Lands until the full Age of W. R. And* that the ſaid *W. R.* ſhould, within one Month afterwards, make a good Conveyance of the ſaid Lands to the Obligee, which he had not done; the Defendant pleaded, that *W. R.* was not yet of full Age; and upon Demurrer to this Plea it was adjudged ill, becauſe the Condition being in the *Copulative*, the Defendant ought to have pleaded, that the Plaintiff had enjoyed the Lands till that Time. *Cro. Eliz.* 870. *Waller* verſus *Crook.*

Cro. Eliz. 549. 7. Debt upon Bond, conditioned, that if the Obligor paid unto the Obligee 15 *l.* on *Michaelmas-Day* next enſuing, and 15 *l.* on *Lady-Day*, and ſo from thenceforth yearly upon the ſaid Days 15 *l.* during the Life of *R. H.* or until the Obligor ſhall lawfully advance one *L. H.* to ſome Benefice, *&c.* the Obligor did advance the ſaid *L. H.* to a Benefice before the firſt *Michaelmas-Day* next after the Making this Bond, and then did not pay the 15 *l.* on that Day; and upon a Demurrer, the Queſtion was, whether the two Sums of 15 *l.* reſerved to be paid as aforeſaid on thoſe Days, were diſcharged by the Advancement of *R. H.* before the firſt Day of Payment; and adjudged, that they were not, for the two firſt Payments ought to be made, whether *L. H.* is advanced, or not, becauſe otherwiſe the Bond might be forfeited, and yet not forfeited by Matter *ex poſt facto*, for if the two firſt Days of Payment ſhould incur, and no Payment be made, nor *L. H.* advanced, the Bond is forfeited; but if he ſhould advance *L. H.* then the Bond would not be forfeited. 2 *And.* 65. *The Counteſs of Warwick* verſus *Biſhop of Coventry.*

8. Debt upon Bond, conditioned, that if *Joan Molineux* ſhould die without Iſſue Male of her Body, begotten by *B. B.* before *Chriſtmas* 1532, *then living*, then the Bond to be void; the Defendant pleaded in Bar, that after the ſaid Bond, and before *Chriſtmas* 1532, *Joan Molineux* did *die* without Iſſue Male *then living*; the Plaintiff replied, that *Joan Molineux* had Iſſue *Henry*, and that before *Chriſtmas*, &c. *ſhe died*, the ſaid *Henry then living*, who likewiſe died before *Chriſtmas*; and upon a Demurrer to this Replication, the Queſtion was, whether thoſe Words, *then living*, ſhould *relate* to the Death of *Joan*, or to *Chriſtmas*, and adjudged, that they ſhould relate to the Death of *Joan.* 1 *And.* 1. *Bold* verſus *Molineux.*

9. The Caſe was, the Lord *Grey* being ſeiſed in Fee, did by Indenture made between him and the Lords *Audley* and *Cromwell*, to the Intent that his Son *John Grey* might marry by the Appointment of the ſaid Lords, Covenant to make an Eſtate to them of 100 *l. per Annum*, *habendum* to them, *&c.* until his Son married, *&c.* for and towards his Maintenance, and of ſuch Woman as he ſhould marry by their Appointment, Remainder over; afterwards, and before any Appointment, the Lord *Cromwell* died, and then the Lord *Audley* appointed the ſaid *John Grey* to marry with *Anne*, and accordingly they were married; then *John* died, and *Anne* entered on this 100 *l. per Annum*, but Judgment was given againſt her, becauſe the Lord *Cromwell* dying before ſhe was appointed to be the Wife of *John Grey*, it was afterwards impoſſible, that there could be any ſuch Appointment as mentioned in the Indenture, by Vertue whereof the Wife was to take ſuch Eſtate, otherwiſe none. 1 *And.* 5. *Butler* verſus *Grey.*

Cro. Eliz. 277. S. C. 10. The Condition of a Bond was, that *W. R. who was no Party to the Bond*, ſhould ſtand to the Award of *I. I.* ſo as it be made before the laſt Day of *Auguſt* next, *&c.* and if no Award ſhould be made, *&c.* then the ſaid *W. R.* ſhould, on the ſeventh Day of *September* following, come into the Porch of the *Guild-Hall* in *Norwich*, and there ſtay two Hours, to be arreſted again at the Suit of the Obligee, or that on *Michaelmas-Day* next, he ſhould pay to the Obligee 10 *l.* in that Porch; no Award was made, *W. R.* who was to do theſe Things, died before *Michaelmas*, yet adjudged, that the Money ſhould be then paid. *Moor* 357. *Cropp* verſus *Feild.* See 2 *Jones. Warren* verſus *White. S. P.*

11. Debt upon Bond, conditioned, *that the Obligee, his Heirs and Aſſigns, ſhould enjoy a Meſſuage*, &c. *without any Let of the Obligor*, &c. *diſcharged, or elſe, upon reaſonable Requeſt, ſaved harmleſs by the Obligor*, &c. *from all former Gifts*, &c. the Defendant pleaded, that no Requeſt was made to him to ſave harmleſs, *&c.* and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Condition of this Bond conſiſted of two Parts, one for quiet Enjoyment, the other to ſave harmleſs, upon Requeſt, and the Defendant had not made any Anſwer to the firſt Part of it. *Moor* 519. *Creſwell* verſus *Holmes.*

12. Debt upon Bond, conditioned, to deliver to the Obligee all the Tackle of ſuch a Ship mentioned in an Inventory, under the Hands of four Perſons, *or in Default thereof to pay to the Obligee ſo much Money*, &c. *as four Perſons ſhould Value the Tackle to be worth*; the Defendant pleaded, that four Perſons had not valued the Tackle; and upon a Demurrer to this Plea the Plaintiff had Judgment, for where the Defendant hath Election to do two Things, and one of them cannot be done, either *thro' the Default of a* * *Stranger, or of himſelf, or of the Obligee, or by the Act of God*, there he ought to do the other, therefore the Defendant in the principal Caſe ought to have got four Perſons to value the Tackle. *Moor* 645. *Moor* and *Baker* verſus *Morewood*. See *pl.* 13. *contra*. Cro. Eliz. 864. S. C. * *See* pl. 22.

13. Debt upon Bond, conditioned, that if the Obligor and his Wife ſhould ſell the Wife's Land, then he ſhould purchaſe for his Wife and her Heirs, ſo much Land, and of that Value of the Land which they had ſold, *or* elſe ſhould, after his Death, leave to his Wife ſo much Money, *&c.* to her own Uſe: The Defendant pleaded, that his *Wife was dead*; the Plaintiff replied, that the Defendant and his Wife had ſold the Lands, *&c.* and that the Husband had not purchaſed other Lands, *&c.* for his Wife and her Heirs; and upon Demurrer to the Replication the Defendant had Judgment, becauſe by the Condition of this Bond he had his Election, *either to purchaſe Lands, or to leave her ſo much Money*, &c. which Election is now prevented by the Act of God, (*viz.*) by the Death of the Wife, ſo that one Part of the Condition being diſcharged, the other Part ſhall be ſo likewiſe; but 'tis otherwiſe where one Part becomes impoſſible to be performed, either by the Act of the Party himſelf, or by the Act of another. *Moor* 357. *Eaton*'s Caſe. *See* Election. (B) 1. Laughter's *Caſe*. Palm. 552. S. C. 3 Mod. 232.

14. The Teſtator deviſed a Houſe to *William Shaw*, upon Condition, *that he* (the ſaid *Shaw*) *ſee my Mother well provided for during her Life*, or *give her* 20 *l. per Annum*; and in an Action brought for the 20 *l.* the Jury found, that the Mother lived with *Shaw* for two Years, but afterwards ſhe left him, and that ſhe was well provided for whilſt ſhe lived with him, but now was not, and that ſhe required *Shaw* to pay her the 20 *l.* but he refuſed; adjudged, that *Shaw* had his Election, either to pay her the 20 *l.* or to provide for her otherwiſe; and that he having ſuffered her to dwell with him two Years, he had determined his Election, and it was her Folly to leave him, for now he is not obliged to pay the 20 *l. &c. Palm.* 76. *Shaw*'s Caſe.

15. In Debt upon Bond, the Caſe was, *T. S.* entered into a Bond to *G. D.* conditioned, that if *T. S. died* without Iſſue, then if he, either by his Laſt Will, or otherwiſe, in *his Life-time*, ſhould convey ſuch Lands to *G. D.* and *his Heirs*, *or* if he and his Wife ſhould not ſuffer a Recovery, or levy a Fine of thoſe Lands, then the Bond to be void; afterwards *G. D. died* before the Lands were conveyed to him, the ſaid *T. S.* being then living, againſt whom an Action of Debt was brought upon this Bond by the Executor of *G. D.* and adjudged, that the Bond was forfeited; 'tis true, the Condition ſeems to be inſenſible, (*viz.*) That if *T. S. died* without Iſſue, then if in *his Life-time* he ſhould convey, when 'tis *impoſſible* for a Man to convey after he is dead, but ſince the *Intention* of the Parties appears to be otherwiſe, this Condition ſhall be conſtrued ſo as to avoid all Impoſſibilities, (*viz.*) that in his Life-time he ſhall make a Conveyance of ſuch Lands, which after his Death ſhall go in ſuch a Manner, and ſuch a Conveyance he ought to make, notwithſtanding *G. D.* is dead; 'tis true, where the Condition of a Bond is to do ſuch a Thing before a *certain Day*, there, if the Party die before that Day, the Bond is diſcharged, but if it be to be done at any Time during his Life, and 'tis not done accordingly, there the Bond is forfeited; now in the principal Caſe, the Obligor was to convey to *G. D.* and his Heirs, therefore, tho' *G. D.* is dead, and for that Reaſon the Condition cannot be performed *in Terminis*, yet it may be performed, as near the Intention of the Parties as is poſſible, and that is to *his Heir*, therefore 'tis not become impoſſible to be performed, for it may be done *in tanto*, tho' not in *toto*. *Palm.* 552. *Eaton* verſus *Butter*. *Doderidge contra*. W. Jones 180. S. C.

16. The Mother was *Tenant for Life* of an Advowſon, the Reverſion to her in Fee, and by Indenture between them *dated* 2 *Junii*, 10 *Jac.* they covenanted to levy a Fine thereof to the Uſe of the Mother and *her Heirs*, for ever, if the *Son did not pay* 10 *s. to her on the firſt Day of September following*, and if he did, then to the Uſe of the Mother *for Life*, Remainder to the Son and his Heirs; the Fine was levied accordingly, the *Son died* after the ſecond Day of *June*, and before the firſt Day of *September*, the 10 *s.* was not paid, and the Heirs of the Son had no Notice given them of this Condition: In a *Quare Impedit* brought by the Mother againſt the Coheirs of the Son, ſhe had Judgment, which was affirmed in a Writ of Error: The Queſtion was, whether ſhe had an Eſtate in Fee upon the Breach of the Condition, in Non-payment of the 10 *s.* by the Heir, on the firſt of *September*; and adjudged ſhe had, for this was a *Condition ſubſequent and not precedent* to her Eſtate, and being now impoſſible to be performed, becauſe her Son was dead, therefore the Eſtate in Fee ſhall continue in her; but admitting his Heirs might have paid the 10 *s.* yet ſince they had not done it, and ſince they ought, at their Peril, to take Notice of the Acts of their Anceſtors, being ſuppoſed to be Privy to ſuch Acts, therefore the Eſtate ſhall be abſolute in the Mother. *W. Jones* 389. *Springe* verſus *Cæſar*. See *Bragg* verſus *Nightingale*. *S. P.* Winch 163. S. C. by the Name of Cooper v. Edgar.

17. The Defendant covenanted, that he *or his Son* R. *or either of them*, ſhall work with the Plaintiff in grinding and poliſhing Glaſſes, *paying to each of them ſo much*, and in an Action of Covenant brought, he aſſigned the Breach, that he had required *R. the Son* to work, and tendered him ſo much, *&c.* after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was ill, for the *Requeſt was made to* R. who is a Stranger to the Covenant, and no Notice

tice given to the Covenantor himſelf; for the Covenant being in the *Disjunctive*, *if they or either of them* worked, 'tis ſufficient if *one of them* do it, and the Words *either of them*, ſhall be conſtrued *if one of them*; but adjudged, that thoſe Words, *either of them*, gave the Plaintiff Liberty to take which of them he would, for the Service of the Son might be better and more beneficial to the Plaintiff than the Service of the Father. 2 *Sid.* 107. *Neale Mil.* verſus *Reeve.*

18. Debt upon Bond, conditioned, that if the Defendant ſhall give the Plaintiff a true Account of all Money received by him as Bailiff of the Manor of, *&c.* by the 28*th Day of November*, &c. *or* render his Body to Priſon at the Plaintiff's Suit in any Action, he ſhall *then* commence againſt him, the Obligation to be void: The Defendant pleaded, that he was always ready to render an Account, and farther, that the Plaintiff had not commenced any Action againſt him (the Defendant) *ad vel ante* 28 *Novemb. præd'*, wherein he could render himſelf to Priſon; the Plaintiff replied, that 300 *l.* was due to him, *&c.* and that *after the ſaid* 28 *Novemb.* (viz.) 12 *Aprilis*, he ſued out an Original *in Account*, and for Want of an Appearance, a *Capias*, of which he gave the Defendant Notice, *&c.* upon a Demurrer to the Replication, the Defendant had Judgment, becauſe he being to do the firſt Act, hath Election either to give an Account, or render himſelf to Priſon; but he is not obliged to render himſelf, unleſs an Action is commenced againſt him on the 28*th of November*, becauſe the Particle *Then* muſt relate to that very Day, and not be conſtrued *then, or from thenceforth*, for that would be to give the Plaintiff Liberty to commence an Action at any Time, and Conditions are always in Favour of the Obligor. 3 *Lev.* 137. *Stanley* verſus *Ferne.*

2 Mod. 200. Poſtea pl. 22. S. C.

19. Debt upon Bond, conditioned, that if the Obligor, or his Heirs, *&c.* ſhall, *within ſix Months* after the Death of his Mother, ſettle on *Hopton Baſſet*, as his Counſel ſhall adviſe, an Annuity of 20 *l. per Annum*, during his Life, *or* if he ſhall not grant the ſame, then if he pay unto the ſaid *Hopton Baſſet*, *within the before-mentioned Time*, the Sum of 300 *l.* the Obligation ſhall be void: The Defendant pleaded, that *Hopton Baſſet* had not tendered any Grant of an Annuity *within ſix Months* after the Death of the Defendant's Mother, according to the Condition, *&c.* and upon a Demurrer to this Plea, the Defendant had Judgment, becauſe in this Caſe, the Condition being in the *Disjunctive*, the Obligor hath Election which Part of the Condition he will perform, but the Obligee himſelf by his Negligence, in not tendering a Grant of Annuity *within ſix Months*, *&c.* for the Obligor to ſeal, hath deprived him of that Election, which of Right he ought to have. 1 *Mod.* 264. *Baſſett* verſus *Baſſett.* *See* Election. (B) 1. *S. P.*

20. Debt upon Bond, conditioned, that *Ann Maſon* ſhall pay 7 *l.* to the Obligee on ſuch a Day, *or* perſonally appear on the 23d Day of *January* Inſtant, in the Houſe of *W. B.* at ten a-Clock in the Morning; the Defendant pleaded, that the ſaid *Ann Maſon* on the 23*d Day of January*, and for ſeveral Days both before and after, *ex viſitatione Dei ægrota fuit*, *&c.* and upon Demurrer to this Plea, it was adjudged a good Plea if it had been in the Caſe of the Obligor himſelf, but here he was bound for a third Perſon, who was no Party to the Bond, and the Condition in ſuch Caſe being in the *Disjunctive*, tho' one Part cannot be performed, the other might. *Raym.* 373. *Topham* verſus *Pannell.* See 1 *And.* 32. *S. P.*

21. Debt upon Bond, conditioned, that if the Defendant ſhould work out 40 *l.* at the uſual Prices in Packing, *&c.* when the Plaintiff ſhould have Occaſion, *&c.* to employ him, *or otherwiſe* ſhall pay the 40 *l.* then the Bond to be void, and the Action was now brought for the 40 *l.* The Defendant pleads, that he was always ready to have worked out the 40 *l.* but that the Plaintiff never employed him; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Condition being in the *Disjunctive*, 'tis in the Election of the Plaintiff to have the Work done, or the Money, and he hath determined his Election to have the Money. 2 *Mod.* 304. *Wright* verſus *Bull.*

2 Jones 95. 3 Lev. 137.

22. The Condition of a Bond was, that *W. R.* ſhould pay ſuch a Sum upon *the* 25*th of December, or ſhould appear* in *B. R.* in *Hilary-Term* following, *&c.* he *died* after the 25th of *December*, and before *Hilary-Term*, and had not paid any Money on the 25*th of December*; adjudged, that the Condition was not broken by the Non-payment, becauſe the Condition being in the Disjunctive, he was deprived of one Part by the Act of God. *T. Jones* 95. *Warner* verſus *White.* See *pl.* 22. *S. C.*

23. Covenant to deliver Goods, *or to pay ſo much Money as W. R.* (who was no Party to the Agreement) *ſhall Value them*; in ſuch Caſe the Defendant can never excuſe himſelf by Pleading that *W. R.* did not Value them, becauſe he had undertaken for him, and therefore if he cannot procure *W. R.* to Value the Goods, he muſt pay the Money; but 'tis not true in other Caſes, as for Inſtance, where the Condition is in the Disjunctive, and the Defendant hath an abſolute Choice to do the one or the other; there, if he is deprived of that Choice by the Act of God, or of the Obligee, the Condition is wholly diſcharged. See 1 *Mod.* 264. *Baſſett* verſus *Baſſett.* *Poſtea pl.* 18. *S. C.* 2 *Mod.* 200. *S. C.* *See* Election. (B) 1. *S. P.* 2 *Jones* 95. *Warner* verſus *White.* *S. P.* 3 *Lev.* 137. *S. C. pl.* 15. *S. C.*

24. So where the Leſſee covenanted with the Leſſor in a Leaſe of a *Mill*, that at the Expiration of the Leaſe he would leave two Mill-Stones in the Mill, as good as thoſe when he entered, *or elſe ſatisfy the Leſſor in* Money, as much as thoſe he left ſhould be worſe, *according to the Diſcretion of the Parties who viewed the ſame* at the Entrance of the Leſſee, in an Action of Debt brought on a Bond for Performance of Covenants; the Defendant pleaded, that he left *two Stones in the Mill* at the End of the Leaſe; and that the Perſons who viewed thoſe which were there when he entered, could not tell how much thoſe which he left were worſe than the other; there

was a Replication and Rejoinder, and upon Demurrer the Plaintiff had Judgment, for this being a *disjunctive Covenant*, and by Conſequence for the Advantage of the Defendant; and he having undertaken, that ſuch Perſons ſhall adjuſt the Value who were Strangers to the Agreement between him and the Leſſor, he muſt procure them to do it, and if he cannot, he muſt leave as good Stones in the Mill as thoſe were when he entered. 1 *Lutw.* 688. *Studholme* verſus *Mandall.*

25. The Condition was to make a Leaſe to the Obligee for Life before ſuch a Day, *or to pay him* 100 *l.* the Obligee died before the Day; adjudged, that his Executor ſhall have the 100 *l.* and that the Ground in *Laughter*'s Caſe is not univerſal. 1 *Salk.* 170.

26. *Sci. fa.* againſt the Bail, reciting a Recognizance taken in the Reign of *the late King William*, wherein the Condition was, that the Defendant ſhould render himſelf to the Priſon of the *Marſhalſea Dominæ Reginæ nunc*, which is *impoſſible*, and if ſo, then the Recognizance is ſingle; but adjudged, that where the Condition is underwritten or indorſed, and *impoſſible* to be performed, there 'tis void, and the Obligation ſingle; but where the Condition is Part of the Obligation it ſelf, and incorporated with it; there, if the Condition is impoſſible, the Obligation is not void. 1 *Salk.* 172. *Pullerton* verſus *Agnew.*

(F)

Where they ſhall be apportioned, extinguiſhed, or ſuſpended, and where they qualify an Eſtate, and are not Limitations to determine it wholly. See *Extinguiſhment.* (E) per totum.

1. LEaſe for Years, upon Condition to be performed by the Leſſee, afterwards the Leſſor let the Lands to a Stranger, *&c.* it was objected, that by making this ſecond Leaſe, the Condition was ſuſpended; but adjudged it was not, yet if a Man makes a Feoffment upon Condition, and afterwards levies a Fine to a Stranger, the Condition is gone. *Cro. Eliz.* 665. *Ferrers* verſus *Burroughs.* Owen 65. S. C.

2. *Leaſe for Years, provided* that the Leſſee, or his Aſſigns, ſhall *not alien* to any Perſon, without the ſpecial *Licenſe* of the Leſſor, who afterwards by Deed gave the Leſſee *licence* to alien or Leaſe the Lands, and then the Leſſee aſſigned all his Term for Years to *W. R.* adjudged, that this Alienation by Licenſe had deſtroyed the Condition, ſo that the Leſſor could never afterwards enter for any Alienation made by the Aſſignee, tho' without Licenſe, becauſe where the Condition is entire, as 'tis in this Caſe, the Leſſor having ſuſpended it in Part, it ſhall be ſuſpended in all, for it cannot be apportioned by the Act of the Party, tho' it may by Act of Law. 4 *Rep.* 119. *Damport*'s Caſe. See *Dyer* 45.

3. So where a Leaſe was made *to Three*, upon Condition, that they, nor any of them, ſhould *not alien*, without the *Aſſent* of the Leſſor; afterwards one of them aliened *with his Aſſent*, and the *other Two* aliened without it; adjudged, that this Condition being entire, and the Leſſor having diſpenced with it as to one, it was determined as to all. *Mich.* 28 *Eliz. Leeds* verſus *Crompton.* 4 Leon. 58. S. C. Lees v. Lord Strafford. Godb. 93. S. C. Noy 32. S. C.

4. Leaſe for Years by a Prior, *&c.* of ſeveral Houſes, rendring the yearly Rent of 5 *l.* 10 *s.* 11 *d.* at the four Feaſts, *&c.* (*viz.*) for one Houſe 3 *l.* 11 *s.* for another 20 *s.* and ſeveral Rents for ſeveral other Houſes, amounting in the Whole to 5 *l.* 10 *s.* 11 *d.* with Condition, that if the ſaid Sum, or any Part thereof, ſhould be in arrear, in Part, or in all, that then the Leſſor and his Heirs, *&c.* might enter; the Priory came to the King by Surrender, who granted one Houſe to *W. R.* for a certain Term of Years, Reverſion thereof to another in Fee; afterwards it was found by Inquiſition, that Part of the ſaid yearly Rent of 5 *l.* 10 *s.* 11 *d.* was in arrear, and before the Return thereof, the King granted the reſt of the Houſes to another in Fee; adjudged, that becauſe the Condition was intire, giving a Re-entry into the Whole for Default of Payment of any Part of the Rent; if it had been in the Caſe of a common Perſon, then this Severance of Part of the Reverſion, (*viz.*) the Selling one Houſe to another in Fee, had deſtroyed the Condition, but it being in the Caſe of the *King*, tho' the Houſe thus demiſed to *W. R.* was diſcharged of the Condition for the Reaſon before-mentioned, and by Conſequence the Patentee of the other Houſes could take no Advantage of it, yet as to thoſe Houſes the Condition ſhould be apportioned, and remain to that Reverſion which the King had. 5 *Rep.* 55. *Knight*'s Caſe. Moor 199.

5. Leaſe for Years, *Proviſo*, that the Leſſee, his Executors, or Aſſigns, ſhall not alien without Licence of the Leſſor, but *only to the Son of the Leſſee*; he died, and his *Executor aſſigned the Term to one of his Sons*; adjudged, that by this Aſſignment the Condition was determined, and that the Son might alien it to any Perſon without Licenſe. 5 *Mar. Dyer* 152. See *Antea Damport*'s Caſe. *pl.* 2.

6. Leſſee for Years, rendring Rent, upon a Condition of Re-entry for Non payment, the Leſſee aſſigned Part of the Lands to one, and Part to another, and kept the remaining Part himſelf; afterwards the Leſſor levied a Fine of all the Lands to the Uſe of the Cogniſee and his Heirs, and the Rent being in arrear, the Cogniſee entered; and it was inſiſted for him, that the Condition was deſtroyed by the Leſſee himſelf, by aſſigning ſeveral Parts of the Land to others; but adjudged, that the Condition was not deſtroyed, and that this Caſe was not like *Winter*'s Caſe, where the *Leſſor*

Leſſor did aſſign Part of the *Reverſion* to one, and Part to another, for there the Leſſor himſelf by his own Act had deſtroyed the Condition of Re-entry, but in this Caſe it was the Act of the Leſſee. *Godbolt* 336. *Hawkeſworth* verſus *Davis*. *Dyer* 308. *Winter's* Caſe.

7. The Teſtator being ſeiſed of Lands held in *Borough Engliſh*, and having three Sons, deviſed it to his ſecond Son and his Heirs, *upon Condition to pay to each of his Daughters* 20 *l. at their reſpective Ages of twenty-one*, the Son was admitted purſuant to the Will, but did not pay the Legacies to his Siſters; adjudged, this was not a *Limitation* of his Eſtate, ſo as to make it go to the younger Brother, who was to inherit by the Cuſtom, but 'tis a *Condition*, and the elder Brother ſhall take Advantage of the Non-performance; but if the Deviſe had been to the *eldeſt Son*, then it would have been a *Limitation* and not a *Condition*, for if it ſhould be a Condition, he is not obliged by Law to perform it, becauſe for the Non-performance it deſcends to him. 2 *Cro.* 56. *Curtis* verſus *Woolverſtone*.

8. Leaſe for Years, rendring Rent, upon Condition, that if the Rent be in Arrear, it ſhall be lawful for the Leſſor to enter; afterwards a Judgment was obtained againſt the Leſſor, and a Moiety of the Rent was extended, together with a Moiety of the Reverſion; adjudged, that the *Elegit* and Extent was good, and that the Condition was wholly ſuſpended, ſo that if the Rent was in arrear, the Leſſor could not re-enter on the other Moiety. *Moor* 71.

9. Covenant to levy a Fine to the Uſe of himſelf and Wife for Life, afterwards he made a Leaſe of the Lands for twenty-one Years, rendring Rent every half Year, and after the Death of *W. R.* to pay a *Fine* of 125 *l.* by 5 *l. per Annum* quarterly, *Proviſo*, that if the Rent or Fine is not paid, it ſhall be lawful for the Leſſor to re-enter, afterwards he levied a Fine purſuant to his Covenant, and then he aſſigned the Reverſion to another; it was objected, that the Fine of 125 *l.* is a Sum in groſs, and not incident to the Reverſion, and ſo not transferred by the Aſſignment; 'tis true, the Condition as to the Rent is transferred, but not as to the *Fine*; but adjudged, that a Man cannot by his own Act divide or apportion a Condition which goes to the Deſtruction of an Eſtate, as 'tis plain this Condition doth, for upon Non-payment of either Rent or Fine, the Leſſor is to re-enter, and ſo to defeat the Leaſe. *Style* 316. *Dekins* verſus *Latham*.

2 Saund. 111. 10. Deviſe of Lands to his Grandaughter *Ann*, *if his Son* Thomas *have no Iſſue Male after the Deceaſe of his Mother*; and if he have any Iſſue Male, *&c.* then he deviſed only 5 *l.* to *Ann*; *Thomas* had Iſſue a Son, who died in the Life-time of his Grandmother, and he had likewiſe two Daughters, who were Siſters and Co-heirs; adjudged this was a conditional Deviſe to *Ann*, and nothing veſted in her till the Contingency ſhould happen; but the *Chief Juſtice Saunders*, who reports the ſame Caſe, tells us, that there was no Queſtion about the Matter in Law, for the Jury found no Manner of Title in the Defendants, only that they were Siſters and Co-heirs of *Richard*, the Son of *Thomas*, which was not material, becauſe it was not found that they were Heirs to *Thomas*. *Sid.* 445. *Allen* verſus *Rivington*.

(G)

What is a good Performance of Conditions and Covenants, and what not, and what ſhall be a Breach thereof.

See *Breach of Conditions* per totum. *Marriage*. (A) 4.

1. DEBT upon Bond, conditioned, that if the Obligor, after the Marriage of the Obligee, and his having a Son by his Wife, ſhould convey Lands of the Value of 40 *l. per Annum* to the Son in Tail, to enjoy after the Death of the Obligor, who pleaded, that he had made a Feoffment to *W. R.* to the Uſe of himſelf for Life, Remainder to the Uſe of the Son in Tail; and upon Demurrer this was adjudged no Performance of the Condition, becauſe the Son was not made a Party to the Feoffment, neither had he any Deed to prove his Title to the Eſtate. *Cro. Eliz.* 825. *Slutfeild* verſus *Somerſett*. *Poſtea* Replication. (B) 5. *S. C.*

Cro. Eliz. 330. Gouldsb. 49, 184. Poph. 106. S. C. 2. Leaſe for ninety-nine Years, upon Condition, that if the Leſſee made a *Leaſe thereof* in other Manner than ſuch as the ſame was leaſed to him, then it ſhould be lawful for the Leſſor to re-enter, the Leſſee *deviſed* the Lands to his youngeſt Son; adjudged, this was a Breach of the Condition, for a *Deviſe* is an Alienation, or a *Demiſe* in other Manner than it was demiſed to him, tho' in Equity the Eſtate ſhall not be loſt, becauſe the Leſſee intended to preſer his youngeſt Son, and not to break the Condition. *Hill.* 38 *Eliz. Owen* 14. *Taunton's* Caſe. *S. P.*

3. Tenant in Tail, Remainder in Tail of a Manor, *&c.* upon Condition, that neither of them ſhould *alien*, or do any Act, but that the ſaid Manor might, without Impediment, revert to the Donor, if they died without Iſſue; the Tenant in Tail married, and alſo granted the Reverſion of a Copyhold, according to the Cuſtom of the Manor; adjudged, that tho' the Dower of the Wife may hinder the Reverting of the Manor immediately upon the Death of the Tenant in Tail, without Iſſue, yet neither that nor the Granting the Reverſion of the Copyhold was any Breach of the Condition; for if there had been an expreſs Condition, that the Donee ſhould not marry, or if he did, that his Widow ſhould not be endowed, this would have been repugnant to the Eſtate granted, and ſo void; and the Granting the Copyhold did not hinder the Reverting of the Manor, becauſe the Copyholder was only Tenant *ad voluntatem Domini*, according to the Cuſtom,

ſtom, ſo that the Words of the Condition might be broken, yet the Intent was not. *Trin.* 17 *Eliz. Dyer* 343.

4. The Poſſeſſion of an Houſe, in which one *Whaley* lived, was decreed to *Parry*, who imagining, that *Whaley* had rather that one *Okey* ſhould be his Landlord, procured the ſaid *Whaley*, with one *Smith*, to enter into a Recognizance to him the ſaid *Parry*, conditioned, that *Whaley* ſhould keep the Poſſeſſion, *&c.* to the Uſe of *Parry*, and as Tenant to him; and if he left the Houſe, and ſhould dwell in another Place, then to deliver the Key and quiet Poſſeſſion to *W. R.* Lord Mayor of *London, to the Uſe of the ſaid* Parry, and at all Times to depart within fourteen Days after Notice, *&c.* In an Action of Debt brought upon this Recognizance, the Defendant pleaded, that he departed out of the Houſe, *&c.* and delivered the Key to the Lord Mayor on the ſame Day, *and quiet Poſſeſſion to the Uſe of the ſaid* Parry; upon this they were at Iſſue, and a Verdict was given againſt *Parry*; but adjudged, tho' the Words of the Condition were performed, the Intent of it was not, *for quiet Poſſeſſion could not be given to the Lord Mayor, to the Uſe of* Parry, but that he or his Agent, or one deputed by him, ought perſonally to come to the Houſe on a certain Day, and there receive the Poſſeſſion from the Tenant. 5 *Eliz. Dyer* 219. *Parrey* verſus *Smith.*

5. The Husband gave Lands to his Wife during the Minority of his Son, upon Condition, that ſhe ſhould do no Waſte, the Husband died, and the Widow married again, and this ſecond Huſband committed Waſte; adjudged to be no Breach of the Condition, becauſe Conditions which tend to avoid an Eſtate, ſhall be taken ſtrictly. *Latch.* 20. *Cobb's* Caſe. *Dyer* 65. *S. P. Moor* 11. *S. P.* 2 Leon. 20. S. C.

6. Feoffment in Fee, upon Condition, that if the Feoffor, within a Year, *&c.* ſhould pay to the Feoffee, or his Heirs, the Sum of 100 *l.* that then the Feoffment ſhould be void; the Feoffee granted the Lands to another, and died, and afterwards within the Year it was agreed between the Feoffor, and the Heir of the Feoffee, that the Feoffor ſhould pay 100 *l.* to the Heir, and that he ſhould pay back again to the Feoffor 70 *l.* of the Money, which was done, and then the Feeoffor entered on the Lands, pretending that the Condition was performed by the Payment of the 100 *l.* to the Heir of the Feoffee; but adjudged, that it was not, becauſe by the Payment of the Money an Eſtate of Inheritance was to be deveſted out of the Grantee, and therefore it ought to be an effectual Payment, and not a colourable one, as this was, for Conditions ought to be truly performed. 5 *Rep. Goodale's* Caſe.

7. In Ejectment, the Caſe was, Leaſe of Lands for Years, rendring Rent at four the moſt uſual Feaſts: *Proviſo*, if the Rent be behind by *the Space of a Year* after due, being lawfully demanded, and *no Diſtreſs to be found there for the Time aforeſaid*, that then the Leſſor might re enter, the Rent was arrear for a Year; the Jury found a Demand, and that there was no Diſtreſs to be had on the Lands *on the laſt Day of the Year*; adjudged, that the Condition was not broken, for 'tis always to be taken in the moſt favourable Senſe for the Leſſee, therefore if there was any Diſtreſs to be taken *at any Time in the Year*, tho' there was none *on the laſt Day*, 'tis well enough. *Cro. Eliz.* 764. *Grigg* verſus *Mayſes.*

8. Debt upon Bond, conditioned for Performance of Covenants; the Caſe was, *Two* made a Leaſe for Years, and both of them covenanted, that the Leſſee ſhould not be diſturbed, or any Ways incumbered *by them*; one of the Leſſors made another Leaſe of the ſame Lands to another Perſon, who diſturbed the firſt Leſſee; adjudged, that the Word *Them* ſhall not be taken *jointly*, but *diſtributively*, ſo that if either of the Leſſors diſturb the Leſſee, 'tis a Breach of the Condition. *Latch* 161. *Meriton's* Caſe. *Poph.* 200. *S. C.* reported by the Name of *Saunders* verſus *Meriton.* Poph. 200. S. C. Noy 86. S. C.

9. Debt upon Bond, conditioned, that if *W. R. make an Obligation to the Plaintiff* for ſo much Money before *Michaelmas next*, then the Bond to be void: The Defendant pleaded, that *W. R.* made the Obligation, and ſealed and delivered it to the Uſe of the Plaintiff; upon Demurrer to this Plea it was adjudged ill, for the Sealing and Delivery of the Obligation was not a good Performance of this Condition, unleſs it had been delivered to the Plaintiff himſelf; for the Intent was, that it ſhould be a good Obligation to him. *Trin.* 31 *Eliz. Cro. Eliz.* 143. *Peaſe* verſus *Draiton. Noy* 18. *S. P. Poſtea pl.* 11. *S. P.*

10. Debt upon Bond, conditioned, that the Defendant ſhould ſuffer the Plaintiff, his Executors, *&c.* not only to threſh Corn in the Defendant's Barn, but from Time to Time to carry it away, *at all convenient Times hereafter*, &c. The Corn laid in the Barn two Years after this Bond was given, in which Time Part of it was eaten with Mice and Rats, and then the Defendant threſhed it; adjudged, that the Bond was forfeited, for the Condition was not to ſuffer the Plaintiff to threſh and carry away the Corn *in convenient Time*, but at *all convenient Times*, which muſt be at all Times when he will, except in the Night, or on Sundays. *Mich.* 30 *Eliz. Earl of Kent* verſus *Brian. Owen* 55.

11. Debt upon Bond, conditioned, that the Obligor ſhall *Releaſe* all his Right in *Blackacre* to the Obligee, at or before ſuch a Day; the Defendant pleaded, that on ſuch a Day he executed a Releaſe, *&c. to the Uſe of the Obligee*; adjudged, this was no Performance of the Condition, becauſe the Obligee had not the *Releaſe in Poſſeſſion*, but muſt bring *Detinue* againſt another to recover it. 4 *Leon. antea pl.* 9. *S. P.*

12. Debt upon Bond, conditioned, that the Obligor ſhould procure the next Avoidance of the Archdeaconry of *Stafford*, ſo as *the Obligee might preſent*, the Obligor did procure a Grant of the next Avoidance, but before it happened, the preſent Archdeacon was made a Biſhop, ſo that

now the King had a Right to preſent, and for that Reaſon the Plaintiff had Judgment. 4 *Leon.* 61. *Bingham* verſus *Squire*. *Gouldſ.* 45. *S. C.*

13. In Debt upon a Bond made by a Widow, conditioned *to make farther Aſſurance, &c.* upon Requeſt, the Obligee tendered an Aſſurance, which was not according to the Condition of the Bond, but differed in the Limitation of the Eſtate, whereupon the Widow refuſed to ſign it, and afterwards *married*; the Queſtion was, whether the Marriage was a Breach of the Condition, and the better Opinion was, that it was a Breach of the Condition, becauſe ſhe cannot execute any Conveyance now, but by *Fine*; and it being to be done at the *Charge of the Obligee*, he may now be put to more Charge, for if ſhe had been ſingle, he might be contented with a Feoffment, but 'tis plain ſhe is now diſabled *by her own Act* to convey the Lands in the ſame Plight as ſhe might before ſhe married, and Conditions muſt be performed in every Circumſtance where the Default is in the Party herſelf. *Hardres* 463. *Edwards* verſus *Owen.*

14. Debt upon two Bonds, the Condition of the one was, reciting a Marriage intended between the Defendant and one *Ann Stow*, and that he ſhould permit her to diſpoſe her perſonal Eſtate, and the Perſon to enjoy it to whom ſhe ſhould diſpoſe it; the other was conditioned, to permit her to give away 50 *l.* and that the Defendant ſhould pay it within two Months after her Death, to each of which the Defendant pleaded, *quod conditio ejuſdem ſcripti nunquam infracta fuit per ipſum ad aliquod tempus hucuſq; & hoc paratus eſt verificare*; and upon Demurrer to this Plea it was argued to be good, becauſe the Defendant could not tell whether ſhe had diſpoſed her perſonal Eſtate, or given away 50 *l.* or not, the Matter lying wholly in her Knowledge, and therefore this Plea was to make her aſſign a Breach, to which the Defendant might give an Anſwer; but adjudged, that the Plea was ill, for the Defendant ought to ſhew how he had performed the Conditions. 2 *Vent.* 156. *Brown* verſus *Rands.*

15. Lands were given to Two, upon Condition, that they ſhould not *alien*, afterwards one releaſed to the other; adjudged no Breach of the Condition. *Winch.* 3. *Wage* verſus *Pretty.*

16. Debt upon Bond, conditioned, that whereas *Danet Forth* was in Cuſtody of the Defendant, at the Suit of the Plaintiff, for 100 *l.* upon Bond, and at the Requeſt of the Defendant was permitted to go at large for ſix Days, if therefore the ſaid *Danet Forth* render himſelf to the *Sheriff of Middleſex*, before the *17th of February*, at the Suit of the Plaintiff, and continue a true Priſoner till he ſhall be diſcharged by the Conſent of the Plaintiff, then the Obligation to be void; the Defendant pleads in Bar, and ſets forth the *Bill of Middleſex*, *the Arreſt*, and that the ſaid *D. F.* being in Cuſtody of the Sheriffs after the Making the ſaid Bond, they permitted him to go at large by the Conſent of the Plaintiff, and that afterwards he returned and offered himſelf to the Sheriffs to become a Priſoner at the Suit of the Plaintiff, and to continue a true Priſoner, according to the Condition of the Bond; and upon a Demurrer, the Queſtion was, whether this Bond was void, the Condition being againſt Law; the Caſe was not adjudged, but in *Benſkyn* and *French*'s Caſe ſuch a Conſideration was held good. *T. Jones* 139. *Ruſhout* verſus *Waite.*

17. Debt upon Bond for Payment of 240 *l.* the Condition was, that the Defendant ſhould pay to the Plaintiff the Sum of 120 *l.* on the *4th Day of January*, according to Agreement in Writing made between them; the Defendant, in his Plea ſet forth the Agreement, reciting a Controverſy between them, concerning the Probate of the Will of *A. E.* the Plaintiff being her next of Kin, and having entered a *Caveat* in Conſideration, that he would withdraw it, and ſuffer the Defendant to prove the Will, he covenanted to *pay the Plaintiff* 120 *l. on the ſaid fourth Day of January, out of the perſonal Eſtate* of the ſaid *A. E.* which ſhould come to his Hands in full Satisfaction of all Demands out of the ſame, and that after the ſaid Bond *hucuſq*; no Part of the perſonal Eſtate of the ſaid *A. E.* came to his Hands to the Value of 120 *l.* and that he had never any of the ſaid perſonal Eſtate, but *to the Value of* 50 *l.* and upon a Demurrer to this Plea it was adjudged ill, for he having confeſſed, that he had 50 *l.* he ought to have paid that; the Meaning of this Condition being, that he ſhould pay 120 *l.* or ſo much thereof as he ſhould receive before *the fourth Day of January*, out of the perſonal Eſtate, and that if he did not receive any before that Day, then none ſhould be paid; therefore, becauſe he neither pleaded a Payment, or a Tender of the 50 *l.* on the fourth Day of *January*, the Plaintiff had Judgment. *T. Jones* 218. *Ogle* verſus *Quintin.*

18. Debt upon Bond, *&c.* the Defendant pleaded a Letter of Licenſe from all his Creditors; provided, that within two Months he would aſſign and ſecure *All the Profits of the Tithes of the Rectory of Saccomb*, to the Uſe of his Creditors, as Counſel ſhould adviſe, and averred, that *W. B.* his Counſel, did adviſe a Letter of Attorney to one *H.* to demand and receive of one *Humberſtone*, *Tenant of the Tithes* (but did not ſay of *all the Tithes*) all Rents and Sums of Money for the Tithes, till the Creditors ſhould be ſatisfied, *&c.* there was a Replication and Rejoinder; and upon Demurrer the Plaintiff had Judgment, becauſe it appeared by the Letter of Licenſe, that *All the Profits of the* Tithes were to be applied to pay the Creditors, and by the Letter of Attorney *H.* was to receive all the Rents and Profits of *Humberſtone* the Tenant, and it did not appear that he was Tenant of *all the Tithes*, ſo that the Condition of the Bond was not performed. 1 *Lutw.* 675. *Plummer* verſus *Adams.*

19. Debt upon Bond, conditioned, that if the Ship *Mary Ann* ſhould ſafely arrive in the *Iſle of May* on ſuch a Day, and well manned, victualled, tackled, *and provided* for a Voyage from thence to *Virginia*, then, *&c.* the Defendant pleaded, that the Ship was ſafe in the *Iſle of May*, &c. and that ſhe was well manned, victualled and tackled, but did not ſay *provided*, as it was in

the Condition; and upon Demurrer it was adjudged, that the Defendant ought to have pleaded according to the very Words of the Condition, and that the very Word *Provided*, which he had left out, was more comprehenſive than the reſt, becauſe by that Word the neceſſary Repairs of the Ship were included. 1 *Lutw.* 698. *Dottin* verſus *Dowrith.*

20. Debt upon a Charter-Party, in which the Plaintiff ſet forth the Charter-Party, that he had performed all on his Part, and *ſhewed how*, and that the Defendant had not performed his Part, and ſhewed wherein, and that ſo much was due to him for the Hire of the Ship, from the Day ſhe broke Ground to the End of her Voyage, and this was held good Pleading. 1 *Lutw.* 704. *Thornton* verſus *Bethel.*

(H)

Of Conditions againſt Law, and void Conditions.

1. TEnant in Tail made a Leaſe to the Father, Mother, and Son, during their Lives, and becauſe he could not limit thoſe Eſtates to them by Way of Remainder, but jointly in Poſſeſſion, there was a *Proviſo* in the Leaſe, that if the Son ſhould claim or demand any Profits of the Lands demiſed, or enter upon the ſame during the Life of his Father or Mother, that then the Eſtate limited to him ſhould be void; adjudged, that this *Proviſo* was void, becauſe it was contrary to the Eſtate limited before; 'tis like the Caſe of a Leaſe for ten Years, *Proviſo*, that the Leſſee ſhall not take the Profits for the firſt two Years, this is void and repugnant. 2 *Leon.* 132. *Moor* verſus *Savill.*

2. If a Man make a Gift in Tail, upon Condition, that the Donee ſhall not make a *Feoffment*, this is a good Condition, but if it be, that he ſhall not make a *Deed of* * *Feoffment*, this is void, becauſe he may make a Deed of Feoffment without Livery, which amounts only to a Tenancy at Will, and Tenant in Tail cannot be reſtrained in ſuch Caſe; ſo where a Gift in Tail was made, upon Condition, that the Donee ſhould not grant a Leaſe to another for his own Life, this is *void and repugnant*, for by ſuch a Gift the Donee is Owner of the Inheritance, and he cannot be reſtrained from making any lawful Act, but if a Man make a Leaſe for Life, or for Years, upon Condition, that the Leſſee ſhall not alien or make a Leaſe to another, this is good, becauſe the Leſſor hath the *Reverſion*, and by Conſequence hath Power to reſtrain his Leſſee. 6 *Rep.* 40. *Sir Anthony Mildmay's* Caſe. Uſes (E) 4. *S. C.* Moor 632. *See Uſes. (E) 3.

3. The Teſtator deviſed his Lands to a *Prior and his Succeſſors*, ſo as they pay yearly to the Dean and Chapter of *Paul's* fifteen Marks, and if they fail, then their Eſtate ſhall ceaſe, and the Dean and his Succeſſors ſhall have the Lands; adjudged a void Condition, becauſe by the Deviſe to the *Prior and his Succeſſors*, the Teſtator had deveſted himſelf of the whole Eſtate, and therefore nothing remained in him to deviſe over upon any Condition whatſoever; beſides, if it ſhould be a *Condition*, the *Dean of Paul's*, &c. could not enter for a Breach thereof, but the Heir at Law of the Teſtator, and that would be to defeat the Will, but ſince this Caſe was adjudged, 'tis become very uſual to limit one Fee after another, upon a Contingency. *Dyer* 33.

4. The Teſtator made two Executors, *provided* that one of them ſhall not adminiſter his Goods, this is a void *Condition*, becauſe it reſtrains the Authority which was given him by the firſt Part of the Will. *Dyer* 74.

5. The Defendant covenanted, that he would go in ſuch a Ship out of the River *Thames* to ſuch a Place in *Spain, and would not deviate*; and in an Action of Covenant brought againſt him, he pleaded Performance generally, and adjudged an ill Plea; for there is a Difference between a *negative Covenant*, which is only in Affirmance of an *affirmative Covenant precedent*, and a *negative Covenant* which is *meerly additional* to an affirmative Covenant, as in the principal Caſe, for there Performance generally is a good Plea, but not in the laſt Caſe, which muſt be pleaded ſpecially, for the Defendant might have departed out of the River *Thames* and ſailed to the *Eaſt-Indies*, if he had not been reſtrained by the latter Part of this negative Covenant *not to deviate*, &c. ſo that 'tis plainly additional. *Sid.* 87. *Laughnell* verſus *Palmer.*

6. So where the Deviſe was to the *Heir at Law*, provided he pay to *W. R.* 20 *l.* this is a void Condition, becauſe there is no Perſon to take Advantage of the Non-performance. 1 *Lutw.* 797.

(I)

Of precedent and ſubſequent Conditions. See Antea (A) 9. *Covenants mutual* per totum. *Deeds.* (A) 2. *Sale.* (D) 9.

1. COnditions are divided into *expreſs and implied* Conditions, thoſe which are *expreſs* are called *Conditions in Fact*, thoſe which are *implied* are called *Conditions in Law*; now *Conditions in Fact* are annexed and inſerted in the Conveyance by apt and expreſs Words, as where a Feoffment is made of Lands, reſerving a Rent to be paid on a certain Day, upon Condition, that if 'tis not paid on that Day, that the Feoffor may *re-enter*; ſo where a Man grants to another an

an Office for Life, tho' there is no Condition expreſſed in the Grant, yet the Law *implies a Condition*, which is, that if the Grantee doth misbehave himſelf in the Execution of that Office, it ſhall be lawful for the Grantor to enter and diſcharge him. *Litt. lib.* 3. *cap.* 5.

2. An *expreſs Condition* is again divided into that which is *precedent* and *ſubſequent*; a *Condition precedent* is ſuch as muſt be performed before the Eſtate can veſt, as in the Caſe of a Will, where the Teſtator deviſed, that if *W. R.* paid 100 *l.* at *Michaelmas* next after his Death to a certain Perſon to whom he deviſed the ſame, then he ſhould have his Lands; or where the Deviſe was of Lands for a certain Term of Years, *provided, that if the Deviſee pay* unto *W. R.* 50 *l.* at *Michaelmas* next after the Death of the Teſtator, that then the Lands ſhould be to him and his Heirs; in theſe and ſuch like Caſes the Condition muſt be performed before the Eſtate can veſt, and therefore theſe are called *precedent* Conditions, becauſe they go before, and muſt be executed before the Eſtate is acquired.

4 Leon. 229. Winch 115. S.C.

3. But a Condition may be *precedent in a Grant*, which is not ſo in a *Will*, as for Inſtance, where the Deviſe was of a Term for three Years to *W. R.* and *if the Wife* (of the Teſtator) *ſhould permit the Deviſee to enjoy the Term for three Years then next following, that then ſhe ſhould have all the Reſidue* of his Goods and Chattels, as ſole Executrix, but if ſhe diſturbed him, then his Son ſhould be Executor; it was objected, that this was a *Condition precedent*, and by Conſequence was to be performed before ſhe could be Executrix; and if ſo, then it was impoſſible for her to perform it, becauſe ſhe could have no Authority, either to permit the Deviſee to enjoy the Term for three Years, or to diſturb him before the three Years were paſt, for then her Power as to her being Executrix, was to commence; but adjudged, this being in the Caſe of a Will, ſhall not be a *Condition precedent*, as it would have beed in a *Grant*, for ſuch Conſtruction ſhall be made of the Will, that the *Intent* of the Teſtator may ſtand, which appears to be, that his Wife ſhould be Executrix immediately, and ſo to continue till ſhe diſturbed the Deviſee at any Time within the three Years; for he never intended that an Adminiſtration ſhould be granted to another till the three Years were expired, becauſe he appointed his Son to be Executor, if within that Time his Wife ſhould diſturb the Deviſee, ſo that this was to abridge the Power of the Wife to be Executrix to her Husband, if ſhe did not perform that Part of his Will. *Cro. Eliz.* 219. *Jennings* verſus *Gower*.

4. A *Condition ſubſequent* is when the Eſtate is executed or veſted, but to be deveſted again by the Non-performance of the Condition, and therefore 'tis called a *ſubſequent Condition*, or executory, as where the Teſtator deviſed a Term of Years to *W. R. upon Condition*, that he pay to *L. R.* 100 *l.* at *Michaelmas* next after his Death, otherwiſe the Deviſe to him ſhall be void; adjudged, that by the Performance of this Condition, the Deviſee ſhall have the Term, otherwiſe not.

5. If a Man is to have Money in Conſideration of ſomething to be done by him, there he muſt ſhew the *Performance* on his Part, becauſe it amounts to a *Condition precedent*; but if upon an Agreement each Party have an equal Remedy, one for the Money, and the other for the Thing to be done, there the Plaintiff need not aver the Performance of his Part. 7 *Rep.* 16. *b.* In *Ugthred*'s Caſe.

6. The Lord of a Manor *covenanted with one of his Copyholders* and his Heirs, to *enfranchiſe* his Copyhold, and in Conſideration *of the Performance thereof*, the *Copyholder covenanted to pay* ſo much Money; adjudged, that he is not obliged by this Covenant to pay the Money, until the Lord had in the firſt Place performed the Covenant on his Part; but the Book tells us it had been otherwiſe, if the Covenant of the Copyholder had been in Conſideration of the Covenant of the Lord of the Manor *to be performed*. 3 *Leon.* 219. *Broccas*'s Caſe.

7. An Award was, that *A.* ſhould pay to *B.* 10 *l.* and in Conſideration thereof *B.* ſhould *execute a Bond* to *A.* to releaſe all his Right to certain Lands; two Judges held this to be a *precedent Condition*, (*viz.*) that the 10 *l.* ſhould be paid before the Bond ſhould be given, and ſo it was afterwards adjudged between other Parties. *Cro. Car.* 384. *Vivian* verſus *Shippen*.

1 Mod. 64. Sid. 464. 2 Mod. 33. S. P.

8. *Debt upon Bond*, conditioned for Performance of *Articles*, which were, that the Plaintiff being a Taylor, had aſſigned his Trade to the Defendant, and the Benefit of all his Cuſtomers mentioned in a Schedule to the ſaid Articles annexed, and covenanted with the Defendant, that from thenceforth he (the Plaintiff) *would relinquiſh and deſiſt to uſe the Trade of a Taylor*, with all or any of the Cuſtomers mentioned in the Schedule; and the Defendant, *in Conſideration of the Performance thereof*, covenanted to pay the Plaintiff 100 *l. per Annum* quarterly, during his Life, then he (the Defendant) ſhews, that he had performed the Covenant on his Part, and pleads in Bar, that the Plaintiff, after the Making the ſaid Articles, (*viz.*) 1 *Auguſt*, *&c.* had uſed the Trade of a Taylor, for one *T. P.* being one of the Cuſtomers mentioned in the Schedule, and for his (the Plaintiff's) ſole Benefit; and upon Demurrer to this Plea it was inſiſted, that thoſe Words, *in Conſideration of the Performance thereof*, make a *Condition precedent*, ſo that when the Plaintiff had broke the Covenant on his Part, the Defendant was diſcharged from the Payment of the 100 *l. per Annum*, for thoſe Words, *in Conſideration of the Performance thereof* are the ſame in Subſtance and Effect, as if the Covenant had been *in Conſideration of the Covenant performed*. But adjudged, that the Covenant on the Plaintiff's Part being in the *Negative*, (viz.) *Not to uſe the Trade of a Taylor*, if thoſe Words, *in Conſideration of the Performance thereof*, ſhould amount to a *Condition precedent*, then the Plaintiff would never have the 100 *l.* during his Life, becauſe a *negative Covenant* cannot be ſaid to be performed till it becomes impoſſible ſo to do, which in this Caſe is not impoſſible, till the Death of the Plaintiff, for he may break it at

any Time during his Life, therefore this is not a Condition precedent, the Plaintiff had Judgment 2 *Saund.* 155. *Hunlocke* verſus *Blacklow.*

9. *In Aſſumpſit*, the Plaintiff ſet forth an Agreement between him and the Defendant, that he (the Plaintiff) ſhould aſſign all his Intereſt in ſuch a Term to the Defendant, who, *proinde*, ſhould pay 250 *l.* and then lays *mutual Promiſes*; and upon a Demurrer to this Declaration it was objected, that this was a *Condition precedent*, and therefore the Plaintiff ought to have averred a Performance, for the Plaintiff was to aſſign, and the Defendant, *proinde*, was to pay the Money (*i. e.*) * *pro aſſignatione: Sed per Curiam*, this is not a *Condition precedent* but a *mutual Promiſe*, for 'tis as reaſonable the Plaintiff ſhould have his Money before the Aſſignment made, as 'tis, that the Defendant ſhould have the Aſſignment before he paid his Money. 2 *Mod.* 33. *Smith* verſus *Shelberry.* * Dyer 76.

10. The Teſtator deviſed Lands to his Son in Fee, *if he ſhall live to twenty-one Years*; provided, if he die before twenty-one, Remainder over to another; adjudged, this was a *Condition ſubſequent*, and that the Eſtate in Fee veſted immediately in the Son, upon the Death of the Father, but to be deveſted, if he did not live to twenty-one Years. 3 *Lev.* 132. *Edwards* verſus *Hammond.*

11. In Covenant, *&c.* the Plaintiff declared upon Articles of Agreement, by which the Defendant covenanted to pay the Plaintiff ſo much Money, *he making to him a ſufficient Eſtate in ſuch Lands*, &c. and tho' he (the Plaintiff) always, from the Making the ſaid Articles, *paratus fuit ad performand' all the Agreement on his Part*; the Defendant had not paid the Money, there was a Plea and Replication; and upon Demurrer the Declaration was adjudged ill, becauſe the Words, *He making a good and ſufficient Eſtate*, are a Condition precedent, and therefore the Plaintiff ſhould have averred a particular Performance, and not by ſuch general Words, as that he had performed all on his Part. 1 *Vent.* 147. *Large* verſus *Cheſhire.*

12. *Debt upon Bond*, conditioned, that the Defendant ſhould pay ſuch Coſts *as ſhould be ſtated by two Arbitrators*; the Defendant pleaded, that no Coſts were ſtated; the Plaintiff replied, that the Defendant did not bring in his Bill of Coſts; and upon Demurrer to this Replication the Defendant had Judgment, becauſe it appeared in the Declaration, that it was neceſſary for the Plaintiff to do a precedent Act, before he could charge the Defendant with a Fault, (*viz.*) to chuſe one Arbitrator, and this he ought to have averred. 1 *Vent.* 71. *Baldway* verſus *Ouſton.*

13. *Aſſumpſit*, *&c.* in which the Plaintiff declared, that there was an Agreement between them, that the Plaintiff ſhould pull down two Walls and build an Houſe, *&c.* for the Defendant, and that the Defendant ſhould pay him 8 *l. pro labore*, *&c.* and lays mutual Promiſes, and avers, that he was ready to perform all on his Part, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that here the Plaintiff had not ſufficiently averred Performance on his Part, but it was held, that where the Parties have mutual Remedies, there is no Occaſion for ſuch Averment; and my Lord *Hale* was of Opinion, that the Words *pro labore* made it a *Condition precedent*, (*viz.*) That the Work ſhould be done before the Money was to be paid. 1 *Vent.* 177, 214. *Peters* verſus *Opie.* *Hob.* 41, 42. *S. P.* 2 Saund. 350. 2 Lev. 23. S. C.

14. *Aſſignee* of a Leaſe brought an Action of Covenant, and the Breach aſſigned was, that the Defendant entered and evicted him, who pleaded, that he might have enjoyed it, *paying the* Rent; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe it did not appear that any Rent was due after the Aſſignment, and before the Eviction, and the Word *Paying* doth not make a precedent Condition. *Sid.* 280. *Allen* verſus *Babington.*

Conditions for farther Aſſurance. See **Covenants.** (I) per totum.

Conditions to ſave harmleſs. See **Covenants.** (D) per totum.

Confirmation.

(A)

See *Waſte.* (C) 2.

This is a ſtrengthning or confirming *an Eſtate to one in Poſſeſſion thereof by a voidable Title, tho' not at preſent void, as where a Biſhop granted the Office of* Chancellor *for Life, this is not a void Grant, but voidable by the Death of the Biſhop, unleſs confirmed by the* Dean and Chapter. *See more in Title* Leaſes by Biſhops.

1. A Feme ſole poſſeſſed of a Term of Years, married and died, the Leſſor did *grant and demiſe* to *W. R.* and his Aſſigns, all the Lands then in the Poſſeſſion of the Huſband for ſixty-three Years, to commence from the End or Expiration of the Term *granted to the Husband*, who married again, and deviſed the firſt Term to his ſecond Wife, and made her *Executrix*, and died; after his Death the Widow married another Husband, and then the Husband and Wife took a Leaſe of him who had the Reverſion in Fee, *for both their Lives*, by Reaſon whereof the Term for Years was drowned, becauſe a Freehold for Life and a Term for Years cannot ſtand together of the ſame Lands in the ſame Perſon; then *W. R.* whoſe Term was to commence after the End of the firſt Term, ſuppoſing the ſame was now ended, by the Acceptance of the Leaſe for Life, entered upon the ſaid Huſband and Wife; ſome Exceptions were taken to the Pleading, (*viz.*) it was alledged, that the firſt Leaſe was *granted to the Husband*, which was not true, becauſe it came to him by the *Intermarriage* of that Woman who had it, ſo that it came to him, not by any Grant, but by an Act in Law; but adjudged, that by the Word *Grant*, it ſhall not neceſſarily be intended, that the Term was *granted* to him, but in this Caſe it ſhall ſhew when the ſecond Term ſhall commence, (*viz.*) After the End of the Term granted to him; in the next Place it was objected, that the Leſſor could not make a new Leaſe to *W. R.* for ſixty-three Years, becauſe the firſt Leaſe for Years was then in Being, and by Conſequence the ſecond Leaſe could be of no Effect; it ought to have been alledged, that the firſt Leaſe for Years was ſurrendered, and thereupon the Reverſioner granted a new Leaſe to *W. R.* the Plaintiff for ſixty-three Years; but adjudged, that the ſecond Leaſe was of good Effect, for the Words *Demiſe and Grant* did enure by Way of Confirmation of it, without any other Words to make a Confirmation. *Plow. Com.* 187. *Wroteſley* verſus *Adams.* 2 *Eliz. Dyer* 178. *S. P.*

2. Tenant for Life, Remainder in Tail, Remainder over; the Tenant for Life, and the Remainder-Man in Tail joined in a Fine *come ceo, &c.* with a Render of a Rent-charge of 40 *l. per Annum*, to the Tenant for Life, the Remainder-man in Tail died without Iſſue, and he in Remainder over entered on the Tenant for Life, ſuppoſing, that by joining in the Fine he had forfeited his Eſtate; but adjudged, that he had not, for it ſhall be a Grant of the Tenant in Tail, and a Confirmation by the Tenant for Life, and ſo no Forfeiture; for if Tenant for Life, Remainder in Tail, join in a Feoffment in Fee, this is no Diſcontinuance, for each of them Grants what he may lawfully Grant, and tho' the Remainder-man in Tail ſhould die without Iſſue, yet the Feoffee ſhall hold the Eſtate during the Life of the Tenant for Life, becauſe joining in the Feoffment ſhall enure only by Confirmation of the Grant made by him in Remainder. 1 *Rep.* 76. *Bredon's* Caſe. *Poſtea* Remainder. (C) 1. *S. C.*

3. In Treſpaſs, the Defendant pleaded, that the Plaintiff being then within Age, made a Feoffment in Fee of the Lands, to the Father of him the ſaid Defendant, rendring Rent, and that the ſaid Plaintiff had confirmed the Premiſſes, *habendum* to him and his Heirs, and that his ſaid Father died ſeiſed, and the Lands deſcended to him as Son and Heir; adjudged, that this Feoffment was void, being made by an Infant, and if ſo, then the Defendant had nothing in the Land, upon which the Confirmation might enure, and ſo that was void in like Manner, for the Land doth not paſs, but where the Confirmation enures by Way of Enlargement of the Eſtate. *Mich.* 2 *Mar. Dyer* 109. *Rudgeway's* Caſe.

See W. Jones 393. Dixie *v.* Beaumont.

4. Lands were given to Husband and Wife, and *to the Heirs of their two Bodies*, Remainder to the Husband and his Heirs; he levied a Fine to the King, who granted the Lands to *W. R.* and his Heirs, and afterwards the Husband died, leaving Iſſue by his Wife *one Son*; after his Death the *Wife entered* within the five Years, ſo that the Fine could be no Bar, then *W. R.* died, and his Heir at Law, by Deed, reciting the Special Eſtate-tail, which was granted to her and her Husband, and that ſhe was now ſeiſed of an Eſtate-tail, *confirmed her Eſtate*, habendum *the Land to her, and the Heirs of the Body of her Husband begotten*; the Wife died, and her Son entered and died, leaving Iſſue two Sons; the eldeſt, when he came of Age, covenanted to ſtand ſeiſed, *&c.* to the Uſe of himſelf and the *Heirs Males* of his Body, and died, leaving Iſſue only a Daughter; the Queſtion was, whether the Land ſhould go to the ſaid Daughter, or to the youngeſt Son; it was inſiſted for him, that he ſhould inherit the Eſtate-tail by Vertue of the Confirmation made by

the Heir of *W. R.* becauſe by expreſs Words he had excluded himſelf and his Heirs to claim the Lands, as long as the Wife had any Iſſue of her Body; beſides, by this Confirmation, the *Quality* of the Wife's Eſtate was altered; for whereas, *after her* Death, the Heir of *W. R.* might have entered and barred the Heirs in Tail; now by this Confirmation he had added an enlarging Quality to make all the Heirs of the Tail inheritable; but adjudged, that this Confirmation was of no Manner of Effect, for when the Wife entered and was ſeiſed of the Eſtate-tail, nothing was left in the *Cogniſee* of that Fine levied by her Husband, but only a *Poſſibility* to have the Remainder in Fee after the Eſtate-tail ſpent, which Poſſibility was likewiſe in *W. R.* and his Heirs, and could not paſs by this Confirmation made by the Heir of *W. R.* for that could paſs nothing but what was drawn out of the Remainder in Fee, which was nothing at all, becauſe no new Eſtate was drawn out of it, or created by the Confirmation, but only the old Eſtate confirmed, and therefore it cannot deſcend, becauſe the Confirmation could not add a deſcendable Quality to him who was diſabled before to take by Deſcent; and it was agreed, that every Confirmation is either *Proficiens*, *Creſcens*, or *Diminuens*, and this was neither, becauſe the Wife had as perfect and as large an Eſtate before the Confirmation as ſhe had afterwards. *9 Rep.* 138. *Beaumont's* Caſe. See *Albany's* Caſe. 1 *Rep.* 111.

5. Tenant for Life, Remainder in Fee, both joined in a Leaſe; it was a Queſtion, whether this ſhall be taken in Law to be the Leaſe of both; adjudged, that it was the Leaſe of the Tenant for Life, during his Life, and the Confirmation by him in Remainder, but that after the Death of the Tenant for Life, it was the Leaſe of him in Remainder, and the Confirmation of the Tenant for Life, and therefore becauſe the Plaintiff had declared on a joint Demiſe of both, it was adjudged againſt him. *6 Rep.* 15. *Treport's* Caſe.

6. The Leſſor being Tenant in Tail, Reverſion in Fee to another, covenanted and *granted* with the Leſſee, that he ſhould enjoy the Lands *during the Life of the Leſſor*, without paying any Rent, but this Deed was not executed by *Livery*; and therefore the Queſtion was, whether it ſhould enure as a Surrender of the Term, or as a Confirmation to enlarge the Eſtate of the Leſſee, during the Life of the Leſſor; the better Opinion was, that it was neither, but only a meer Covenant, but Juſtice *Weſton* held it to be a Confirmation by the Word *Grant*. *Paſch.* 10 *Eliz. Dyer* 272. *Sackford's* Caſe.

7. The Father made a Feoffment in Fee to the Uſe of his eldeſt Son, *upon Condition, &c.* afterwards the Father and Son joined in Grant of a Rent-charge, and the Condition being broken, the Father entered; the Queſtion was, whether he ſhould hold the Lands charged with this Rent; and it was inſiſted for him that he ſhould not, becauſe his Joining in the Grant with his Son amounted only to a Confirmation, which did not alter the Quality of his Eſtate; but adjudged, that the Grant of the Rent-charge was good; and this Diſtinction was then made, (*viz.*) when the Eſtate of him to whom the Confirmation is made, is upon an *expreſs Condition*, in ſuch Caſe a Confirmation cannot alter it, but when he who had ſuch a conditional Eſtate makes an abſolute Grant of his Eſtate to another, without any Manner of Condition, ſo that the Eſtate of the Grantee is ſubject only to the Condition which was annexed by another Conveyance to the Eſtate of the Grantor, there the Confirmation of the Eſtate of the Grantee doth extinguiſh that Condition; as for Inſtance, Leſſee for Life grants a Rent-charge in Fee, the Grant is abſolute, but ſtill 'tis determinable in reſpect of the Eſtate of the Grantor, but if he in Reverſion confirm ſuch Grant, that Confirmation enlarges the Eſtate of the Grantee, which before was determinable upon the Life of the Grantor, and makes it good; but if Leſſee for Life grants a Rent-charge in Fee, to be paid only *during the Life of the Grantor*, and afterwards he in Reverſion confirms the Rent to the Grantee and his Heirs, and the Tenant for Life dieth, there the Rent ſhall ceaſe, becauſe a Confirmation cannot enlarge that which was determinable upon an expreſs Condition. 1 *Rep.* 146. *Mayhoe's* Caſe.

8. The Leſſor made a Leaſe to three Perſons *at Will*, one of them died, and afterwards, the Leſſor reciting his Death, and that the Leaſe was determined by Surrender, he granted the Eſtate to the Survivors and *their Heirs*; but there being no Livery made, it was adjudged void, for by the Surrender of the Leaſe, *the Eſtate at Will was determined*, ſo the ſecond Grant could not enure by Way of Confirmation. *Hill.* 10 *Eliz. Dyer* 269.

9. Upon a Trial at Bar in Ejectment, the Caſe upon the Evidence was, that the *Earl of Moreton* being ſeiſed in Fee, made a Feoffment to the *Earl of Kenoul*, who was his Son in Law, but no *Livery and Seiſin*, ſo that the *Lord Kenoul* had only a voidable Title, and about a Year afterwards the *Lord Morton* granted and confirmed the Premiſſes to the *Lord Kenoul*, at which Time and before, they both lived in the Houſe, Part of the Premiſſes, but the *Lord Morton* was the Houſe-keeper and paid the Pariſh Taxes; the Queſtion was, whether this was ſufficient Evidence to prove the *Lord Kenoul*, who was Tenant at Will by the Feoffment, to be ſo in Poſſeſſion, when the Grant and Confirmation was made by the ſecond Deed, ſo as it might operate and take Effect; and adjudged that it was, for the Law carries the Poſſeſſion to him that hath the Right, and that was to the *Lord Kenoul*, who was Tenant at Will, unleſs Proof had been made, that the *Lord Morton* determined his Will after the Feoffment, and before the Confirmation. *Sid.* 385. *Lord Kenoul* verſus *Sir Jeremy Whitchot.*

Conies. See **Warren.**

Conſideration. See **Uſe.**

Conſpiracy.

(A)

1. ONE *Walter* being robbed, accuſed *Stone* of the Robbery, but afterwards retracted his Evidence; *Stone* being not ſatisfied with this Retraction, brought an Action againſt *Walter* for defaming him; thereupon *Walter* accuſed him again of the Felony and Robbery, and *Stone* was bound over to the Aſſiſes, and *Walter* was bound over to proſecute, who appearing at the Aſſiſes with ſeveral *London Poulterers*, ſome of them ſpoke aloud in the Court, that *Walter* was an honeſt Man, when the Evidence was giving to the Jury upon the Indictment, and *Walter* ſwore poſitively that *Stone* was the Perſon who robbed him; but upon Circumſtances it appeared to the Jury, that he was not the Man, whereupon they found *Ignoramus*, ſo that tho' *Stone* was never indicted, and therefore could not be legally acquitted, yet *Walter* and the Poulterers were fined for this Conſpiracy to accuſe him, and that ſuch Conſpiracies are puniſhable by Indictment at the Suit of the King, but this was in the Star-Chamber. *Moor* 813. *Stone* verſus *Walter & al'*.

2. *Sir James Creiton, a Scot*, entered into Articles with *Cantrell*, in Truſt for one *Smith*, that *Cantrell* ſhould have the ſixth Part of what ſhould be forfeited by *Sir Anthony Aſhley*, upon his Conviction of poiſoning one *Rice*, and *Cantrell* covenanted to procure Witneſſes to convict him, which were the aforeſaid *Smith* and the Widow of the ſaid *Rice*, and *Smith* was to ſwear, that he being *Sir Anthony*'s Servant, ſaw him put Poiſon in a Cup of Liquor, and commanded him, the ſaid *Smith*, to carry it to *Rice*, which he did, and that *Rice* drank and immediately died, and it was proved, that *Sir James* promiſed *Smith* to get his Pardon, if he would accuſe himſelf and *Sir Anthony*, *&c.* and for this Conſpiracy *Sir James* was fined 1000 *l.* in the Star-Chamber, and ſome of the Defendants were ſentenced to the Pillory, and to be burnt in each Cheek with the Letters *F. and C.* which ſignified *falſe Conſpirator*; and the Lord Chancellor cited ſeveral Precedents of ſuch Cenſures, and ſaid, that the *Malice* or Corruption in theſe Accuſations ought to be apparent, and tho' an *Ignoramus* is found, yet the Party is finable for ſuch Conſpiracies, and ſo he is if the Bill is found, and the Defendant *legitime acquietatus*. *Moor* 816. *Sir Anth. Aſhley*'s Caſe.

1 Lev. 62. Sid. 68. 3. Indictment for a Conſpiracy to charge the Proſecutor to be the Father of a *Baſtard-Child*; it was moved to quaſh it, becauſe Fornication is a Spiritual Offence, which is very true, but yet *B. R.* hath Cogniſance of every unlawful Act by which Damages may enſue, and in this Caſe it may be a Damage to the Proſecutor to keep the Child. *Sid.* 68. *Timberley* verſus *Child*. 1 *Lev.* 62. *S. C.* By the Name of *The King* verſus *Kimberley*.

1 Lev. 125. 4. Information againſt *Starling*, an Alderman of *London*, and ſixteen others, Brewers, for that they conſpired to take away the *Gallon Trade*, by which the Poor were ſupplied with Beer, and to cauſe them to mutiny againſt the Farmers of Exciſe, ſetting forth, that the Exciſe was Part of the King's Revenue, and that the Defendants endeavoured to impoveriſh the Farmers, *&c.* upon Not guilty pleaded, the Jury found them guilty of a Conſpiracy to impoveriſh the Farmers of Exciſe; it was inſiſted in Arreſt of Judgment, that the Information ought to be quaſhed, becauſe *Vi & Armis* were omitted, but adjudged, that Conſpiracies are not of Force, but Secret; then it was objected, that the Defendants were not guilty of any Offence, for it was no Crime to impoveriſh the Farmers; but adjudged, that the Verdict relates to the Information, and there 'tis ſet forth, that the Exciſe is Part of the King's Revenue, and therefore to impoveriſh the Farmers, would be to make them incapable to pay the King, ſo they were all fined. *Sid.* 174. *The King* verſus *Starling & al'*.

5. The Defendants were indicted for conſpiring to charge one with Keeping a Baſtard-Child, and thereby to bring him into Diſgrace; after a Verdict for the King, it was moved in Arreſt of Judgment, that the bare Conſpiring was not indictable, without doing ſome Overt-Act; 'tis true, they affirmed it to the Party himſelf, intending to get Money of him that it might not be diſcovered, but it doth not appear that he was actually charged with Keeping the Child, or that he was brought before a Juſtice of Peace; but adjudged, that there was as much an Overt-Act as the Deſign of this Conſpiracy would admit, there being no real Child, but only a Contrivance to cheat the Man of his Money: The principal Offender was fined 50 *l.* and the other 30 *l.* *The King* verſus *Armſtrong & al'*. 1 *Vent.*

T. Jones 192, 199. 6. Caſe, *&c.* in Nature of a Conſpiracy, for that the Defendants did conſpire to indict the Plaintiff of High Treaſon, and for that Purpoſe did ſolicite and ſuborn one *Wilkinſon*, a Priſoner in the *King's Bench*, to give falſe Evidence againſt him, and accordingly an Indictment was preferred to the Grand Jury at the *Old Bailey*, &c. which was found *Ignoramus*; the Action was laid in *London*, and upon Affidavits it was moved, that the *Venue* might be changed to *Surrey*, which was oppoſed by the Plaintiff, being an *Earl*, and ſhall not be forced to travel into another County to try his Cauſe; beſides, the Indictment was preferred at the *Old Bailey*, which is in *London*, and ſo this Matter is local; but adjudged, that they might alter the *Venue* in Caſe of a Peer, and that this

this Cauſe of Action was tranſitory, and that the Conſpiring and Preferring the Indictment were but Aggravations of Damages; and that 'tis true, where the Cauſe of Action ariſes in ſeveral Counties or Places, the Plaintiff hath his Election to bring it in either, according to *Bulver's* Caſe. 7 *Rep.* Yet if there cannot be an indifferent Trial in the Place where 'tis laid, the Court may change the *Venue*, and ſo it was done in this Caſe. 1 *Vent.* 364. *Earl of Shaftsbury* verſus *Cradock*. *Idem* verſus *Graham*.

7. *Thody* and two others were indicted, for that, *conſpiratione inter eos habita*, they enticed *T. P.* to play, and cheated him with falſe Dice; *Thody* was found guilty, and the other Defendants not having pleaded, it was moved, that Judgment might not be entered againſt him until they came in, becauſe this Fact was laid by Way of Conſpiracy; if the reſt ſhould come in and be acquitted, no Judgment could be given againſt him: But *per Hale*, where one is found guilty, if the other doth not come in upon Proceſs, or if he dies pending the Suit, the Judgment ſhall be againſt the other. 1 *Vent.* 234. *Thody's* Caſe. See *Skinner* verſus *Gunter*. *S. P.*

8. Two Men were indicted for being common Pawn-Brokers, and that one of them had unlawfully obtained Goods of the Proſecutor, and that he, together with the other, *per confederationem & aſtutiam*, did detain the ſame till they were paid twelve Guineas; one of them was acquitted: *Et per Curiam*, the Acquittal of one is the Acquittal of both upon this Indictment. 3 *Mod.* 220. *The King* verſus *Grimes & al'*.

9. The Defendants were indicted, for that they intending to oppreſs and defame *T. S.* did *falſly and malitiouſly Conſpire*, &c. *falſly* to charge the ſaid *T. S.* to be the Father of a Baſtard-Child, of which ſuch a Woman was big, and in Purſuance thereof did *falſly affirm* him to be the Father; upon Demurrer to this Indictment it was objected, that he might be the Father, becauſe he did not *aver that he was not, but adjudged, that tho' People may *conſult to proſecute a guilty Perſon*, yet 'tis indictable to charge an *innocent Man* right or wrong; that in this Caſe 'tis the *Conſpiracy* which makes the Offence, tho' nothing is done in Purſuance of it, and it need not be averred, that *T. S.* is *innocent*, for he ſhall be intended ſo till the contrary appears; beſides, the Indictment is, that the Defendant *falſly* affirmed *T. S.* to be the Father. 1 *Salk.* 174. *The Queen* verſus *Beſt*. Mod. Caſes 137, 185. * 9 Rep. 53. a.

10. The Defendant was indicted, for that he together with *Taylor* and *Jefferies*, *prætextu* of a certain Warrant in Writing, ſuppoſed to be ſigned and ſealed by *Sir Salathiel Lovel*, Recorder of *London*, did Arreſt *Muriell*, and brought him before *J. Chamberlaine*, a Juſtice of Peace of *Middleſex*, *licet* the ſaid Warrant was not directed to either of them, and *licet* the Defendant did know that it was *forged*, and that the Defendant, when *Muriell* was before the Juſtice, perſwaded him to refuſe Bail, tho' the Fault being only a Miſdemeanor, was in its own Nature bailable, but *did not alledge that ſufficient Bail was tendered*, and that when *Muriell* was committed by the Juſtice, the Defendant *Tracy* and the other Two, at the Inſtance and Perſwaſion of the Defendant, did extort divers Sums of Money from him, but did not *alledge how much, or any certain Sum*; upon Not guilty pleaded, the Jury acquit him of the Knowing the Warrant to be *forged*, and find him guilty as to the reſt; and it was objected in Arreſt of Judgment, that this Indictment was ill, becauſe it charged the Defendant with Perſwading the Juſtice of Peace not to take Bail, but doth not ſet forth, that *any Bail was offered*; beſides, it charges him with extorting ſeveral Sums of Money from *Muriell*, but doth not ſay *for what, or how much he extorted*, and for theſe Reaſons the Indictment was held incertain and inſufficient, and therefore quaſhed, but the Defendant was ordered to enter into a new Recognizance to appear to a new Indictment. *Mod. Caſes* 30. *The Queen* verſus *Tracy & al'*.

11. Afterwards an Action on the Caſe was brought by *Muriell* againſt the ſame Defendant *Tracy*, and others, for that they *per conſpirationem inter eos habitam*, and to vex and oppreſs him, did *prætextu* of a certain Warrant from *Sir S. L.* the Recorder of *London*, Arreſt him, *&c.* it was objected, that this Declaration was ill, becauſe, if the Warrant was legal, there can be no Conſpiracy to take a Man up by Vertue of a legal Warrant, and it ſhall be intended in this Caſe to be legal, becauſe the Plaintiff did not ſet forth, that the Warrant was taken out *ſine aliqua probabili cauſa*; and upon this Exception, the Cauſe being upon Trial before the Chief Juſtice, a Juror was withdrawn. *Mod. Caſes* 169. *Muriell* verſus *Tracy & al'*.

Conſtable.

(A)

See *Leet* per totum. *Officer* per totum.

1. THE Defendant being a Conſtable, was indicted, for that he contemptuouſly, negligently, and voluntarily refuſed to execute *diverſa præcepta & warranta*, directed to him by *T. P.* a Juſtice of Peace, under his Hand and Seal; it was quaſhed, becauſe it did not ſet forth the Nature and Tenor of the Warrants, for unleſs the Defendant can know with what particular Acts and Omiſſions he is charged, he cannot tell how to make his Defence. 1 *Vent.* 305. *Burrough's* Caſe.

2. In Treſpaſs for taking *Salmon*, the Defendant juſtified the Taking by Vertue of the Statute 1 *Eliz. cap.* 17, for that he was a *Conſtable*, and that the Salmon were caught out of Seaſon; and upon a Demurrer to this Plea it was adjudged ill, becauſe a Conſtable cannot intermeddle without a Warrant, nor the Leet without a Preſentment. 1 *Salk.* 407. *Atkinſon* verſus *Crouch.*

3. A *Doctor of the College of Phyſicians in London* was choſen a *Conſtable in Berks*, for a Tenement which he had there, and it was moved he might be diſcharged by Reaſon of his *Privilege* of a Doctor of Phyſick, and by Vertue of the Statute 34 *H.* 8. *cap.* 8, concerning this College, and he was diſcharged. *Sid.* 431. *The King* verſus *Pordage.*

4. A Conſtable was indicted, ſetting forth, that one *Naſh* was convicted of *Deer-ſtealing*, upon the Statute 3 & 4 *Will.* 3. *cap.* 10, and that the Defendant being a Conſtable, the Juſtice directed his Warrant to him to levy the Penalty, which he did, but had not returned the Warrant, or made any Certificate thereof; he was found guilty; and it being removed by *Certiorari*, it was adjudged, that tho' the Conſtable is not named in this Statute, yet the Juſtices may command him to execute the Warrant, becauſe, as at Common Law a Conſtable was a ſubordinate Officer to the Conſervators of the Peace, ſo he is now a proper Officer to the Juſtices; that where an Officer neglects his Duty incumbent upon him, either by the Common Law, or by any Statute, he is indictable, that the Conſtable need not return the Warrant it ſelf, becauſe it may be neceſſary for him to keep it in his own Defence; but then he ought to certify what he hath done upon it, becauſe otherwiſe the Proſecutor is at an End of his Proſecution. 1 *Salk.* 380. *The Queen* verſus *Wyatt.*

Conſultation.

(A)

1. THIS is a Writ by which a Cauſe which hath been removed from the Spiritual Court by a Prohibition is returned thither again; for if the Temporal Court, who hath prohibited the Eccleſiaſtical Judge to proceed, finds the Suggeſtion falſe, or not well proved, thereupon a Rule is made to return it into the Spiritual Court, and the Writ is called a Conſultation.

2. Cauſes of which the Spiritual Courts have Juriſdiction, are,

Adminiſtrations.
Admiſſions of Clerks.
Adultery.
Appeals in Eccleſiaſtical Cauſes.
Apoſtacy.
Baſtardy general.
Blaſphemy.
Celebration of Divine Service.
Chaſtity, ſolicitation thereof.
Church Repairs.
Dilapidations.
Divorces.
Fornications.
Hereſies.
Inceſt.
Inſtitution of Clerks.
Marriage Rites.
Oblations.
Obventions.
Ordinations.
Penance, Commutation for it.
Penſions.
Probate of Wills.
Procurations.
Schiſms.
Simony.
Tithes, Subſtraction and Right thereof.

Where a Suit is in the Spiritual Court for any of theſe Cauſes, or the like, and not mix'd with any temporal Thing; and if a Suggeſtion is made for a Prohibition, a Conſultation ſhall be awarded. 5 *Rep.* 9. In *Cawdry*'s Caſe.

3. Libel, *&c.* for Tithes of *Slate Stone*, the Defendant prayed a *Conſultation*, becauſe the Plaintiff had moved the Court of Chancery for a Prohibition upon the ſame Libel, and that Court had granted a Conſultation, ſo that to move for a Prohibition in another Court is meerly vexatious, for which Reaſon a Conſultation was granted. *Cro. Eliz.* 277. *Liſſe* verſus *Watts.*

4. Adjudged, upon a Motion to ſet aſide a *Prohibition*, that where a *Conſultation* is once granted upon the Right of the Thing in queſtion, there a *new Prohibition* ſhall never be granted upon the ſame Libel; but where a Conſultation is granted upon any Default of the Prohibition, either *in Form*, or by Miſpriſion of the Clerk, or by miſpleading in it, there a Prohibition may be granted again upon the ſame Libel. *Paſch.* 7 *Jac.* 2 *Brownl.* 247.

Where a Conſultation is once granted, a new Prohibition ſhall never be on the ſame Libel.

5. Libel, *&c.* for *all the Tithes* of the Farm in the Occupation of *W. R.* who ſuggeſted for a *Prohibition*, that the Queen was ſeiſed of two Parts in Three of the ſaid Tithes, and had granted them to one *W. R.* to whom he had paid the ſaid two Parts, and thereupon the Defendant in the Prohibition prayed a *Conſultation* as to the third Part; but adjudged, that the *Conſultation* muſt be granted according to the Libel, which was, for *all the Tithes*; and it appearing he had no Right to two Parts, he muſt Libel again *de novo* for the third Part. *Hob.* 115. *Hoskins* verſus *Towſe.*

Conſultation muſt be purſuant to the Libel.

6. Where a Jury upon Iſſue joined, upon a *Prohibition* for a *Modus*, find a different *Modus*, than what was ſet forth in the Pleadings, yet no Conſultation ſhall go, becauſe there being a *Modus* found, it appears that the Plaintiff ought not to ſue for Tithes in Kind. 1 *Vent.* 32.

Continuance.

(A)

Of Pleas after the laſt Continuance. See *Diſcontinuance.*

1. CASE *for Words*, the Defendant pleaded an Agreement between them after the laſt Continuance, and ſo prayed Judgment *Si* at the Enqueſt; adjudged an ill Plea, for he ought to have concluded in Bar, *viz.* Judgment *ſi actio, &c.* and ſo in all Pleas after the laſt Continuance; and thereupon Judgment was given for the Plaintiff, for the Defendant's Plea was a Confeſſion of the Matter for which the Plaintiff had declared. *Cro. Eliz.* 49. *Cockaine* verſus *Witnam.*

2. Debt upon four Bonds to pay Money, three of the Actions were tried in *London* in *Trinity-Term*, and the *Fourth* was tried at *Lent Aſſiſes* afterwards, and there was not any Continuance from *Trinity-Term to Lent Aſſiſes*, yet Judgment was given for the Plaintiff. *Paſch.* 17 *Jac.* 2 *Cro.* 528. *Smith* verſus *Bowyer.*

3. In Treſpaſs, *&c.* after a Plea, Replication, and Demurrer, the Entry was, *Curia adviſari vult* from *Hilary-Term* to *Trinity-Term*, leaving out *Eaſter-Term*; it was inſiſted, that this might well be done, becauſe 'tis the Act of the Court, and they may take ſo much Time to adviſe before they give their Judgment: But *per Curiam*, for that very Reaſon a Term cannot be left out, becauſe 'tis a Delay of Juſtice, and contrary to *Magna Charta, nulli negabimus juſtitiam, &c.* now the Terms were inſtituted in the Reign of the *Saxon King Edgar*, on Purpoſe to diſtribute Juſtice, and therefore to omit a Term in the Continuances, is a Delay of Juſtice. 2 *Roll. Rep.* 442. *Johnſon* verſus *Norton.*

4. A Day was appointed to argue a Special Verdict in *Ejectment*, and before that Day came, the Defendant got a *Releaſe* from the caſual Ejector of all Ejectments, *&c.* and when the Cauſe came to be argued, he pleaded this *Releaſe* after the laſt Continuance: *Et per Curiam*, this was held good, but 'tis otherwiſe in a *Releaſe*, between the Day of *Niſi prius and Day in Bank*, becauſe he had no Day in Court; but in the Principal Caſe, *Curia adviſari vult*, &c. *idem dies datus eſt partibus*, &c. 2 *Roll. Rep.* 467. *Wyes* verſus *Banbury.*

5. *Scire facias* on a Judgment, the Writ was *Teſte* 25 *Aprilis*, 6 *Will.* 3. returnable in *Trinity-Term*, 6 *Will.* 3. but the Entry on Record was, *Trinity*, 7 *Will.* 3. and no *Continuance* from *Trinity* 6. to *Trinity* 7 *Will.* 3. the Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; it was objected againſt him, that the Cauſe was out of Court for Want of theſe Continuances, ſo that he could never have Judgment; but adjudged, that the *Plea-Roll* ſhall be amended, becauſe *Continuances*, *Eſſoins*, &c. are the Acts of the Court, and at Common Law they may * amend their own Acts, before Judgment, tho' in another Term, but their Judgments are only amendable in the ſame Term in which they are given, whereupon the Plea-Roll was amended

* 8 Rep. 156. *b.* 2 Cro. 211.

mended thus, *Memorand' quod alias ſcilicet Termino Sanctæ Trinitatis Anno ſexto*, &c. and ſo the Continuances entered down to *Trinity* 7. 3 *Lev.* 431. *Chambers* verſus *Moor.*

Contribution. See **Bridges.**

Conveyance.

(A)

Of proper and improper Words in Conveyances, and of Defects in the Execution of them. See *Feoffment.* (C) 15.

1. WHere a Conveyance is by *Bargain and Sale*, no *Uſe* is raiſed, unleſs the *Conſideration is for Money*, or the Eſtate be executed, where the Conveyance is by *Covenant to ſtand ſeiſed*, no Uſe is raiſed if Money is the Conſideration; but if the Father, in Conſideration of natural Affection, and likewiſe of Money paid by the Son, covenanted to ſtand ſeiſed, and the Deed is not enrolled, yet the *Uſe* ſhall ariſe as a *Covenant to ſtand ſeiſed*; ſo if the Father, in Conſideration of natural Affection, and of 100 *l.* paid by the Son, convey Lands to him, with a *Letter of Attorney in the Deed to make Livery*, and the Deed is enrolled, there the Son may take either by the *Enrollment* or the *Livery*, which is firſt executed. 7 *Rep.* 40. In *Bedell*'s Caſe. *Winch* 60. *S. C. Plow. Com.* 305. *S. P.*

2. The Word *Grant* is the moſt material Word to paſs a *Reverſion*, and yet where a Man *aliened, bargained, and ſold* a Reverſion, leaving out the Word *Grant*; adjudged, that the Reverſion did paſs. 2 *Cro.* 210. *Adams* verſus *Steer.*

3. One covenanted in Conſideration of a Marriage, that the Land ſhould *deſcend, remain or come* to his Daughter; adjudged, that no Uſe ſhall ariſe by theſe Words, becauſe of the Incertainty of his Intention, how his Daughter ſhould take. *Moor pl.* 267.

2 Cro. 4. The Words were, *give, grant, alien, releaſe and confirm*, and there was a ſpecial Clauſe of Warranty in the Deed, and it was enrolled within ſix Months, this was adjudged as a Covenant to ſtand ſeiſed; tho', if there had been a Letter of Attorney in it to give Livery, it had been otherwiſe. See *pl.* 9, 25.

5. Two Brothers, the eldeſt did *give, grant, and releaſe* to the other, there being no Conſideration mentioned in the Releaſe, nor any Livery made. *Plowden* would have averred, that the
* Pl. 4. Deed was made for *brotherly Love*, and ſo would raiſe an Uſe. *Vivian*'s Caſe; but in * *Debb and Peplewell*'s, 'tis ſaid, the Land was enjoyed againſt the Releaſe.

6. The Father, in Conſideration of Love to his Son, and for natural Affection, *bargained, ſold, gave, granted, and confirmed* to his Son, and his Heirs, certain Lands, *&c.* this Deed was enrolled; yet adjudged, that the Lands did not paſs, becauſe there was no *Money* paid, or the Eſtate executed. 2 *Cro.* 127. *Osborne* verſus *Bradſhaw.*

7. Where the Father did *give*, or *bargained and ſold* Lands to his Son; adjudged, this ſhall not amount to a Covenant to ſtand for Want of apt and proper Words. *Cro. Car.* 394. *Ward* verſus *Lambert.*

8. *The Father*, by Deed between him and his Son of the one Part, and *T. P.* and *R. W.* of the other Part, in Conſideration of natural Love, did *give, grant, and enfeoff*, to the ſaid *T. P.* and *R. W. &c.* to the Uſe of himſelf for Life, Remainder to his Son in Tail, and there was no Execution of this Deed, otherwiſe than by *Sealing and Delivering it*; adjudged, that it was void, and that no Uſe did ariſe, becauſe the Uſe was to ariſe out of the Eſtate of *T. P.* and *R. W.* who took no Eſtate by this Deed, for Want of due Execution of it. *Sid.* 25. *Hore* verſus *Dix*,
* Feoffment. (C) 15. and ſo where the Father did *give, grant, and confirm* Lands to his Son, *&c.* adjudged, that this ſhould not enure as a Covenant to ſtand ſeiſed, becauſe the Deed was void in the Frame of it. * *March* 50. *Pitfeild* verſus *Peirce.* See *Cheſter* verſus *Willan.*

1 Vent. 137. 2 Lev. 9. S. C. 9. In Treſpaſs, the Caſe upon the Pleadings was thus, the *Father* did *give, grant, bargain, ſell, alien, enfeoff, and confirm* his Lands to his *Daughter*; adjudged, that tho' theſe were all Words of a Conveyance at Common Law, yet they ſhall amount to a *Covenant to ſtand ſeiſed*, &c. 1 *Mod.* 175. *Croſſing* verſus *Scudamore.* 2 *Vent.* 318. *S. P.* 3 *Lev.* 372. *S. P.* and affirmed in Error in the Exchequer-Chamber. See *Pitfeild* verſus *Peirce*, *pl.* 8. See *pl.* 4, 23, 25.

10. Upon a Trial at Bar in an Ejectment, the Caſe was, that *Henry Crawley*, 6 *Novemb.* 1645, made a Conveyance to *T. P.* in Fee, and levies a Fine to the ſame Uſe, but without any Conſideration afterwards 13 *March* 1645, he covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his eldeſt Son in Tail (who was now Plaintiff) and levies a Fine accordingly; about eight Years afterwards, he and his Wife and *T. P.* join in a voluntary Conveyance to *Godfrey*, who deviſed theſe Lands to be ſold by his Executor, and died, and about four Years afterwards, the Executor ſold them to *Skinner* for 2000 *l.* adjudged, that tho' *Skinner* paid a valuable

Conſideration, yet the Eſtate to *Godfrey* being voluntary, under whom *Skinner* claimed, if the firſt Conveyance, made 6 *Novemb.* 1645, was not good, then the Son had a good Title, and *Skinner* had none; but if that Conveyance was good, that *Skinner* had a Title. *Raym.* 25. *Eden* verſus *Chalke.*

11. Grant of a Rent-charge to commence *after the Death of Ann Greaves or Tho. Greaves*; and there was a Clauſe in the Deed, that if the Rent be behind, *&c.* it ſhould be lawful for the Grantee to diſtrain at any Time during the *joint Lives of the ſaid Ann and Thomas*; now it was impoſſible by this Grant, that the Rent ſhould be in arrear *during their joint Lives*, becauſe it was not to commence till *after the Death of one of them*, and therefore thoſe Words were rejected. *Vaugh.* 175.

12. In Ejectment, the Caſe was, the Mother for divers Conſiderations, and for and in Conſideration of 20 *l.* paid, did by a Deed, entituled, *Articles of Agreement, demiſe, grant, bargain, aſſign, and ſet over* certain Lands to her Son and his Heirs for ever, and ſhe enjoyed the ſame Lands during her Life; adjudged, that this ſhall not amount to a *Covenant to ſtand ſeiſed*, becauſe the Agreement was by *Articles*, which are only preparatory to a Conveyance intended to be hereafter. 1 *Lev.* 55. *Foſter* verſus *Foſter.* See 2 *Lev.* 226, 314. See *March* 50. Sid. 82. Raym. 43.

13. The Husband covenanted to ſtand ſeiſed in Conſideration of Marriage, to the Uſe of himſelf for Life, Remainder to his *Wife* for Life, Remainder to his own right Heirs; *Proviſo*, that he might make Leaſes generally, and accordingly he made a Leaſe to the Defendant, rendring Rent, and died, and the Wife brought an Action of Debt for the Rent, and had a Verdict, but could not get Judgment, becauſe the Power *being general* to make Leaſes, no Uſe can ariſe upon the Covenant to ſtand ſeiſed, and if ſo, the Leaſe is void, and then no Rent is due. 1 *Lev.* 30. *Dorothy Chutes*'s Caſe.

14. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he had promiſed to pay 700 *l.* to the Defendant, he promiſed to Seal two Deeds for the Conveyance of a Manor with Warranty, *according to the Draughts agreed on between them*, and aſſigned the Breach, that tho' he had tendered him two Inſtruments in Writing, according to the Draughts, and required him to Seal them, yet he had not done it, *&c.* after a Verdict for the Plaintiff, it was inſiſted in Arreſt of Judgment, that the Declaration was ill, for that the Plaintiff ſhould produce the Deeds to the Court, that they might judge of them; beſides, he did not ſhew, that he tendered *Wax, Pen*, and *Ink*, and that the Requeſt was made, not at the ſame Time with the Tender; but adjudged, that where the Deeds are agreed on before, they need not be produced in Court; that the Plaintiff need not tender any *Wax, &c.* becauſe the Defendant had not taken upon him to convey, and that the Requeſt after the Tender is a better Way, becauſe he hath Time to conſider, that where Conveyances are agreed in Writing, and to be executed according to that Agreement, the Defendant is to do it at his Peril, and there needs no Tender in ſuch Caſe: But if one is to Seal a Conveyance generally, there the Counſel of the Purchaſer is intended to draw it, and then he ought to tender it to the Vendor. 1 *Lev.* 44. *Webb* verſus *Bethel.*

15. Leſſee for Years *remiſed, releaſed, diſcharged*, and for ever *quit claimed* to him in Reverſion; the Queſtion was, whether it was a good *Releaſe* or *Surrender* of the Term; 'tis true, if it had been by *Tenant for Life*, it had not been good, for 'tis void by Way of *Releaſe*, and not good by Way of *Surrender*, becauſe it Wants apt and proper Words for ſuch Conveyance; but a Leaſe for Years, conſiſting only in *Contract*, may be ſurrendered by the Word *Diſcharge*, to which the Court inclined. 1 *Lev.* 145. *Maſon* verſus *Tredway.*

16. In a Special Verdict in Ejectment, the Caſe was, the Father being ſeiſed in Fee, died ſeiſed, leaving *Henry* his Son and Heir, and one Daughter, to whom he gave 100 *l.* for her Portion; the Widow married one *Senhouſe*, and then by an Indenture made between him and his Wife, and *Henry* the Son, in which there were mutual Covenants, *Henry* did covenant, that if he died without Iſſue, *He does give and grant the Lands to her* (his Mother) *and her Heirs*, he afterwards died without Iſſue, and his Siſter brought this Ejectment; the Queſtion was, whether this laſt *Covenant and Grant*, ſhall amount to a *Covenant to ſtand ſeiſed*, ſo as to paſs the Eſtate to his Mother; and adjudged, that it ſhould; for where the Intent appears to paſs an Eſtate, but the Conveyance is defective, it ſhall be ſupplied by *Way of Uſe* to fulfil the Intent, and in this Caſe it plainly appears, that the Son intended his Mother ſhould have the Eſtate, if he died without Iſſue. 2 *Lev.* 225. *Coltman* verſus *Senhouſe.* See *Liſle* verſus *Grey.* Jones 105.

17. So where the Words were, *I give and grant* a Rent-charge to my Couſin, and his Heirs, theſe are Words of Conveyance at Common Law; yet adjudged, they ſhall enure as a Covenant to ſtand ſeiſed. 3 *Lev.* 370. *Oſſman* verſus *Sheafe.* *Poſtea pl.* 29. *S. C.*

18. So where the *Son* did *give and grant* Lands to his *Mother*, and her Heirs, tho' this was a defective Conveyance at Common Law, yet it was adjudged good by Way of *Uſe* to ſupport the Intention of the Donor, and therefore by thoſe Words an *Uſe* did ariſe to the Mother by Way of Covenant to ſtand ſeiſed. 2 *Lev.* 225. *Coleman* verſus *Senhouſe.* T. Jones 103.

19. A Grant of a *Rent-charge*, without *Attornment or Enrolment*, cannot enure as a Grant, but it ſhall operate as a Covenant to ſtand ſeiſed, *&c.* ſo adjudged in the Caſe of *Lade* verſus *Baker.* 2 *Vent.* 260. See *pl.* 25. *S. C.* 3 Lev. 29. 4 Mod. 149.

20. So a *Feoffment* was made without *Livery and Seiſin*, but it being in Conſideration of a *Marriage* to be had, *&c.* adjudged, that it did enure as a Covenant to ſtand ſeiſed. 2 *Lev.* 213. *Walker* verſus *Hall.*

21. Tenant

21. Tenant in Fee, in Conſideration of this *Marriage*, *&c.* did *covenant*, *grant and agree*, *all that Meſſuage* to the Uſe of himſelf for Life, then to his Wife for Life, for her Jointure, then to their firſt Son in Tail Male, *&c.* now by thoſe Words it appeared, that the Husband intended ſome Benefit for his Wife, therefore the Court *ſupplied other Words* to make the Deed ſenſible, (*viz.*) *He covenanted, granted and agreed all that Meſſuage, to be* to the Uſe of himſelf for Life, *&c.* 1 *Lutw.* 782. *Sleigh* verſus *Metham.*

4 Mod. 149. S. C.

22. In *Replevin*, the Defendant avowed, for that *Richard Marſh* being ſeiſed in Fee, did, in Conſideration of *natural Love to Nicholas his Son, and* 5 *l.* to be yearly paid to the ſaid *Richard*, during his Life, *give and grant* to the ſaid *Nicholas*, and his Heirs, *&c.* and then pleads, that the ſaid Grant, *nullo attornamento vel alia executione* being thereon made, beſides the Sealing and Delivery thereof, did operate *by Way of Covenant, to ſtand* ſeiſed to the Uſes therein mentioned, by Reaſon whereof, and of the Statute for transferring Uſes into Poſſeſſion, the ſaid *Nicholas* was and is ſeiſed of the Premiſſes in Fee, and for 4 *l.* Arrears of Rent, the Defendant, as Bailiff to the ſaid *Nicholas*, made Conuſance; and upon Demurrer to this Plea it was inſiſted, that it was ill, becauſe here was a *Grant* pleaded from *Richard* to *Nicholas* his Son, without any *Attornment* or *Enrollment*, and it plainly appearing, that it was intended to enure as a *Grant*, it ſhall not work as a *Covenant to ſtand ſeiſed*; but adjudged, that here being no Execution of this Deed to make it work as a *Grant*, it ſhall operate as a *Covenant* to ſtand ſeiſed, but upon a Writ of Error brought in *B. R.* this Judgment was reverſed, becauſe this Grant from Father to Son was pleaded as a *Grant*, but without any *Attornment*, and the Averment in the Plea, that it operated as a Covenant to ſtand ſeiſed was impertinent, for it ought to have been poſitively pleaded, that the Father did Covenant to ſtand ſeiſed to the Uſe of the Avowant, *&c.* 2 *Vent.* 149. *Lade* verſus *Baker* 260, 267. *S. C.* See 1 *Mod.* 178, where a Grant of a Rent to his Kinſman for Life, there being no Attornment, it operated as a Covenant to ſtand ſeiſed. See *pl.* 19. *S. P.*

23. In Ejectment the Caſe upon the Pleadings, and a Special Verdict, was thus, *William Lewis*, being ſeiſed of a Reverſion in Fee, did, by Deed-Poll, in Conſideration of *natural Love* and Affection to his Wife, and to *Rob. Lewis* his Son, and *Ellen* his Daughter, *give, grant, and confirm* unto *Rob. Lewis*, *habendum* to him and his Heirs, to *the Uſes* following, (*viz.*) to *the Uſe* of himſelf for Life, then to *the Uſe* of his Wife for Life, then *to the Uſe* of *Robert*, and the Heirs of his Body, and for Want of ſuch Iſſue to the *Uſe of Ellen*, and the Heirs of her Body, *&c.* *William Lewis* and his Wife died, *Robert* deviſed the Eſtate to the Plaintiff, and died without Iſſue, *Ellen* entered and was poſſeſſed, and claimed the Lands by this Deed, in which there was a Warranty, but no Execution of it, either by *Attornment* or *Enrollment*, or otherwiſe; the Queſtion in the Court of Exchequer was, whether this Deed ſhould operate as a *Covenant to ſtand ſeiſed*, or be void, and adjudged there, that it ſhould operate as a Covenant to ſtand ſeiſed; and upon a Writ of Error brought upon the Statute of *Ed.* 3. before the Commiſſioners appointed by that Statute, to ſit upon Writs of Error given in the Court of Exchequer, that Judgment was reverſed; upon which Judgment of Reverſal a Writ of Error was brought in *Parliament*, where it was argued, that this ſhall enure as a *Covenant to ſtand ſeiſed*, that Words proper to a Conveyance are not abſolutely neceſſary, and that this may ſo enure, tho' the Word *Covenant* is not in the Deed; and this appears in *Bedel's* Caſe, 7 *Rep.* and in *Fox's* Caſe, 8 *Rep. ut res magis valeat:* But it was argued on the other Side, and ſo adjudged, that no Uſe ariſes by this Deed, becauſe the *Intention* of it was to transfer the Eſtate to the Son, and that the *Uſes* ſhould ariſe out of the Eſtate ſo transferred, and therefore this differs from *Debb* and *Peplewell's* Caſe, and from *Croſſing* and *Scudamore's* Caſe, for in thoſe Caſes *no Uſes are limited upon the Eſtate intended to be conveyed*; but in the one an *Intention* only to convey an Eſtate to the Husdand, and in the other an *Intention* to convey an Eſtate to the Daughter; and becauſe, for Want of due Execution of thoſe Conveyances, the Eſtate could not paſs *at Law*, therefore it was adjudged to paſs by raiſing of an Uſe by a Covenant to ſtand ſeiſed. 2 *Vent.* 318. *Samon* verſus *Jones.*

Sid. 467. 1 Mod. 67.

24. In Covenant, the Plaintiff declared, that by Articles of Agreement, the Defendant covenanted to convey to the Plaintiff certain Lands in *Bowmere*, *&c.* by ſuch Conveyance as his (the Plaintiff's) Counſel ſhould adviſe, and that he, by the Advice of his Counſel, did tender to the Defendant a Conveyance by Leaſe and Releaſe, and he ſet forth both *in hæc verba*, which the Defendant refuſed to ſeal; the Defendant pleads, that the Plaintiff did not tender ſuch Conveyance, upon which they were at Iſſue, and the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Conveyance tendered was not ſuch as was warranted by the Articles, for thoſe were to make ſuch reaſonable Conveyance as Counſel ſhould adviſe; but in this Conveyance there was a Covenant againſt the Acts of a Stranger, and a general Warranty, which is unreaſonable; beſides, the Articles were to make a Conveyance of the Lands in *Bowmere*, and the Conveyance tendered, was not only of his Lands in *Bowmere*, but of all other his Lands; the Judgment was ſtayed. *Raym.* 190. *Laſſels* verſus *Chatterton.* See 2 *Cro.* 571. * *Coles* verſus *Kinder.*

* 2 Roll. Rep. 192. S. C.

25. A Settlement was made as followeth, (*viz.*) In Caſe I die without Iſſue, then I *give, grant, and confirm my Lands* to my Kinſman *S. S.* to the Uſe of my ſelf for Life, and after my Deceaſe, to him and the Heirs of his Body: The Queſtion was, whether this did amount to a *Covenant to ſtand ſeiſed*, ſo as to raiſe an Uſe to *S. S. &c.* it was objected, that it did not, becauſe Uſes are created by the *Intention* of the Parties; but he who made this Settlement could never intend, but that the Eſtate ſhould paſs at Common Law by thoſe Words *Grant and Confirm*, and if ſo, then it could not paſs by Way of Uſe, and indeed not at all, becauſe there being no Livery

and Seiſin or Attornment, therefore nothing will paſs to *S. S.* it could not paſs by Bargain and Sale, becauſe that is only where a Recompence is on each Side to make the Contract good: *Sed per Curiam*, this ſhall amount to a *Covenant to ſtand ſeiſed*, tho' the * formal Words to make it ſo are wanting. 3 *Mod.* 237. *Harriſon* verſus *Auſtin.*

* *See* Fox's *Caſe in Title* Bargain and Sale.

26. Covenant, *&c.* wherein the Caſe was, that *T. A.* being ſeiſed of a Piece of Land in Fee, made a Leaſe thereof to *I. G.* for ſixty-one Years, in Conſideration that he ſhould build fifteen Houſes, and pay 100 *l. per Annum* Rent; that the ſaid *T. A.* being ſeiſed of the *Reverſion*, *&c.* granted it to *Sir Philip Meadows in Fee*, who, by Leaſe and Releaſe, *bargained*, *ſold*, *remiſed*, *releaſed*, and *confirmed the Reverſion* to the Plaintiff and his Heirs, who, by Vertue of the ſaid Bargain and Sale, and *Releaſe*, was ſeiſed, *&c.* upon Demurrer to this Declaration it was objected, that by the Words *Remiſe*, *Releaſe* and *Confirm*, this Declaration was double, and the Defendant could not tell which to anſwer, and that it ſhould be only, that he *releaſed the Reverſion*; but adjudged, that where many Words have the ſame Signification, the Declaration ſhall not be double, as where the Defendant pleaded, that the Earl of *S. dedit feoffavit*, *barganizavit*, *vendidit & confirmavit* to him a Foreſt, *&c.* 1 *Lutw.* 351. *Lamplugh* verſus *Shires.*

27. Debt for 315 *l.* upon Articles of Agreement, (viz.) *Memorandum, on the 14th Day of February 1687. Imprimis, 'tis covenanted by T. H. and John Smith, Whereas T. H. hath covenanted by Vertue of theſe Preſents, concluded and articled all his Lands to I. S. and his Heirs. Item, for the Sum of* 315 l. *the one Half to be paid the 2d of February, &c. Item, the ſaid I. S. then to enter, the other Half to be paid the 2d of February following*; the Defendant pleaded, that the Plaintiff had not made a good Conveyance to him, nor permitted him to enter; and upon Demurrer to this Plea it was objected, that the Words were inſenſible, and did not oblige the Plaintiff to convey, (viz.) *T. H. by Vertue of theſe Preſents, hath covenanted his Lands to I. S. and his Heirs*; beſides, the Word *Whereas*, in the Beginning of the Articles, made the Whole to be only a Recital; but adjudged, the Plaintiff was obliged to convey, becauſe the Defendant was to pay the Value of the Lands, and to enter on ſuch a Day, which he could not lawfully do without a Conveyance; and as for the Word *Whereas*, it was impertinent, and ſhall be therefore rejected. 1 *Lutw.* 493. *Hilton* verſus *Smith.*

28. In Replevin, the Caſe upon the Pleadings was upon a Deed, the Subſtance whereof was, *To all Chriſtian People*, &c. *Know ye, that I Mary Waller, for the Love which I bear to my Kinſman Sir William Brodney, do* Give and Grant, *to him and his Heirs, my Annuity of* 14 *l. per Annum*; and upon Demurrer the Queſtion was, whether this Deed ſhould operate as a *Covenant to ſtand ſeiſed*, it was objected, that it could not, becauſe it plainly appears, that the Party intended it ſhould operate as a *Grant*, and not as an *Uſe*, by the very Words in the Deed, (*viz.*) I *Give and Grant*, &c. which are Words proper for a Conveyance at Common Law; but the better Opinion was, that tho' ſome Books do Warrant that Conveyances ſhall operate according to the Words, yet of late, the Judges have a greater Conſideration of the Paſſing the Eſtate, than the Manner by which 'tis paſſed, and therefore gave Judgment for the Defendant in this Caſe, that the Deed ſhall operate as a Covenant to ſtand ſeiſed. 2 *Lutw.* 1209. *Oſman* verſus *Sheafe.* 3 Lev. 370.

Conuſance of Pleas. See **Pleas of Privilege.**

Coparceners.

(A)

Actions by them, good, and not. See *Jointenants.*

1. THREE *Coparceners*, one *married* and died, the other Two, and the Heir of the dead Siſter brought an Action of Waſte, without naming the *Husband* of the dead Siſter, who was *Tenant by the Curteſy*, and held good. *Lewkenor* verſus *Ford. Godb.* 114. 1 Leon. 48.

2. *In Ejectment* upon a Leaſe made by two Coparceners, in which the Plaintiff declared *quod demiſerunt*, it was objected, that this was ill, becauſe the Leaſe was ſeveral by their reſpective Moieties, and therefore it could not be ſaid *quod demiſerunt*, and this was held a good Exception. *Moor* 682. *Milliner* verſus *Robinſon.*

3. Debt upon Bond againſt three Coheirs, two of them confeſs Aſſets, and the Third confeſſed a little Lands; the Plaintiff replied, that the Third had more Lands, upon which they were at Iſſue, and at the Trial the Plaintiff was *Nonſuit*; and now he moved for Judgment againſt the other Two, for ſo much as they had confeſſed, and the Third offered likewiſe, that Judgment might be entered againſt her for what ſhe had confeſſed; but adjudged it could not be done, be-

cauſe the Plaintiff being *Nonſuit* as to one, is ſo to all them, and the Conſent of the Third to have Judgment entered, ſhall not bind the other Two, nor even herſelf, without a new Original; the Plaintiff ought to have taken his Judgment againſt the other Two at firſt, but he having omitted it, 'tis too late now for a new Original, becauſe the Land is ſold. *Sid.* 378. *Blake*'s Caſe.

4. *In Replevin*, the Caſe upon the Pleadings was, that *Simon Bennet* made a Leaſe for Years of Lands to one *Gueſlin*, the Reverſion deſcended to his two Daughters, *Grace*, who married *John Bennet*, and to the *Counteſs of Salisbury*, who was his other Daughter; and in Replevin, the Defendant made Cogniſance, as Bailiff to one of them; and upon Demurrer it was held ill, becauſe it ſhould have been as Bailiff to both. *Mich.* 7 *W.* 3, *B. R. Page* verſus *Stedman.*

Copyhold.

Acts of Parliament extending to Copyhold, and not. (A)
Acceptance of Rent, or other Thing determining the Copyhold, or diſpenſing with the Forfeiture. (B)
Admittances in general, and whether they are good. (C)
Copyhold, whether it can be now made, and what deſtroys it. (D)
Amerciaments and Fines. (E)
Court-Baron. (F)
Cuſtoms of the Manors and Grants of Copyholds, good. (G)
Cuſtoms of Manors, and Grants of Copyholds, not good. (H)
Entailing Copyholds. (I)
Forfeiture of Copyhold, or not, for not appearing at Court, *&c.* (K)
Forfeiture, or not, for refuſing to pay Fines or Rents. (L)
Forfeiture, or not, for making *Leaſes* without Licence. (M)
Fines and Recoveries of Copyholds. (O)
Forfeiture, and other Determination of Copyhold Eſtates, and who may enter, and what Actions lie againſt them for Waſte. (P)
Forfeiture, *&c.* what ſhall not be a Forfeiture. (Q)
Free Bench or Widows Eſtate. (R)
Heirs to Copyholds and *Heriots*, *&c.* (S)
Husband and Wife Copyhold Tenants. (T)
Infants Copyholders. (V)
Jointenants Copyholders. (W)
Leet, *&c.* the Court. (X)
Leaſes by Copyholders. (Y)
Manors, *Lords* thereof, what Acts they may do, *&c.* (Z)
Manors in general. (a)
Of *Manors*, *&c.* (b)
Pleadings concerning Copyholders. (c)(m)
Preſcription by Copyholders. (d)
Preſentment. (e)
Steward of the Court and his Deputy-Steward. (f)
Surrender, where good. (g)
Surrender, what paſſes by it, and what not. (h)
Surrender to the Uſe of the Will, and to other Uſes, not good, and when not neceſſary. (i)
Surrendree, Caſes concerning him, *&c.* (k)
Trees and Woods growing on Copyholds. (l)
Pleading, By-Laws, good, and not good. (m)

(A)

Where Acts of Parliament extend to Copyhold Eſtates, where not.

See *Extinguiſhment. Guardian.* (A) 6. Poſtea (Y) 7. *Tithes.* (G) 11.

Moor 128. *Hardres 433.

1. WHERE an Act of Parliament alters the Tenure or Intereſt of the Eſtate, or other Thing in Prejudice of the Lord, or any of the Cuſtoms, in ſuch Caſe the * general Words in the Act ſhall not extend to the Eſtate, but when no Prejudice can be to the Lord, or to the Tenant, then 'tis otherwiſe. 3 *Rep.* 7. *Heydon*'s Caſe.

2. If he who hath a *pretended Title* to a *Copyhold*, bargains and ſells it, 'tis within the Statute 32 *H.* 8. Of *Maintenance* in Buying pretended Titles, and 'tis comprehended under the Words

Right and Title, becauſe great Part of the Lands in *England* are Copyhold, and the Intention of the Law-Makers was to include them, to avoid *Maintenance*. 4 *Rep.* in *Kite* and *Quinton*'s Caſe.

3. A Copyholder being convicted of *Recuſancy*, a Commiſſion was awarded to enquire of his Goods and Lands, and amongſt the reſt ſome *Copyhold* Lands were ſeiſed to pay the *Forfeiture of* 20 *l. per Month*, whereupon he came in, and by Way of Plea ſet forth, that ſuch Lands were *Copyhold*, and prayed an *Amoveas manum*; and upon the Demurrer of the Attorney-General it was adjudged, that Copyhold Lands were not within the Words nor the Meaning of the Statute 29 *Eliz. Of Recuſancy*, by Reaſon of the Prejudice that might come to the Lord, who might loſe his Cuſtoms and Services, tho' he had committed no Offence. *Owen* 37. *Everard*'s Caſe. *Cro. Eliz. Suliard* verſus *Everard. S. P.*

4. Adjudged, that Copyholds are not within the Statute of *W.* 2. *De Donis*, *&c.* for if they were, then the Lord could not enter for a Forfeiture upon a Felony committed, but the Donor would, and the Services muſt be done to him and not to the Lord. *Paſch.* 35 *Eliz. Cro. Eliz. Pitts* verſus *Hockly.*

5. The Teſtator was ſeiſed of ſeveral Rents, iſſuing both out of Freehold and Copyhold Lands, and died ſeiſed; after his Death his Executor brought an Action of Debt for the Arrears due in the Life-time of his Teſtator; adjudged, that the Statute 32 *H.* 8. *did not extend to Arrears of Copyhold Rents*, therefore this Action would not lie for them; and as for the Arrears of *Freehold Rents*, the Action would not lie, becauſe the Plaintiff had not ſhewed, that the Tenants did *attorn* to his Teſtator. *Mich.* 6 *Jac.* 1 *Brownl.* 102. *See* Rent. (B) 8. *S. C.* Yelv. 135.

6. Adjudged, that a Copyhold Eſtate is not barred by a *Fine and Nonclaim*, according to the * Statute of Fines, and that *Leſſee for Years, in futuro*, is not barred by ſuch Fine. *Trin.* 2 *Jac. Noy* 23. *Mills* verſus *Bradley.* * 7 H. 7. c. 10, 24. 4 H. 7. cap. 24.

7. Tenant for Life, or for Years, of a Manor, and afterwards a Copyhold comes into his Hands, either by a Forfeiture, or by ſome other Determination of the Eſtate of the Copyholder, and then he becomes bound in a *Statute-Staple or Merchant*, and afterwards demiſes this Copyhold again to another, it ſhall be liable to this Statute in the Hands of the new Copyholder, becauſe it was once annex'd to the Freehold or Eſtate of the Lord, and chargeable in his Hands; but if a Copyholder himſelf is bound in a *Statute*, his Lands ſhall not be extended, becauſe he has only an Eſtate at Will. *Moor* 94.

8. Copyholder of Inheritance made a Leaſe for twenty-one Years, with Licence, and the Leſſee covenanted to erect a Pale on ſuch a Cloſe, and lay forty Load of Dung on the Land every Year, and to repair the Buildings; afterwards this Copyholder, who had made the aforeſaid Leaſe, ſurrendered his Lands to the Uſe of the Plaintiff and his Heirs, who was admitted, and brought an Action of Covenant againſt the Leſſee for not performing theſe Covenants; and the Queſtion was, whether the Plaintiff, who was a *Surrendree*, be ſuch an *Aſſignee* within the Meaning of the Statute 32 *H.* 8. as may maintain an Action of Debt or Covenant, and admitting that he is not within the Statute, then whether he may not maintain this Action at Common Law *as an Aſſignee*, where the Covenant is made by expreſs Words between the Leſſor and Leſſee, their Heirs and Aſſigns; the Caſe was not adjudged. *Cro. Car.* 17. *Plott* verſus *Plummer. Poſtea* (Y) 7. *S. C.*

9. A Copyhold of Inheritance was purchaſed, and about two Years afterwards, the Purchaſer being an Inn-keeper, became a *Bankrupt*; adjudged, that Copyhold Lands are within the Intent of the Statutes 13 *Eliz. and* 21 *Jac.* of *Bankrupts*, for thoſe Statutes in general Words make *all Lands, Tenements and Hereditaments* liable; but this Purchaſe being made long before the Copyholder became an Inn-keeper, and no Fraud being found in him, it was held, that his Lands were not ſubject to the Statutes. *Cro. Car.* 395, 458. *Criſp* verſus *Pratt.* March 34. W. Jones 437.

10. Upon a Bill in the Exchequer, the Caſe was, *Iſaac Pennington* was attainted of *High Treaſon* by the Act 12 *Car.* 2. and was at that Time ſeiſed of a Meſſuage of *forty-one Acres* of Land, *&c.* being *Copyhold*, held of the Manor of *Winfarthing* in *Norfolk*, of which the Defendant was Lord, that by the ſaid Statute the Forfeiture is given to the King of * *All Lands, Tenements and Hereditaments*, &c. which the Perſon attainted had on the 25*th Day of March* 1646, and that they ſhall be in the actual Poſſeſſion of the King, without Inquiſition found: *Proviſo*, that no Grants or Conveyances, *or Grants and Surrenders of Copyholds*, *&c.* had or made *before* 29 *September* 1659, by any Perſons attainted, *&c.* ſhall be impeached, *&c.* The Queſtion was, whether by the general Words of this Act of Parliament the Copyhold Lands are included, and ſo forfeited to the King, and whether the *Proviſo*, wherein Copyhold Lands are mentioned, adds any Force to the *general Words*; and adjudged, that it was not, for if the Eſtate ſhould be forfeited, the Copyhold would paſs by Letters Patents and not by Surrender; and it would be hard to conſtrue an Act of Parliament ſo as to deſtroy the Intereſt of the Lord of the Manor, an innocent Perſon; 'tis true, in * *Criſp and Pratt*'s Caſe, it was adjudged, that Copyhold Lands were included in the general Words of *All Lands, Tenements, and Hereditaments*, in the Act of 21 *Jac.* concerning *Bankrupts*, but the Reaſon was, becauſe Copyholds are expreſly mentioned in the Statute 13 *Eliz.* concerning Bankrupts, and the Statute 21 *Jac.* being ſubſequent and explanatory, and a very beneficial Law, therefore Copyholds have been adjudged to be within thoſe ſubſequent Laws; beſides, the Lord of the Manor, in the Caſe of a Bankrupt Copyholder, can be at no Prejudice, becauſe the Aſſignee of the Commiſſioners is to be admitted, and to pay his Fine to him; and in this Caſe of Forfeiture the Lord ſhall have the actual Poſſeſſion of the Copyhold by Way of Eſcheat, after the Death of the Copyholder, and this *pro defectu hæredis*, becauſe his Blood is corrupted by the

* *See the* Lord Cornwallis's *Caſe.* Poſtea (P) 23.

* *See* pl. 9.

* Poſtea (Q) 11. the Attainder; but it may be a Queſtion, who ſhall have the Profits during his Life. *Hardres* 432. * *Duke of York* verſus *Sir John Marſham.* See *Lord Cornwallis*'s Caſe.

11. Copyholder ſurrendered his Lands to the Uſe of Husband and Wife, *and their Heirs lawfully begotten*, Remainder to *W. R.* in Fee; the Husband and Wife were admitted, and afterwards he died, and ſhe married again, and then ſhe and her Husband aliened the Lands; the Queſtion was, whether Copyholds are within the Statute 11 *H.* 7. *cap.* 20, and whether this was an Eſtate-tail, or not; it was inſiſted for the Plaintiff, that Copyholds were within this Statute, for it ought ſo to be conſtrued, that it may ſuppreſs the Miſchief, and advance the Remedy thereby provided, and that this is an Eſtate-tail, tho' the Word *Body* is omitted: But adjudged, that Copyholds are not within this Statute, for in Conſtruction of Statutes 'tis to be conſidered, what the Law-makers intended at the Time of the Making thereof; now, when this Statute was made, Copyholders were ſo little regarded, that they were reputed to be no more than *Tenants in Villenage*, or in the moſt beneficial Acceptation, but as *Tenants at Will*; beſides, they cannot be within this Statute, becauſe they cannot alien without the Licence of the Lord, ſo that the Sale is the Act of the Lord as well as of the Copyhold; and if he ſhould refuſe, the Tenant hath no Remedy, but in Chancery; 'tis true, Copyholders are comprehended in Statutes which are made for the publick Good, for which Reaſon they are not within the Statute *de Donis*, for that makes an Alteration of the * Tenure, and may be prejudicial to all Lords of Manors; they are not within the Statute 31 *H.* 8. *cap.* 1, *of Partitions*, nor within the Statute 29 *Eliz. of Recuſancy*; they are not within ſuch Statutes which give a Forfeiture to the King, or to any particular Perſon, but they are within *Penal Statutes*, which give a Forfeiture generally, becauſe in ſuch Caſe the Lord may enter; and as to the other Point, this is an Eſtate in Fee, and not in Tail; 'tis true, the Statute *de Donis* doth not mention the Word *Body*, but 'tis not the Statute, but the Common Law which makes that Word requiſite in Eſtates-tail; 'tis true likewiſe, that this would have been an Eſtate-tail in a Will, and that the Parties might intend to create an Eſtate-tail, but that will not do in the Caſe of a Surrender, becauſe 'tis not a Conveyance at Common Law. 2 *Sid.* 41, 73. *Harrington* verſus *Smith.*

* Cro. Car. 42. Bendl. 191. Poph. 33.

2 Lutw. 1181. S.C. *See* Hutt. 16, 17. S. P. 12. Adjudged, That a Copyholder is not within the Act 12 *Car.* 2. *cap.* 24, to diſpoſe the *Cuſtody of his Heir*, for it belongs to the Lord of the Manor, according to the Cuſtom; 'tis true, this is not *de jure*, for where there is no ſuch Cuſtom, then the next *of Kin* to whom the Lands cannot deſcend, ſhall have the Cuſtody of the Heir himſelf, and alſo of his Lands; but if there is ſuch a Cuſtom, it ſhall prevail againſt this Statute, for if it ſhould not, it might be prejudicial to ſeveral Lords of Manors. 3 *Lev.* 395. *Clench* verſus *Cudmore.* *Poſtea* Guardian. (A) 6. *S. C.*

4 Mod. 80. 1 Salk. 185. 13. Covenant, *&c.* in which the Plaintiff declared, that the Lord of the Manor of *Hackney* granted the Copyhold in Queſtion to one *H.* who, according to the Cuſtom of the Manor, made *a Leaſe of it* to the Defendant for twenty-one Years, in which the Leſſee covenanted to *repair*, *&c.* afterwards *H.* ſurrendered the Reverſion to another *H.* who ſurrendered to the Plaintiff, who brought this Action, and aſſigned the Breach in not Repairing after the Reverſion came to him; the Defendant pleaded, that before the Reverſion came to the Plaintiff, he (the Defendant) aſſigned his Leaſe to *Picks*, who entered and is poſſeſſed, of which the Plaintiff had Notice; and upon a Demurrer it was objected againſt the Plaintiff, that he being an Aſſignee of a Reverſion of a Copyhold, was not within the Statute * 32 *H.* 8. *cap.* 34. for he is not within the general Words, neither can a Copyholder be intended to be within the Act, becauſe of the Meanneſs of his Eſtate, and therefore the Statute made againſt Bankrupts expreſſes them in particular, which is very true, becauſe otherwiſe a Prejudice might ariſe to the Lord; but where no ſuch Prejudice can be, there they are comprehended under the general Words of *Lands*, *Tenements*, *and Hereditaments*; and *Hale* Ch. Juſt. held them to be within the Statute *de Donis.* 3 *Lev.* 326. *Glover* verſus *Cope.* *Poſtea* (k) 3. *S. C.*

* Antea 8.

(B)

Where the Acceptance of Rent, or other Thing determines the Copyhold, or diſpenſes with the Forfeiture. See Poſtea. (V) 1. (Z) per totum.

1 And. 191. S. C. Gouldsb. 34. S. C. 1. THE Steward granted the Copyhold Lands *in Fee*, afterwards the Lady of the Manor leaſed the ſame Lands to another *for twenty-one Years*, who aſſigned the ſaid Term to the Copyholder; adjudged, that by the Acceptance of the Term, which was his own Act, he had deſtroyed the Copyhold Eſtate. 2 *Rep.* 16. *Lane*'s Caſe. 1 *Leon.* 170. *S. C.* reported by the Name of *Smith* verſus *Lane.*

2. After a Copyholder had committed *Waſte*, the Lord *accepted the Rent*, yet he may enter for the Forfeiture, becauſe the Eſtate is immediately veſted in him. *Godb.* 47.

3. Copyholder made a *Leaſe for Years*, *without Licence*, which is a *Forfeiture* at Common Law; the Lord of the Manor, before any *Entry*, made a Leaſe of the Freehold of this very Copyhold; adjudged, that his Leſſee ſhall not take Advantage of the Forfeiture, but that the Leſſee of the Copyholder ſhall continue in his Eſtate, becauſe the Leaſe made by the Lord, before *Entry or Preſentment*, is in Nature of an Affirmance of the Leaſe made by the Copyholder. *Owen* 63. *Penn* verſus *Merrivall.*

4. A Copyholder committed a Forfeiture by making a Leaſe, and afterwards the Lord *accepted* the Rent, yet he is not concluded to enter for the Forfeiture, even before *Preſentment*, for the Land is veſted in him immediately, and the *Preſentment* is only to give him Notice that the Eſtate is forfeited, for the *Acceptance of the Rent* doth not diſpence with the Forfeiture, becauſe in Copyhold Caſes the Forfeiture incurs upon a Breach of a *Condition in Law*, which differs from a *Condition in Fact*, as where a Leaſe is made, upon Condition, that the Leſſee ſhall do no Waſte, yet if he afterwards commits Waſte, and the Leſſor accepts the Rent of the Leſſee, he diſpences with the Forfeiture; but 'tis not ſo in a Condition in Law. *Mich.* 29 *Eliz. Godb.* 47.

5. Husband and Wife were Copyholders to them and their Heirs; the Husband, in Conſideration of a Sum of Money which he paid to the Lord of the Manor, obtained an Eſtate of Freehold to him and his Wife, and the *Heirs of their two Bodies*; the Husband died, leaving Iſſue, the Wife entered and ſuffered a Common Recovery, and then the Heirs of the Husband entered by Vertue of the Statute 11 *H.* 7. *cap.* 20, adjudged, that their Entry was lawful, becauſe by the Acceptance of the new Eſtate the Copyhold was extinguiſhed. *Hill.* 26 *Eliz. Cro. Eliz.* 24. *Stockbridge*'s Caſe.

6. A Copyhold Meſſuage and Lands eſcheated to the Lord of the Manor, wherein the Copyholder had *Right of Common by Preſcription in ſixty Acres of Land*, Parcel of the Demeſnes of the Manor; the Lord *granted* this eſcheated Copyhold in Tail, with all *Commons to the ſaid Meſſuage or Tenement belonging, or in any wiſe appertaining*, or therewith uſed, *&c.* the Queſtion was, whether the Grantee ſhould have Common in theſe ſixty Acres; adjudged, that he ſhould, in the ſame Manner as the Copyholder had; for tho' the Right of Common was formerly by Preſcription, and the antient Copyhold is now deſtroyed by *Unity of Poſſeſſion* in the Lord, yet this ſhall enure as a new Grant of the Common. *Paſch.* 40 *Eliz. Cro. Eliz.* 794. *Worlidge* verſus *Kingſmill*. 2 And. 168. *So where A. had Common appertenant in the Lands of B. and afterwards B. made a Feoffment of the ſame Lands to A. who made a Leaſe thereof to B. with all Commons, &c. uſed with the ſaid Lands; now, tho' the old Common was extinguiſhed by the Feoffment, yet this is a good Grant of a new Common, and 'tis uſed therewith, tho' 'tis not the ſame Common.* Cro. Eliz. Bradſhaw *v.* Eyre 570. Unity of Poſſeſſion. (A) 7.

7. The Wife was a Copyholder for Life, her Husband upon one and the ſame Day made a Leaſe of the Land for one Year, excepting the laſt Day, and ſo from Year to Year, excepting the laſt Day; then he *ſurrendered* the Copyhold to the Lord, who leaſed it for forty Years; adjudged, that his *Acceptance of this Surrender*, not knowing the *Forfeiture*, did not diſpenſe with it, and that his Leſſee for forty Years had a good Title againſt the Leſſee of the Copyholder. *Cro. Car.* 233. *Matthews* verſus *Whetton*. *See* (M) 3. (P) 1. W. Jones 249.

8. In Ejectment, upon Evidence at a Trial at Bar, it was ruled, that a Lord *pro tempore* of a legal Title, tho' 'tis only *at Will*, if he admits a Copyholder after a Forfeiture committed, he hath *diſpenſed with the Forfeiture, not only as to himſelf, but as to him who is Lord in Reverſion, for he may make voluntary Grants. 1 *Lev.* 26. *Milfax* verſus *Baker*. See 4 *Rep.* 24. See *Poſtea* (P) 20. *S. C.* * *'Tis otherwiſe of a Lord by Wrong, or by Diſſeiſin.* 1 Lev. 26.

(C)

Of Admittances, where they are good, and of Admittances in general.

1. THE Admittance of *Tenant for Life*, is the Admittance of him *in Remainder*, but not to prejudice the Lord of his Fine; and the Reaſon is, becauſe the Remainder muſt veſt when the particular Eſtate veſts, or it never ſhall. *Goldſ.* 95. * *Kipping*'s Caſe. *Cro. Eliz.* 662. *Colchin* verſus *Colchin*. *S. P.* 1 *Leon.* 174. † *Bullen* verſus *Grant*. *S. P.* * Cro. Eliz. 504. S. C. † Cro. Eliz. 148. S. C.

2. Husband and Wife, Copyholders to them and the Heirs of the Husband, who died, and the Heir, in the Life-time of the Wife, *before he was* admitted, made a Surrender; adjudged, that it was good. *Cro. Eliz.* 662. *Colchin* verſus *Colchin*.

3. Copyholder in Fee ſurrendered to *B. S. for Life, Remainder to R. L. in Fee*; the Tenant *for Life was admitted*, and afterwards *he in Remainder* in Fee ſurrendered to the Uſe of *W. R.* in Fee, which Surrender the Lord accepted; and the ſaid *W. R.* was admitted to the Remainder; the Tenant for Life died; adjudged, that his Admittance was likewiſe the *Admittance of him in Remainder*, ſo as to veſt the Remainder in him; and when the Lord accepted the Surrender, he admitted him to have a Remainder. *Cro. Eliz.* 504. *Keping* verſus *Bunny*. *Poſtea* (L) 4. *S. C.* See *pl.* 24, 28. Moor 465. Gouldsb. 95.

4. A Copyholder ſurrendered into the Hands of two cuſtomary Tenants out of Court; adjudged, that before this Surrender is preſented, and the Surrendree admitted, the Heir at Law of the Surrenderor may receive the Profits, becauſe a Copyhold cannot be transferred from one to another, without a Surrender and Admittance; but if the Lord of the Manor takes Notice of a Surrender, and accepts the Rent due from the Tenant, as being admitted, tho' he was not admitted in Fact, yet this ſhall amount to an Admittance. *Godb.* 268. *Froſwell* verſus *Welch*. *Poſtea* (h) 9. *S. C.* 3 Bulſt. 214. 1 Roll. Rep. 411. S. C. 2 Cro. 403. S. C. Bridg. 49. S. C.

5. If a Lord of a Manor hath a wrongful and defeaſible Eſtate, he may admit either upon a Surrender or Deſcent, and 'tis good. 4 *Rep.* 24. *Rous* verſus *Archer* in *Pennifather*'s Caſe. *Poſtea pl.* 23. *S. C.* and 1 *Rep.* 140. *Chudleigh*'s Caſe, *Poph.* 71. *Moor* 112. *S. C.* 3 *Leon.* 239. 4 *Leon.* 9. 1 *Vent.* 360. *S. P.* Owen 27, 29.

6. A Copyholder of Inheritance had Iſſue two Daughters by two Venters, and died ſeiſed, after his Death both the Daughters entered, and took the Profits ſeveral Years; then the eldeſt Daughter died without Iſſue, and without being admitted, and afterwards the Youngeſt was admitted to the Whole, as ſole Heir to the Father; adjudged, that the Poſſeſſion of the Eldeſt, tho' * before Admittance, ſhall make her Siſter of the Half-Blood inheritable to the whole Copyhold-Land. 12 *Eliz. Dyer* 291. 4 *Rep.* 23. *S. P.*

* Poſtea 31.

7. The Heir may enter and bring an Action of Treſpaſs *before Admittance*, and ſo may his Heir, if he die before. 4 *Rep.* 24. *Clerke* verſus *Pennifather*. *Brown*'s Caſe. *S. P.* 21.

8. Where a Surrendree dieth before Admittance, his Heir ſhall be admitted. 4 *Rep.* 29. *Bunting* verſus *Lepingwell.*

Moor 271.

9. If ſuch Leſſee is ejected, he may bring an *Ejectione firmæ* without his Leſſor being admitted. 1 *Leon.* 100. *Rumney* verſus *Evers.*

See (S) 1. S. C.

10. Where a Copyholder hath Iſſue by two Venters and dieth, and then the eldeſt Son dieth before Admittance, the Iſſue of the whole Blood ſhall inherit; and if the Iſſue were Daughters by two Venters, and the eldeſt Siſter died before Admittance, her collateral Heir ſhall be inheritable. *Dyer* 291. 4 *Rep.* 21. *S. P. Brown*'s Caſe. *Poſtea pl.* 35.

11. The Heir of the Surrenderor ſhall take the Profits till the Surrendree is admitted, unleſs the Lord accept the Rent, which may amount to an Admittance. *Godb.* 269. *Treſwell* verſus *Welch.*

12. A Copyholder ſurrendered to the Uſe of *W. R.* and the Lord of the Manor, without any reaſonable Cauſe, refuſed to admit the Surrendree; adjudged, that he cannot enter without a Special Cuſtom to Warrant his Entry before Admittance, for till then the Surrenderor continueth in Poſſeſſion. *Cro. Eliz.* 349. *Berry* verſus *Green.*

13. A Copyholder ſurrendered into the Hands of the Lord to the Uſe of her *Son W. and his Heirs*, and at the next Court *W.* and *his Wife* were admitted to them and their Heirs; adjudged, the *Wife* had no Title, becauſe ſhe hath none by the Surrender. 4 *Rep.* 28. *Weſtwick*'s Caſe, and in *Bunting*'s Caſe.

Antea 8.

14. So where a Surrender was made out of Court to the Lord, to the Uſe of *M.* the Wife of his Son *Robert*, without ſaying for what Eſtate, and the Admittance was to the Wife *and Robert, and to the Heirs of Robert*; it was reſolved, that the Wife had only an Eſtate for Life by the Surrender, and the Admittance muſt be of the like Eſtate, and the Reverſion ſtill in the Surrenderor. 4 *Rep.* 29. *Bunting* verſus *Lepingwell.*

15. The Surrender was to the Uſe of a Stranger *for ever*, and he was admitted to him and *his Heirs*, ſuch an Admittance will give him a Fee. *Patſhall*'s Caſe. *Cro. Eliz.*

16. A Surrender was made to the Uſe of another and his Heirs, *upon Conditions, &c.* the Surrendree died, and his Daughters and Heirs were admitted, but *without any Condition*, and the Surrenderor releaſed to them all his Right; adjudged, that tho' the Admittance was not purſuant to the Surrender, yet the Releaſe had extinguiſhed all the Right of the Surrenderor, becauſe the Daughters were Copyholders in Poſſeſſion, by the Admittance of the Lord, who had his Fine; and the Releaſe of the cuſtomary Right did enure to them by Way of Extinguiſhment. * 4 *Rep.* 25. *Kite* verſus *Quinton.* 2 *Cro.* 101. *Whitton* verſus *Williams. S. P.* 2 *Cro.* 226. *Underhill* verſus *Kelſea. S. P. Godb.* 268. *S. C.*

* Poſtea (Q) 2. (Z) 2.

Cro. Eliz. 102.

17. The *Lord of a Manor* may *admit out of it*, but the *Steward* cannot, becauſe the Court muſt be held *infra Manerium*, but by Cuſtom the Court may be held out of the Manor, and then his Admittances are good. 4 *Rep.* 27. *Clifton* verſus *Molineux*, and 26, *Melwich*'s Caſe.

18. Where a Copyholder makes a Surrender to the Uſe of another, and the Lord admits the Surrendree, he is in by him who made the Surrender, and not by the Lord, for he hath only a cuſtomary Power to admit the Perſon *ſecundum formam & effectum ſurſum redditionis*, ſo that he is only an Inſtrument to make the Admittance. 4 *Rep. Taverner*'s Caſe.

1 Brownl. 143. S. C.

19. The Father being a Copyholder in Fee, ſurrendered to *W. R.* and his Heirs, who ſurrendered again to *L. R. for Life*, who was admitted, but *W. R.* who made the Surrender to *L. R.* for Life, was never admitted; the Father died, and his Son and Heir was admitted, and entered on the Tenant for Life, and he brought an Ejectment; adjudged, that the firſt Surrender made by the Father to *W. R.* was of no Effect till he ſhould be admitted, which being never done, his Surrender to *L. R.* for Life, is void, becauſe he had no Eſtate to ſurrender; and tho' his Surrendree was admitted, yet that ſhall not be an Admittance of the Surrenderor by Implication, but the Right remains ſtill in him, and by Conſequence ſhall deſcend to his Heir. *Yelv.* 144. *Wilſon* verſus *Weddall. Latch* 226. * *Cornwallis* verſus *Harwood. S. P. Poſtea* (P) 25. *S. P.*

Palm. 416. S. C.

2 Cro. 434. S. C.

20. *W. R.* was admitted, *habendum* to him and his *Wife* in Tail, Remainder over; this Admittance was good to the *Wife*, tho' ſhe was only named in the * *Habendum*, and not in the Premiſſes. *Popham* 125. *Brooke* verſus *Brooke. Poſtea* 9, 11. *S. C.* See *Poſtea* 40. *S. P.*

* *'Tis not ſo in Feoffments.*

4 Leon. 238. S. C. 2 Cro. 98. S. C.

21. A *Guardian in Socage* did, in his own Name, admit a Copyholder in Remainder for Life; and held good, for he hath a lawful Intereſt. *Godb.* 143. *Sapland* verſus *Ridler.* Owen 115. S. C.

22. Every one who hath a lawful Eſtate in a *Manor*, is *Dominus pro tempore*, and may grant Copyholds. 4 *Rep.* 23, in *Clerke* and *Pennifather*'s Caſe, as Tenant in Fee, or in Tail, Tenant in Dower or by the Curteſy, Tenant for Life or Years, Tenant by *Elegit* or Statute, or at Will, *&c.*

23. Tenant for the Life of another Man, continued in Poſſeſſion, and held the Eſtate after the Death of that Man, and granted Copies of Copyhold Lands; adjudged, that he was now become *Tenant at Sufferance*, for he firſt came in by the Agreement of the Party, and is therefore *Dominus pro tempore*, and if ſo, he is neither an Abator, Diſſeiſor, or Intruder, but hath ſuch an Intereſt, which by no Means can be reputed wrongful, and therefore Grants of Copies by him are good. *Owen* 29. * *Rous*'s Caſe. *Antea pl.* 5. *S. C. Moor* 236. that ſuch Grants and Admittances may be made upon Surrenders. * 2 Leon. 45. S. C. Cro. Eliz. 699. S. C.

24. In a Special Verdict in Ejectment, it was adjudged, that the Admittance of the *Tenant for Life*, is the Admittance of him *in Remainder* to a Copyhold Eſtate, for the Fine is entire, and when the Remainder comes to the Poſſeſſion, there is no new Fine due. *Trin.* 36 *Eliz. Moor* 358. *Dell* verſus *Higden*. See *pl.* 3. *S. P.* Cro. Eliz. 372. S. C. 4 Rep. 23. S. C.

25. So where a Deviſe was of a Copyhold for Years, Remainder over, and the Leſſee for Years was admitted, that is an Admittance of him in Remainder. 1 *Bulſt.* 42.

26. A Widow claimed her Free Bench, and the Steward refuſed to admit her, upon which ſhe brought an Ejectment, and held good, for if her Admittance had been neceſſary, ſhe did all in her Power to procure it, and in the Caſe of a Copyhold, that ſhall be an Admittance in Law. *Hutt.* 18. *Jorden* verſus *Stone*. *Poſtea* (R) 4. *S. C.*

27. A Copyholder having a Son about five Years old, ſurrendered, *&c.* that the Lord might grant *de novo* to the Uſe of himſelf for Life, and afterwards to the Uſe of his Wife, during the Nonage of his Son, and afterwards to the Uſe of his Son in Tail, and ſoon after died, before he was admitted, but his Widow was admitted accordingly, and married again, the ſecond Husband had the Eſtate during the Infancy of the Son, and need not be admitted, for he hath the ſame Eſtate to which the Wife was admitted. *Didicot*'s Caſe.

28. Where the *Tenant for Life* is admitted, that ſhall be an Admittance of him in *Remainder*. 4 *Rep.* 21. *Brown*'s Caſe. * 1 *Leon.* 174. *Bullen* verſus *Grant. S. P. Goldſ.* 95. *Kipping*'s Caſe. * Cro. Eliz. 148. S. C.

29. Copyholder of Inheritance ſurrendered to the Uſe of his Wife for Life, Remainder to *W. R.* his youngeſt Son in Fee, the Wife was admitted, but the Son would not; and afterwards, without being admitted, he ſurrendered to the Uſe of the Plaintiff, in the Life-time of his Mother; adjudged, that the Admittance of the Wife was the *Admittance of the Son in Remainder*, for ſhe being admitted to the particular Eſtate, the Remainder depends on that, and veſts without any other Admittance, for both make but one Eſtate. *Auncelme* verſus *Auncelme*. 2 *Cro.* 31, and 4 *Rep.* 23. *Fitz* verſus *Huckly*. * *Witch* verſus *Haskyns*. * Cro. Eliz. 441. S. C.

30. *The Deſcent* to an Heir, whoſe Anceſtor had a wrongful Title, ſhall not take away the Entry of the right Heir, who may enter without Admittance. 2 *Cro.* 26. *Joyner* verſus *Lambert.*

31. *In Ejectment*, upon Not guilty pleaded, a Special Verdict was found, that the Lands were Copyhold, Parcel of the Manor of *Flamſteed*, and deſcendable, *&c.* according to the Cuſtom of the Manor; the Cuſtom whereof was, that where a Man married a Woman *ſeiſed in Fee*, *ſecundum conſuetudinem Manerii* of cuſtomary Lands, he ſhould be *Tenant by the Curteſy* after the Death of his Wife, that *A.* who was a Copyholder, was ſeiſed in Fee, *&c.* who had Iſſue a Daughter, and died, that the Daughter married *Ralph Heydon*, that he in Right of his Wife entered and had Iſſue, who died, that the Wife afterwards died before any Admittance, and that the Husband entered after her Death, and made a Leaſe for Years to the Plaintiff; the Queſtion was, whether the Husband ſhould be *Tenant by the Curteſy where the Wife died before Admittance*; it was objected, that the Wife was not ſeiſed *ſecundum conſuetudinem* before *Admittance*, for the Cuſtom in ſuch Caſe is, that ſhe ſhall have Seiſin delivered by the Lord of the Manor; but the better Opinion was, that he ſhould be *Tenant by the Curteſy* notwithſtanding his Wife was *never admitted*, for * *poſſeſſio fratris*, by an Entry before any Admittance, had been adjudged good; and the Intent of an Admittance is only to entitle the Lord to thoſe Duties which belong to him, (*viz.*) to *Fealty*, *Homage*, *Relief*, *Rent*, and *Suit*, *&c.* but if the Lord will delay to admit a Copyholder, that ſhall not prejudice a third Perſon, ſuch as the Husband is in this Caſe. *Moor* 271. *Ever* verſus *Aſton*. 1 And. 192. *Antea 6. 4 Leon. 38. contr.

32. He may enter before Admittance, and make a Leaſe according to the Cuſtom. *Bullock* verſus *Dibly*. *Popham* 39. 2 *Cro.* 105. *S. C.* 1 *Bulſt.* 42. *Eylfe* verſus *Chopley*. *S. P. Poſtea* 35. *S. C.* Moor 596. Poſtea (T) 2.

33. Where a Copyhold of Inheritance deſcends to an Heir, it ſhall not be *Aſſets*, becauſe 'tis an Inheritance created by Cuſtom; 'tis true, the Deſcent is directed by the Common Law, but it doth not allow any other collateral Qualities which do not concern ſuch Deſcent, and which are proper to other Inheritances at Common Law. 4 *Rep.* 22. *a.*

34. A Copyholder died, and the Lord admitted a Stranger; adjudged, that the Heir might enter and maintain an Action of Treſpaſs, *&c.* without being admitted by the Lord. *Noy* 172. *Simpſon* verſus *Gilliam*.

35. A Copyholder in Fee made a Leaſe for Years, with Licenſe, *&c.* and died, leaving Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, the eldeſt Son died *before Admittance*; adjudged, that the Land ſhall deſcend to the Daughter of the whole Blood, for the eldeſt Son might have entered and taken the Profits before Admittance; and if ſo, then *poſſeſſio fratris facit ſororem eſſe hæredem* of cuſtomary Lands. *Mich.* 8 *Jac. Ayliffe* verſus *Chopley*. 1 *Bulſt.* 42. See *pl.* 10. *Brown*'s Caſe. Antea 32.

36. In Replevin, the Defendant made Conuſance, as Bailiff of *T. P.* for that *Joſeph Marke*, &c. was ſeiſed of the Place where in Fee, being Parcel of the Manor of *Liſcard*, and demiſed the ſame to *S. R.* for ninety-nine Years, if *W. W.* ſhould ſo long live, rendring Rent, that *S. R.* entered; Poſtea (c) 9. S. C.

entered; and the ſaid *Joſeph Marke* being ſeiſed of the Reverſion in Fee, *according to the Cuſtom of the Manor*, at a Court there held, *&c.* did *Surrender* into the Hands of the King, then Lord
*4 Leon. 25. of the ſaid Manor, according to the Cuſtom of the Manor, the ſaid * Reverſion and Rent to the Uſe of the ſaid *T. P.* and his Heirs, to whom the Lord at the ſame Court did grant the ſaid Reverſion and Rent by his Steward, to him and his Heirs, *according to the Cuſtom of the ſaid Manor*, by Vertue whereof the ſaid *T. P.* became ſeiſed, *&c.* the Plaintiff made a frivolous Replication, and the Defendant demurred, but the Plaintiff had Judgment, becauſe the Conuſance was ill, for the Lands on which the Diſtreſs was taken were *Freehold*, for ſo they muſt be taken to be, becauſe the Defendant did not ſet forth, that *Marke* was ſeiſed according to the Cuſtom of the Manor, *&c. ad voluntatem Domini*; and if ſo, then they could not paſs by *Surrender* in Court, and Admittance without a Special Cuſtom, which ſhould have been thus ſet forth, (*viz.*) *Infra Manerium præd. de tempore quo, &c. talis habebatur conſuetudo*, but by the Words *Secundum conſuetudinem Manerii*, without more, a Cuſtom is ſhewn by Implication. 2 *Vent.* 143. *Rogers* verſus *Bradley*. 1 *Cro.* 185. *Vaughan* 253. 2 *Leon.* 29. *S. P.*

37. Copyholder ſurrendered to *W. R.* and his Heirs, upon Condition, that if he paid 800 *l.* on ſuch a Day, the Surrender ſhould be void; *W. R.* died before the Day of Payment, his Heir at Law being then beyond Sea, but a Friend was admitted in the Name of the Heir, who afterwards returned into *England*, and the Perſon admitted having made a Leaſe for Years, reſerving Rent, *&c.* the Heir brought an Ejectment: The Queſtion was, whether any Eſtate paſſed to the Heir ſince his Anceſtor died before Admittance, or if any Thing did paſs, whether he could be admitted by his next Friend; and adjudged, that ſuch Admittance was good, becauſe the ſubſequent Conſent of the Heir is as effectual as an Authority given precedent to the Admittance; and this ſubſequent Aſſent is ſhewed by his bringing this Action, by which the Admiſſion is affirmed, and 'tis certainly good Law, that where one ſurrenders to the Uſe of another, and his Heirs and the Surrendree *dies before Admittance*, that in ſuch Caſe his Heir ſhall be admitted, and ſo ſhall his Executor, if the Surrender was of a Term for Years. 2 *Sid.* 37, 61. *Blunt* verſus *Clerke*.

38. In a Special Verdict in Ejectment, the Caſe was, the Father being ſeiſed of a Copyhold in Fee, ſurrendered it to the Uſe of *himſelf and his Wife for Life*, *Remainder to the Son* (the now Defendant) *in Tail*; the Father and Mother were *admitted* and paid a Fine, and being both dead, the Defendant *prayed to be admitted to the Remainder*, which was done, and a Fine of 58 *l.* ſet upon him, which was demanded, and a Day and Place appointed where, and when he ſhould pay it, which he did not pay, for that none was due, he being admitted by the *Admittance of his Father and Mother*, *the Tenants for Life*, and thereupon he refuſed to pay it; adjudged, that no Fine is due, unleſs there is a *Special Cuſtom* for it; 'tis true, my Lord *Coke* tells us, that ſuch Admittance ſhall not be prejudicial to the Lord in reſpect of his Fine, but that muſt be intended where ſuch *Fine is due by Cuſtom*, *for the Admittance of him in Remainder*, and without ſuch *Cuſtom* none is due, becauſe the Admittance to the particular Eſtate is the Admittance to him in Remainder. 3 *Lev.* 308. *Barnes* verſus *Corke*.

1 Vent. 260. 1 Mod. 102. 120. 39. In a Special Verdict in *Trover*, the Caſe was, that the Father being ſeiſed of a Copyhold, had Iſſue *three Daughters* by his firſt Wife, and two Daughters and a Son by his ſecond Wife, and that he ſurrendered to his *three Daughters* for eleven Years, Remainder to his *two Daughters* for five Years, *Remainder to his three Daughters* by the firſt Wife, Remainder *to his own right Heirs*; the Father died, the *three Daughters were admitted*; the Son died before the Expiration of the *eleven Years*, the three Daughters entered and cut the Trees, then the Term expired; adjudged, that the Admittance of the three Daughters was the Admittance of the Son in Reverſion, ſo as to make *poſſeſſio fratris*, and then the Copyhold will deſcend to his *two Siſters* of the whole Blood to him, and not to all his Siſters, as Heirs to their Father, and that the Lord may aſſeſs one Fine for the particular Eſtate, and another for that in Remainder, but then this laſt Fine need not be paid till the Remainder comes in Poſſeſſion. 2 *Lev.* 107. *Blackburne* verſus *Graves*. 1 *Vent.* 260. by the Name of *Batmore* verſus *Graves*.

Sid. 360. S. C. 1 Vent. 173. S. C. 40. Debt upon Bond, conditioned, that the Defendant ſhould, at the next Court held for the Manor of *Wimbledon*, ſurrender a Meſſuage in *Mortlacke* to the Uſe of the Plaintiff and his Heirs, and procure him to be admitted Tenant, *&c.* and that he ſhould enjoy the ſame without Interruption of the Defendant or *Lancelot Symonds*, or any other Perſon claiming under them, or either of them; the Defendant pleaded, that he did ſurrender at the next Court, and procured the Plaintiff to be admitted, and that he quietly enjoyed, *&c.* according to the Condition, *&c.* The Plaintiff replied, that the ſaid Meſſuage was demiſable by Copy of Court-Roll in Fee, for Life, or for Years, at the Will of the Lord, according to the Cuſtom of the Manor; and that before the ſaid Bond made, *Sir Edw. Cecil* was ſeiſed in Fee of the Manor; and at a Court held there 8 *April*, 22 *Jac.* he granted this Meſſuage by Copy of Court-Roll to *Patience Huſſey for Life*, Remainder to *Lancelot Symonds* in Fee, *&c.* that at a Court held there 7 *Aug.* 17 *Car.* the ſaid *Lancelot ſurrendered his Remainder*, &c. to the Uſe of the ſaid *Patience* for Life, and after her Deceaſe, *to the Uſe* of the ſaid *Lancelot and Jane*, then his Wife, for their Lives, and for the Life of the Survivor, *&c.* and afterwards, to the *Uſe* of the Heirs and Aſſigns of the ſaid *Lancelot* for ever, who were admitted accordingly; that *Lancelot and Patience* died, and that *Jane* ſurvived and claimed a Title to the ſaid Meſſuage *for Life* by Vertue of the ſaid Surrender, and thereupon ſhe entered and became ſeiſed for Life, *&c.* and upon a Demurrer to this Replication it was inſiſted for the Defendant, that the Surrender to *Patience Huſſey*, *for Life*, was void, becauſe ſhe had an *Eſtate for Life* before, and by Conſequence a Remainder limited upon a void Eſtate in the Crea-

tion, muſt be likewiſe void; and if ſo, then *Jane* hath no Title, becauſe nothing paſſes by this Surrender, for the particular Eſtate on which the Remainder ſhould depend and be ſupported, being void, all the Remainders muſt be likewiſe void, for ſo they would be at Common Law; and as to Grants, Surrenders, and Eſtates in Remainder, Copyhold Lands are regulated by the * Rules of the Common Law; if therefore *Jane Symonds* had no Title, then there is no Breach aſſigned; but it was argued, and ſo adjudged for the Plaintiff, that tho' the Eſtate limited to *Patience Huſſey for Life*, was void for the Reaſon before-mentioned, yet *Lancelot and Jane* took an Eſtate jointly for their Lives in Poſſeſſion, after the Death of the ſaid *Patience*, not by Way of Remainder, but by an immediate Settlement and preſent Eſtate, for a Surrender is rather in Nature of a Deed-Poll than an Indenture, and enures by Way of Limitation of Uſe, and both Surrenders and Admittances have been often conſtrued and taken contrary to the Rules of Common Law Conveyances, as where the Husband took a Copyhold of the Lord of the Manor to whom he delivered *Seiſin, habendum* to him and *his Wife*, this is a good Grant to the Wife, tho' ſhe was named only after the *Habendum*, and ſhe took a preſent Eſtate with her Husband, which ſhe could not have done by a * Conveyance in the like Words at Common Law, and ſo in the principal Caſe this Surrender ſhall be conſtrued as an immediate Settlement upon the Husband and Wife. 1 *Saund.* 148. *Wade* verſus *Bach.*

* Cro. Eliz. 297. 2 Cro. 376. 2 Bulſt. 272. Poſtea 48.

* Cro. Eliz. 323. 2 Cro. 434. Antea 20. S. P.

41. Upon a Trial at Bar in an Ejectment, it was ruled upon Evidence, that where one *William Savil* was Tenant in Tail of ſeveral Copyhold Lands held of the Manor of *Wakefield*, made a *voluntary Leaſe* thereof for twenty-one Years, *without Licence*, on Purpoſe to commit a Forfeiture, which he appointed to be for the Benefit of one *Arthur Savill*, and his Heirs; this Leaſe was preſented at the next Court, and the Lord of the Manor ſeiſed the Lands; and it being proved, that it was the Cuſtom of the ſaid Manor to commit ſuch Forfeitures in Order to bar Eſtates-tail, and to transfer their Lands to whom they pleaſed; that tho' this *Arthur Savill* was not admitted in the Life-time of *William*, who made this Leaſe; and tho' the Leſſor of the Plaintiff was actually admitted by the Lord of the Manor, who afterwards ſold the Manor to one *Clapham*, and he admitted the ſaid *Arthur Savill*, he had a good Title by Vertue of ſuch Admittance againſt him who was admitted before; for this Forfeiture did operate in Nature of a Surrender or Common Recovery, and that the Lord of the Manor is bound to admit him who was appointed by him who made the Forfeiture, and no other; but if he doth, then as ſoon as he is admitted, he ſhall avoid all meſne Acts made by the Lord, as he might if a Surrender had been made to his Uſe, and he had been afterwards admitted, according to that Surrender. 2 *Saund.* 422. *Grantham* verſus *Copley.*

42. In a Special Verdict in Ejectment of Land in *Tilehurſt*, upon the Demiſe of *Henry Zinzan* Junior; the Caſe was, *Sir Peter Vanlore* Junior, was ſeiſed in Fee of the Manor of *Tilehurſt*, of which the Lands in Queſtion were Parcel, held by *Copy of Court-Roll, for one, two, or three Lives* ſucceſſively, one after another, according to the Cuſtom, that *Sir Peter* had iſſue three Daughters, *Jacoba*, married to *Henry Zinzan* the Elder, *Suſanna*, married to *Sir Robert Croke*, and *Mary*, married to the *Earl of Sterling*, that *Sir Peter Vanlore*, at ſuch a Court, *&c.* granted the Lands in Queſtion by Copy of Court-Roll, to *Henry Zinzan* the Elder, who was Husband to *Jacoba* his eldeſt Daughter, *Habendum* to him and to *Henry Zinzan* Junior, who was the Leſſor of the Plaintiff) and to *Peter Zinzan*, for their Lives, ſucceſſively, as they are named in the Copy, *&c.* that *Henry Zinzan* the Elder was admitted and entered, and became ſeiſed for Life, Remainder to his Sons *Henry and Peter Zinzan* ſucceſſively; that *Sir Peter Vanlore* died without Iſſue Male, and that the ſaid Manor deſcended to his ſaid three Daughters; that *there is a Cuſtom in the ſaid Manor, that if any Cuſtomary Lands are granted by Copy to two or more Perſons*, for Lives, *and the Life of the longeſt Liver of them ſucceſſively, that the Perſon firſt named in ſuch Copy may ſurrender all the Lands*, and thereby deſtroy the Title of the other Perſons therein named; that by Indenture 10 *May*, 28 *Car.* 2. the ſaid three Daughters and Coheirs of *Sir Peter Vanlore*, and their Husbands, covenanted to levy a Fine of the ſaid Manor to *Daniel Blagrave* and another, and of the Lands in Queſtion to the Uſe of the ſaid *Henry Zinzan Senior, and Jacoba* his Wife, for their Lives, without Impeachment of Waſte, Remainder to the Uſe of ſuch Perſon as *Jacoba* by her Laſt Will ſhould appoint, and for Want of ſuch Appointment, to her own right Heirs; that the Fine was levied accordingly, that *Henry Zinzan* the Elder died, and *Jacoba* his Wife ſurvived, who, by Leaſe and Releaſe conveyed theſe Lands to *Frances and Jane*, and their Heirs, who entered, and *Henry Zinzan* the Younger entered upon them and made the Leaſe to the Plaintiff, and he had Judgment in *C. B.* and that Judgment was now affirmed in a Writ of Error in *B. R.* the Queſtion being, whether the *Deed and Fine* was a Surrender of this Copyhold, ſo as to bar the Plaintiff, *Henry Zinzan*, who was the ſecond named in the Copy, and adjudged, that it was not, becauſe the *Cuſtom extends only to Copyholds*, and ſuch an Eſtate cannot paſs by *Fine*; and 'tis a Cuſtom againſt common Right, and therefore it ought to be taken * ſtrictly, for 'tis againſt common Right to give Power to *Tenant for Life* to deſtroy a third Perſon's Eſtate, without any Recompence; therefore where a Cuſtom was, that if the Surrendree doth not come in to be admitted upon the third Proclamation, he ſhall forfeit: A Surrender was made to *John* for Life, the Remainder to *Elizabeth* for Life; *John* did not come in upon the third Proclamation, yet *Elizabeth* ſhall not forfeit, and that was *Baſpole* and *Long*'s Caſe. *Raym.* 402. *Zinzan* verſus *Talmage.*

T. Jones 141.

* Viz. *To paſs by Surrender and not by Fine.*

43. In Replevin, the Defendant made Conuſance, as Bailiff of *Jane Croſs*, for that before the Taking the Cattle, *&c.* ſhe was ſeiſed in Fee *at the Will of the Lord of the Manor, according to the Cuſtom of the Manor*, &c. of and in one Meſſuage, which, Time out of Mind, hath been Par-

cel of the Manor, and demiſed and demiſable by Copy of Court-Roll, *&c.* upon a frivolous Replication and a Demurrer, it was objected againſt this Avowry, that it was ill, becauſe the Defendant did not ſet forth, that *Jane Croſs was admitted*; and a Copyholder, in Pleading his Eſtate, muſt ſet forth either an *Admiſſion* or Grant from the Lord, otherwiſe 'tis ill, which is very true, if the Title had come in Queſtion, but not elſe, as where one pleads a particular Eſtate for Life, or Years generally, there the Commencement muſt be ſhewn; but if a Leſſee for Years let the Lands for a leſſer Term, reſerving Rent, he may, in an Action of Debt brought for that Rent, alledge, that at the Time of the Leaſe he was poſſeſſed of it, *for the Term of divers Years then to come*, and being ſo poſſeſſed, leaſed it to the Defendant, without ſhewing the Beginning of his Term, and how derived, for 'tis but an *Inducement* to the Action. 2 *Vent.* 181. *Adams* verſus *Croſſe*.

44. A Copyholder made a Leaſe for Years, rendring Rent, and afterwards ſurrendered the Reverſion to *T. P.* who diſtrained for Rent-arrear, and in Replevin avowed the Taking, *&c.* for Rent arrear, but did not mention any Attornment of the Leſſee, or that he had Notice of the Surrender; and upon Demurrer it was objected againſt the Avowry, that it was ill for the Reaſons before-mentioned, but adjudged well enough; becauſe the Surrender it ſelf being a notorious Act, there was no Occaſion of an Attornment or Notice. *Raym.* 18. *Black* verſus *Mole*.

5 Mod. 244, 378.

45. In a Special Verdict in Ejectment, the Caſe was, the Father being ſeiſed of a *Manor*, ſettled it on the Marriage of his Son, to the Uſe of himſelf for Life, Remainder to his Son in Tail, with Power to make Leaſes for one, two, or three Lives, or for thirty Years, *&c. ſo as ſuch Demiſe be not of the* * *Demeſne Lands*, and afterwards he demiſed a Copyhold Tenement and Lands for thirty Years; adjudged, that this Leaſe was void, becauſe it was of Copyhold Lands, which are Parcel of the Demeſnes, for by a Grant of the *Demeſnes* the Copyholds will paſs, and by the ſame Reaſon, by excepting the Demeſnes, the Copyholds are excepted; and the rather, becauſe this Power is excepted out of the Inheritance, and the Tenant for Life, by ſuch Leaſes, might deſtroy all the Copyholds, which is unreaſonable. 2 *Salk.* 537. *Winter* verſus *Loveday*.

* Poſtea (b) 2.

46. Surrender to the Uſe of himſelf *for Life*, then to *Alice*, his Wife, for Life, and after the Deceaſe of the Survivor, then to the Uſe of his Laſt Will, and if no Will, then to his own right Heirs; the Surrendree was admitted, and afterwards he by Will deviſed all his real and perſonal Eſtate to his Wife after his Deceaſe, Remainder to be divided by *W. R.* and *T. P.* (whom he made Executors) between his Relations, according to their Diſcretion; adjudged, that the Eſtate veſted in the Executors *before Admittance*, becauſe the Admittance of the Surrendree was the Admittance of them in Reverſion. 5 *Mod.* 306. *Warſop* verſus *Abell*.

47. A Copyholder in Fee ſurrendered to the Uſe of the Mortgagee in Fee, this Surrender was not *preſented* at next Court, and the Copyholder became a *Bankrupt* before any Preſentment at all, and the Commiſſioners aſſigned the Eſtate to his Creditors: And *per Cowper*, Lord Chancellor, tho' the Surrender was void in Law, becauſe it was not preſented, yet the Aſſignee of the Commiſſioners ſhall be in no better Condition than the Bankrupt himſelf would have been; and 'tis plain, that by the Surrender his Lands were bound in Equity, tho' it was defective for Want of a Preſentment, and for that Reaſon he ſhall be a Truſtee for the Mortgagee. 2 *Salk.* 449. *Tailour* verſus *Wheeler*.

48. *T. P.* being ſeiſed in Fee of a Copyhold, ſurrendered it to the *Uſe* of himſelf for Life, Remainder to his Son *Valentine* and *Alice* his Wife, for their Lives, and *their Heirs and Aſſigns, and for Default of ſuch Iſſue* to the Uſe of the Surrenderor and his Heirs; adjudged, that the Limitation of Uſes in a Copyhold ſurrender, muſt be conſtrued by the ſame * Rules as in a Limitation of Uſes by any Common Law Conveyance, which are tied up to ſet Forms and Words, and are not to be conſtrued according to the Intention of Parties, as in Wills, becauſe by the Statute 21 *H.* 8, the Teſtator hath Liberty to expreſs his *Intention* as he will, that in this Caſe the Son and his Wife had a *Fee-ſimple* and not an Eſtate-tail, becauſe the Words *in Default of ſuch Iſſue*, do not import *their Dying* without Iſſue, nor of what Bodies ſuch *Iſſue* ſhall proceed, but generally, and every *Heir* is the *Iſſue* of ſome Body, therefore this expreſs Eſtate in Fee-ſimple ſhall not be turned into an Eſtate-tail by Implication, by thoſe Words *In Default of ſuch Iſſue*, and the rather, becauſe of the Word *Aſſigns*, and an Eſtate-tail is not aſſignable. 2 *Salk.* 621. *Idle* verſus *Cook*. See 7 *Rep.* 40. *Litt. Rep.* 344. *Cro. Car.* 363. *Cro. Eliz.* 478. *Sid.* 41.

* Antea 40.

49. The Teſtator *deviſed* Copyhold Lands to his *Grandſon*, and upon a Bill in Equity, *Somers, Lord Chancellor*, decreed the Will to be good, and that Equity ought to ſupply a Surrender in the Caſe of a *Grandſon* as well as in the Caſe of the Heir at Law, but this Decree was reverſed in the Houſe of Peers, for that Equity ought not to ſupply ſuch a Defect, unleſs in Favour of the Heir. 1 *Salk.* 187. *Kettle* verſus *Townſend*.

(D)

Whether a Copyhold can now be made, and what deſtroys it when made, and what will not deſtroy it.

See *Borough Engliſh. By-Laws.* See *Extinguiſhment.* (B) 1. See *Poſtea* (H) 5. (P) per totum.

1. IF Lands are granted by Copy, which were never ſo granted before, and the Iſſue is, whether the Lord granted by Copy of Court-Roll, *ſecundum conſ' Manerii*, the Jury muſt find *Non conceſſit*, for tho' *Dominus de facto conceſſit*, yet it was not *ſecundum conſ' Manerii*. 1 *Leon.* 55. *Kemp* verſus *Carter*.

2. *In*

2. *In Replevin*, the Caſe was, the *Earl of Arundel* was ſeiſed in Fee of the Manor of *B.* whereof the Place where, *&c.* was *Copyhold*, and demiſable by Cuſtom in Fee, and that the Defendant was a Copyholder of Inheritance, *&c.* that the ſaid *Earl* made a Feoffment of the ſaid Manor to the Uſe of himſelf for Life, Remainder to the Uſe of the *Lord Lumley and Elizabeth his Wife*, (who was Daughter of the ſaid *Earl*) and to the Heirs of their two Bodies to be begotten, who made a Leaſe of the ſaid Cuſtomary Lands to the Plaintiff for 100 Years; the Queſtion was, if by this Leaſe the Lands were ſo ſevered from the Manor, that the Copyhold was extinct; it was inſiſted, that it was, for by the Leaſe the Cuſtoms were gone, and by Conſequence the Cuſtomary Tenure, for the Eſtate of a Copyholder muſt be *ſecundum conſuetudinem Manerii ad voluntatem Domini*, but by the Leaſe the Copyholder cannot hold *ſecundum conſuetudinem Manerii*, becauſe the Services, Waſtes and Forfeitures are extinguiſhed; but adjudged, that the Copyhold ſtill remains, for otherwiſe by ſuch Practiſes all the Copyholders in *England* might be defeated; and if any Diſadvantage ariſes to the Lord of the Manor, 'tis by his own Act, and he ſhall not be relieved againſt it. *Trin.* 29 *Eliz.* 2 *Leon.* 208. *Beal* verſus *Langley*. See *Poſtea Murrell* verſus *Smith. S. P.*

3. The Husband being ſeiſed of a Manor in Right of his Wife, made a Leaſe for Years of Copyhold Lands, and died; adjudged, that this Leaſe ſhall not deſtroy the Cuſtom to the Wife, but that after his Death ſhe may grant it by Copy, as before. *Paſch.* 38 *Eliz. Cro. Eliz.* 459. *Coningsby* verſus *Raſtell.*

4. *In Replevin*, the Defendant avowed, *&c.* and upon the Pleadings, the Caſe was, that *H.* 8, was ſeiſed of the Manor of *Chinckford in Eſſex* in Fee, and that he built a new Houſe there, called *Lorrimore*, and granted the Keeping thereof to *Sir John Gates*, *for Life*, with the Cloſe called *Scales*, *being Parcel of the Copyhold of the ſaid Manor*, without reciting that it was *Copyhold*, and this was for exerciſing the ſaid *Office* of Houſe-Keeper; the King died, and ſo did *Sir John Gates* the Patentee; then Queen *Mary* granted the ſaid Manor in Fee to *Suſan Tongue*, who made a Leaſe thereof to one *Lee*, and he, before the Expiration of his Leaſe, granted this Cloſe in Fee to *Rob. Lee*, according to the Cuſtom of the Manor; the Leaſe expired, and *Robert Lee* leaſed it to *Feild*, *the Plaintiff*, *at Will*, and the Defendant, as Heir to *Tongue*, entered, *&c.* the Queſtion was, whether the Grant of the King, without reciting that this Cloſe was Copyhold, had extinguiſhed the Copyhold Cuſtom, or not, and enfranchiſed the Cloſe; and adjudged, that it had not, but only ſuſpended it during the Life of *Sir John Gates* the Patentee. 2 *Sid.* 17, 35, 81, 137. *Feild* verſus *Boothby*. See * *Lea* verſus *Boothby*.

* W. Jones 449. *See* Poſtea (P) 16.

(E)

Of Amerciaments and Fines.

1. AN *Amerciament* is always by the *Homage or Jury*, and * differs from a *Fine*, for that is by the Act of the *Steward*, and the one is to be affeered, but the other not; and the Judgment in Amerciament is, *quod ſit in miſericordia*, and a Diſtreſs may be taken for it, without alledging *a* * *Cuſtom*, but for an Amerciament in a *Court-Baron*, the Lord muſt preſcribe. 11 *Rep.* 42. *Godfrey*'s Caſe. 8 *Rep.* 38. *Greiſly*'s Caſe. 1 *Brownl.* 26. *S. P.*

* *It differs likewiſe from a Pain, for that ought not to be affeered.* 1 Leon. 203. Caſtle *v.* Oldman.

2. *In Replevin*, *&c.* the Defendant made Conuſance for ten *Amerciaments*, the Plaintiff not appearing at a Court, *&c.* the Plaintiff replied, that the Taking was *de injuria ſua propria*; and upon a Demurrer he had Judgment, becauſe the Defendant had not alledged in Fact, that the Perſon *did not appear after Summons*, but only that *preſentatum fuit per homagium*, that he did not appear. *Cro. Eliz.* 806. *Parham* verſus *Norton*. *Moor* 88. *Lukin* verſus *Eve contra.*

3. *Debt* for a Fine in a *Court-Leet*, in which the Plaintiff declared, that he had a *Leet* within the Manor of *R.* to which all *Reſiants* there ought to come, and that at ſuch a Court held there before *T. M.* his Steward, he told the Defendant he was a *Suitor* to the Court, and that he ought to be ſworn to enquire, *&c.* the Defendant thereupon anſwered, *in ſaying ſo thou lieſt*, for which the ſaid Steward ſet a Fine of 20 *s.* upon him, *&c.* upon *Nil debet* pleaded, it was found for the Plaintiff, and it was objected, that this was not ſuch a Contempt, for which a *Fine* ought to be impoſed; but adjudged, that it was an apparent Contempt, and an Abuſe to the Steward as a Judge, and that he himſelf might aſſeſs the *Fine*, for which this Action did well lie. *Cro. Eliz.* 581. *Earl of Lincoln* verſus *Fiſher.* Owen 113. Moor 470.

4. A *Conſtable* was choſen in a *Leet*, who refuſed to accept the Office, but went out of Court, and for this Contempt the Steward fined him, and the Bailiff diſtrained for the Fine; adjudged good, for every Judge of Record may impoſe a reaſonable Fine for a Contempt or Diſturbance in Court, and ſuch Fine need not be *affeered*, becauſe 'tis impoſed by *the Court*, whereas an *Amerciament* is by the Jury, which is the Reaſon why it muſt be *affeered*, and for ſuch a Fine a Diſtreſs may be taken without preſcribing to it, and ſo it may for an Amerciament. 8 *Rep.* 38. *Greiſly*'s Caſe.

5. *Twelve chief Pledges* at a Court-*Leet* refuſed to preſent, that each of them ought to pay to the Lord 10 *s. pro certa Leta*, for which Contempt the Steward fined them 6 *l.* and the Bailiff diſtrained for the Fine; adjudged, that it was not well impoſed, for the Fine ought to be ſet *ſeve-*

rally, and not jointly, becauſe the Offence is ſeveral, but there is no Way of avoiding a Fine erroneouſly impoſed, but by Pleading it. 11 *Rep.* 42. *Godfrey's* Caſe.

6. *In Treſpaſs*, the Defendant juſtified by Reaſon of an *Amerciament* in a Court-*Leet*, which was *affeered to* 10 *s.* and that by a Precept out of Court he diſtrained for it; adjudged, that the Plea was ill, becauſe it did not ſet forth, that the Amercement was for an Offence done within the *Juriſdiction of the Court*; beſides, it ſets forth, that the Plaintiff was amerced, but did not ſay to *what Sum*. *Hob.* 122. *Wilſon* verſus *Hardingham*. *See* Pleas. (C) 3. *S. C. See pl.* 16. *S. P.*

7. *In Replevin*, *&c.* the Defendant *preſcribed* to diſtrain for all *Amerciaments* in the Manor, and ſhewed, that the Plaintiff was preſented by the Homage, he being a Cuſtomary Tenant, *&c.* for not *Repairing* an Houſe, being likewiſe a Cuſtomary Tenement, *&c.* for which he was amerced by *the Steward* 10 *s.* and ſo juſtified the Taking, and it being found for the Avowant, Error was brought to reverſe the Judgment; and the Error aſſigned was, becauſe the Avowant had not laid his *Preſcription for the Lord of the Manor to amerce his Tenants*, for he cannot do it of *common Right*, if he do, 'tis Extortion, neither is here any Offence laid in the Copyholder, for he is not bound by the Common Law to *repair* the Houſe, becauſe he cannot have *Houſe-bote* upon the Lands, unleſs by *Preſcription*, neither can a Steward *amerce*, unleſs it be by * Preſcription, tho' he may aſſeſs Fines for a Contempt in Court. 1 *Leon.* 242. *Blunt* verſus *Whitacre*.

* Poſtea 11.

8. Adjudged, that the *Beaſts of a Stranger* found upon the Land cannot be diſtrained for an *Amerciament*, as they may for Rents and Services. *Noy* 20. *Pell* verſus *Towers*. *Poſtea* (F) 5. *S. C.*

9. *In Replevin*, the Defendant juſtified by Reaſon of a *Fine* aſſeſſed by the *Steward of the Court-Leet*, for that the Plaintiff did not come to the Court and do Suit there; upon Demurrer to the Plea it was adjudged, that this Aſſeſſment of a *Fine*, without a Preſentment of the Offence, was ill, and that the Plaintiff ought rather to be *amerced* than *fined*, becauſe, if the Steward ſhould ſet an unreaſonable *Fine* on the Plaintiff, he is without Remedy; but if the Amerciament be unreaſonable, the Law hath provided a Writ for the ſame, which is grounded on *Magna Charta*, *cap.* 14, and is called *Moderata miſerecordia*. *Cro. Eliz.* 241. *Hall* verſus *Tarbett*.

10. Error, *&c.* to reverſe an *Amerciament*, which was *affeered in a Court-Leet*; and the Error aſſigned was, that it was unreaſonable; adjudged, that after *an Amerciament is affeered*, it cannot be reverſed for the unreaſonableneſs of it, and that the Writ *de moderata miſericordia* doth not lie in ſuch Caſe. 1 *Bulſt.* 125. *Stubbs* verſus *Flower*.

11. In Treſpaſs for Taking a Gelding and two ſilver Spoons, *&c.* the Defendant pleaded, that the Queen was ſeiſed of the Manor of *B. &c.* and that he was her Bailiff, and that it was *preſented* by the Homage at a Court held for the ſaid Manor, that the Plaintiff was amerced 10 *s.* in a former Court, by the Steward, for ſurcharging the Common, which Amerciament was *affeered*, and for which he diſtrained the Gelding, and that the Plaintiff delivered to him the two Spoons, that he might have the Gelding again; and upon Demurrer to this Plea it was adjudged, that the *Amerciament by the Steward* was good, but that the Diſtreſs taken by the Bailiff was ill, becauſe there was no *Preſcription* laid to diſtrain for an Amerciament; and tho' the Queen by her Prerogative, might diſtrain in ſuch Caſe, yet a common Perſon cannot take a Diſtreſs for an Amerciament in a Court-Baron, without * *Preſcription*. *Cro. Eliz.* 748. *Rowlſtone* verſus *Alman*.

*Antea 7.

12. *In Replevin*, the Caſe upon the Pleadings was, a Man was *ſummoned to appear at a Court-Baron*, and he not appearing, was *amerced to* 5 *s.* and a Diſtreſs was taken for the ſame; and adjudged, that it was not lawful, becauſe it was aſſeſſed for Suit of Court, which is *Suit-Service*, and for ſuch Suit the Lord cannot *amerce* his Tenant, but muſt *diſtrain* for it. *Moor* 185. *Allen* verſus *Givers*.

13. In Treſpaſs for Taking his Cattle, the Defendant juſtified as Bailiff for an Amerciament in a Court-Leet, for that the Plaintiff left the Gates open, *&c. ad nocumentum inhabitantium*, *&c.* adjudged, this is not amerceable in a Leet, for it doth not belong to a Leet. *Moor* 356. *Evington* verſus *Brimſtone*.

Raym. 204. *See* Leet. (A) 11. S. C.

14. *In Replevin*, the Defendant made Conuſance as Bailiff to Lord of a Manor, who had a *Court-Leet by Preſcription*, and then alledged a *Cuſtom* for ſuch a Vill to ſend one to be ſworn *Conſtable*, which not being done, a Fine was ſet, for which the Diſtreſs was taken; and upon Demurrer to this Plea it was held, that tho' of common Right a *Diſtreſs may be taken for a Fine in a Court-Leet*, where 'tis impoſed, for ſuch Things as are incident to its Juriſdiction, as for Contempts, *&c.* yet when that Court is enabled only by *Cuſtom* to ſet a Fine, as in this Caſe, the Defendant muſt alledge a *Cuſtom* likewiſe to diſtrain for the Fine. 1 *Vent.* 105. *Pierſon* verſus *Ridge*.

15. *In Treſpaſs* for Taking ſeveral Goods, the Defendant juſtified for an *Amerciament* aſſeſſed in a *Court-Baron*; and upon a Demurrer to this Plea it was adjudged ill, becauſe the Defendant did not ſet forth an *Affeerment* by the *Affeerers*. 3 *Lev.* 19. *Coniers* verſus *Frank*.

16. In an Action of Debt for an Amerciament in a Leet, the Plaintiff ſets forth, that the Defendant was preſented and amerced, which ſaid Amerciament was affeered *by all the Jurors to* 40 *s. &c.* The Defendant demurred generally and had Judgment, becauſe the Plaintiff did not ſhew to what Sum the Defendant was amerced; beſides, the *Affeerment* ought to be made by Officers elected by the Steward, and not by the *Jury*, and they take a Special Oath for that Purpoſe. 3 *Lev.* 206. *Evelin* verſus *Davis*. *See pl.* 6. *S. P.*

17. Treſpaſs for Taking a Cup and detaining it till he paid 20 *s.* The Defendant pleaded, that *ad quandam Curiam*, the Plaintiff was *amerced*, for which the Cup was taken; and upon a Demurrer to this Plea it was held ill, becauſe it did not appear what Court it was, for if a *Court-Baron by Grant*, then it ſhould be *coram Seneſchallo*; if by *Preſcription*, it may be *coram Seneſchallo*,

or *coram ſectatoribus*, or before both; beſides, it did not appear that the Houſe wherein the Defendant alledged the Treſpaſs was *infra Manerium*, nor that the Taking was *infra juriſdictionem Curiæ*. 1 *Mod.* 75.

(F)

Of the Court-Baron.

1. WHere a Lord of a Manor had many *antient Copyholds* in a Town, and granted the *Inheritance* of them all to another, yet the *Grantee* may hold Courts for the Copyhold Tenants, and take Surrenders and make Admittances, for tho' by the Severance of the Copyholds from the Manor by this Grant, 'tis no longer a Manor in Law, becauſe it wanteth free Tenants, of which a Manor muſt conſiſt as well as of Copyhold Tenants, yet the Grantee may hold a Cuſtomary Court for his Copyhold Tenants. 4 *Rep.* 26. *Melwich* verſus *Luter*. Cro. Eliz. 102. S. C. *and* 443. *cited, where it was held a ſtrange Judgment, and that upon a Writ of Error in the Exchequer Chamber the Judgment was reverſed.*

2. About eight Years after, the Caſe before-mentioned was denied to be Law, and the Court ſaid, that it was a ſtrange Judgment, and that upon Error brought it was reverſed in the Exchequer-Chamber, and this was ſaid in the Caſe of *Bright and Forth*, which was thus: *ſſ.* The Manor of *C.* extended into *C.* and *B.* (and in *B.* there were only Copyholders for Life, and no free Tenants) the Lord of the Manor levied a Fine, and ſuffered a Recovery of the Manor (*excepting his Lands in B.*) to ſeveral Uſes, afterwards he kept a Court-Baron in *B.* and the Steward granted a Copyhold for Life; adjudged, that the Grant was void, becauſe *B.* was not a Manor. *Cro. Eliz.* 443. *Bright* verſus *Ford*.

3. *Quo Warranto* againſt the Defendant, for holding a Court-Baron in the Hundred and Manor of *W.* he pleaded that *B. G.* was ſeiſed of the Manor and Hundred of *W.* whereof the Manor of *N.* was Parcel and *Copyhold*, and known as well by the Name of a Meſſuage and ſeven Yard-Lands *Cuſtomary*, as by the Name of a Manor, and that the ſaid *B. G.* demiſed to him the ſaid Manor of *N.* by the Name of a Meſſuage and ſeven Yard-Lands, and 20 *s.* Rent, and *ea ratione & virtute conceſſionis præd'*, he held a Court-Baron within the Manor; and upon a Demurrer it was adjudged, that the *Quo Warranto* being a Writ of Right, it ought to be anſwered in *Chief*, which the Defendant could not do, becauſe of the Weakneſs of his Eſtate, it being Copyhold, *à fortiori*, he could not enable himſelf in his own Right to hold ſuch Court. *Yel.* 190. *The King* verſus *Stafferton*. *Poſtea* Copyhold. 1 Bulſt. 54, 57. 2 Cro. 259. S. C.

4. The Lord of a Manor preſcribed to have a Court-Baron held in his Manor, from three Weeks to three Weeks, * *before his Steward*, where it had been uſed to enquire and preſent all Treſpaſſes in the common Fields, *&c.* adjudged, that a * *Preſcription to have a Court-Baron before his Steward, is not good*, yet it might be good to hold a *Court before his* † *Steward*, but not a *Court-Baron*, for that ought to be *coram ſectatoribus, &c.* 2 *Cro.* 512, 582. *Armyn* verſus *Appletoft*. *Cro. Eliz.* 791. In *Pill* verſus *Towers*. *S. P.* *Poſtea pl.* 11. *S. P.* *See* pl. 5. * *See* Juſtification, (E) 5. † 2 Cro. 282. 1 Leon. 316. 1 Brownl. 41, S. P. Godb. 68. T. Jones 23. S. P.

5. *Preſcription* by the Lord of a Manor to have a *Court-Baron* within his Manor, is void, becauſe ſuch a Court is incident to a Manor of *common Right*, and a Man ſhall never preſcribe to that which the Law gives him of common Right, but to preſcribe to hold ſuch a Court *before the* * *Steward*, is certainly Wrong, for Pleas are holden before the Suitors and Bailiffs of the Lord by Writ, but when without Writ, then 'tis *coram ſectatoribus* only. *Noy* 20. *Pell* verſus *Towers*. *Cro. Eliz.* 791. *S. C.* By the Name of *Pill* verſus *Towers*. *Yelv.* 192. *S. P.* * 2 Cro. 582. Cro. Eliz. 792. Godb. 49. S. P.

6. In Trover, the Defendant pleaded, that he was Bailiff of the Manor of *H. &c.* and that a Plaint was there levied againſt the now Plaintiff, and that Proceſs came to the now Defendant, Bailiff of the ſaid Manor, to diſtrain the Plaintiff to be at the next Court to anſwer the ſaid Plaint, by Virtue whereof he * diſtrained the Plaintiff by his Goods; and becauſe he did not appear at the ſaid Court, the Goods were forfeited to the Lord of the Manor, *&c.* and upon Demurrer to this Plea it was adjudged, that Goods cannot be forfeited upon a Default for not appearing at a Court-Baron, for the Diſtreſs is in Nature of a Pledge, to be kept ſafely, and the Diſtreſs muſt be infinite till the Party appear, and no Attachment will lie, therefore the Intermeddling with the Goods was a Converſion, and the Action is well brought againſt the Bailiff. *Yel.* 194. *Gomerſall* verſus *Waite of Medgate*. 2 *Cro.* 255. *S. C.* Yelv. 194. S. C. * *The Proceſs in a Court-Baron is Summons, Attachment, and Diſtreſs infinite.* 2 Roll. Rep. 403. *See* 1 Bulſt. 53.

7. The Lord of a Manor made a Leaſe of his Court-Baron to Two of his Copyhold Tenants for 200 Years, excepting to himſelf all other Demeſnes and Services; the Leſſees kept Court, and accepted Surrenders, and gave Licenſes to let Leaſes, *&c.* adjudged this was a good Leaſe, and that the Courts might be continued by the Leſſees, in order to take Surrenders and admit Tenants. *Cro. Eliz.* 394. *Jackſon* verſus *Neale*. *Poſtea* (Y) 3. *S. C.* 4 *Rep.* 26. *S. P.*

8. A

Cro. Car. 43. Moor 410. S. C.

8. A Widow recovered her Dower of a Copyhold by a Plaint in the Court-Baron, and had Judgment and 50 *l. Damages*, for which ſhe brought an Action of Debt in *B. R.* and the Queſtion was, whether ſhe could recover Damages to 50 *l.* in a Court where they can hold Plea only for 40 *s.* and adjudged, that the Damages are well awarded, and that an Action of Debt will lie for them; for as they can hold Plea of the Land, ſo they may award Damages as far as the Party is damnified. *Cro. Eliz.* 426. *Shaw* verſus *Thompſon*. 4 *Rep.* 30. *S. C. Moor* 410.

9. Adjudged, that where Judgment is given in a Court-Baron, and a *Levari facias* awarded to the Bailiff, that he cannot ſell the Goods, and ſo levy the Money, without a ſpecial Cuſtom ſo to do. *Hill.* 3 *Jac. Noy* 17. *Try* verſus *Burgh.*

10. A Plaint was levied in a Court-Baron, and the Defendant was ſummoned to appear on a certain Day, the Steward comes after Sun-ſet on that Day, and held a Court, and the Summons being returned ſerved, and the Party not appearing, Judgment was given againſt him, and held good, tho' the Court was held in the Night; and if it had been erroneous, the Party could have no Remedy by a Writ of falſe Judgment, or otherwiſe, but only by a Petition to the Lord of the Manor, who is Chancellor of his own Court. *Moor* 68.

11. In Replevin, the Defendants made Cognizance as Bailiffs to *Sir John Stowell*, and preſcribed to have a Court held twice every Year, *before the Steward*; there was not Notice taken of this Manner of Pleading, (*viz.*) that the Court was to be held *before the Steward*; for the Queſtion was only concerning a By-Law. *Cro. Car.* 497. *Antea pl.* 4, 5. *S. P.*

12. Adjudged, that a Man *preſcribe ſpecially* to have a *Court-Baron* to be held *before the Steward*, and in another Book the Court was of Opinion, that a Court-Baron may be held *before the Steward ſecundum conſuetudinem Manerii*, tho' the Suitors are Judges; and that this was the Opinion of the Lord Chief Juſtice *Vaughan.* 1 *Mod.* 173. 2 *Jones* 23.

2 Salk. 604. S. C. Poſtea (G) 24. S. C.

13. In a Special Verdict in Replevin, the Jury found, that *W. M.* was ſeiſed in Fee of the Manor of *M.* and that Time out of Mind there was *an antient Court there held before the Steward twice every Year*, &c. when the Defendant made Cognizance for Suit, *&c. ad Curiam Manerii*, *&c.* now the Queſtion was, whether that Court, and that found by the Jury, were the ſame, or not, becauſe *Curia Manerii* muſt be intended a *Court-Baron*, for ſuch a Court is incident to every Manor; But *Curia tent' coram Seneſchallo*, muſt be a *Cuſtomary-Court*, not of Freeholders but of Copyholders; it was inſiſted for the Plaintiff, that the Court found by the Jury could not be a *Court-Baron*, becauſe that is always held *coram ſectatoribus*, but that found by the Jury is *coram ſeneſchallo*; 'tis true, there are ſome Caſes which prove that to be true, but the later Authorities are otherwiſe, for in Fact every Court is held *before the Steward*, tho' the Suitors are Judges, and ſo it was adjudged. 2 *Lutw.* 1211. *Tonkin* verſus *Crocker.*

(G)

Cuſtoms of Manors, and Grants of Copyholds, good. See *By-Laws.* (m) per totum. See *Poſtea* (C) 5, 11.

1. A Cuſtom, that the Lord might aſſign to take the Profits of a Copyhold deſcended to an Infant to his own Uſe, without rendring Account, good. 1 *Leon.* 266.

3 Leon. 38. S. C.

2. In Replevin, *&c.* the Lord of the Manor avowed the Taking the Diſtreſs for the Breach of a By-Law, ſetting forth the Cuſtom of the Manor, that the Tenants thereof might make By-Laws *for the better Ordering their Cattle*, *cum opus fuerit*, and that the Plaintiff being one of the Homage, and Tenant of the Manor, did, with others, make a By-Law, that he who put his Cattle into ſuch a Common, before the Ringing a Bell, ſhould forfeit 10 *s.* and that it ſhould be lawful for the Lord to diſtrain for the ſaid Forfeiture, but did not alledge any *Preſentment by the Homage of the Breach of this By-Law*; and upon Demurrer to this Avowry it was objected, that the Cuſtom to make a By-Law was alledged to be *cum opus fuerit pro meliore ordine Catallorum*, and the Avowant had not ſet forth, that *opus fuit* to make a By-Law, nor that it was *pro meliore ordine Catallorum*; but adjudged, that the Cuſtom and Avowry were good. *Hill.* 15 *Eliz. Dyer* 323. *Lord Cromwell's* Caſe. *Godbolt* 50. *S. P.*

So where the Cuſtom was, that the Lord might grant Copyholds in Fee, he may grant them for Life or Years, becauſe thoſe Eſtates are included in the Fee, which is greater. Cro. Eliz. 373. Stanton v. Barns. *And if he grant it for Life, he may afterwards grant it in Fee.* 1 Leon. 56. *See* Verdict. (I) 4.

3. Cuſtom of a Manor was, that the Lord might grant Leaſes of the Lands, either by himſelf, *or by his Steward or Deputy Steward*, and by his laſt Will he gave Authority *to ſeveral Perſons* to make Leaſes *according to the Cuſtom*, to raiſe Fines to pay his Debts, and died, his Widow recovered the third Part of the Manor in Dower; and the Copyholds of which thoſe Perſons had made Leaſes were aſſigned to her by the Sheriff, together with other Lands in Dower; adjudged, that ſhe ſhall avoid the ſaid Leaſes, becauſe made by other Perſons than what is warranted by the Cuſtom; but *quære*, for *Swaine's* Caſe. 9 *Rep.* 64. and 4 *Rep.* 24, ſeem to the contrary. *Hill.* 8 *Eliz. Dyer* 251.

4. The Cuſtom was, that the Lord of the Manor might grant Copies in Remainder, *with the Aſſent of the Tenants*, and the Copies in Remainder, otherwiſe granted, ſhould be void; it was objected, that this is a void Cuſtom, becauſe 'tis unreaſonable, that Tenants who have no Manner of Intereſt in the Copyhold to be granted, ſhould yet have a Power to make a Copyholder at their Pleaſure,

Pleaſure; but on the other Side it was ſaid, that this Cuſtom might have a lawful Beginning, for it ſeems to be grounded on the Reaſon of the Common Law, that a Remainder ſhould not veſt without the Aſſent of the particular Tenant; ſo a Cuſtom, that a Woman ſhould not have her Widow's Eſtate, unleſs ſhe claim it within a Year and a Day after the Death of her Husband, is a good Cuſtom. *Mich.* 31 *Eliz. Godb.* 140.

5. In Treſpaſs, the Caſe was, that there were divers cuſtomary Lands in the Manor of *H.* which by the Cuſtom of the ſaid Manor, Time out of Mind, had been granted by Copy of Court-Roll, *&c.* for *one, two, or three Lives*, and that the Lord of the ſaid Manor had granted the Place where, *&c.* being Parcel of the ſaid cuſtomary Tenements to *G. D.* and *R.* his Wife, *during her Widowhood*; adjudged, that this was a good Grant within the Cuſtom, for every Grant *durante Viduitate* is a good Grant for *her Life*, if ſhe pleaſe. 4 *Rep.* 30. *Downe* verſus *Hopkins. Cro. Eliz.* 323. *S. C.*

6. Cuſtom was, that the Lord might grant Copyholds for Life *in Reverſion*, where the Lands were demiſable for one, two, or three Lives; the Lord granted the Copyhold to one for Life, in Poſſeſſion, and afterwards he married, and then he granted the *Reverſion* of the ſame Copyhold to another for Life, and died; the firſt Copyholder for Life in Poſſeſſion died, and he who was Copyholder in Reverſion, entered, and made a Leaſe for a Year, which was warranted by the Cuſtom, and this Copyhold, amongſt other Lands, was aſſigned to the Widow of the Lord of the Manor for her * *Dower*; adjudged, that this Copyholder in Reverſion ſhall hold his Land diſcharged of the Dower, for tho' the Lord married before he granted the Reverſion, yet the Copyholder is in by Vertue of the Cuſtom, which is Paramount the Title of Dower. 1 *Leon.* 16. *Cham* verſus *Dover.*

59. Moor 94. Godb. 130. 8 Rep. 63. 2 Brownl. 208. *The Opinion in* Dyer 270. *b. was denied.*

* 1 Leon. 4. 2 Leon. 152. 3 Leon.

7. Adjudged, that where the Cuſtom of a Manor was, that a Copyholder ſhould not alien his Copyhold without Licence of the Lord, and that Cuſtom was proved by the Court-Rolls or antient Precedents, or by Seiſures made for ſuch Alienations, tho' the contrary Uſage hath been for the Space of eighty Years laſt paſt, yet that ſhall not deſtroy the Cuſtom; adjudged likewiſe, that where the Cuſtom was, that a Copyholder may leaſe his Lands for three Years without Licenſe, and without paying any Fine, altho' the Lord can ſhew that ſome Copyholders have paid Fines upon ſuch Leaſes, yet ſuch Fines by Encroachment ſhall not extend to break the Cuſtom. *Mich.* 25 *Eliz. Howard's* Caſe.

8. The Cuſtom of a Manor was, that *Dominus pro tempore* might grant Copies for two or three Lives, in Poſſeſſion *or Reverſion*; a Widow was Tenant in Dower of the Manor, granted a Copyhold to *W. R.* for Life, to have and to hold *after the Death of L. R.* who was then Tenant in Poſſeſſion, and who *ſurvived the Widow*; adjudged, that this Grant of the *Reverſion* was good, tho' it was not *executed* in the Life-time of the Tenant in Dower. *Cro. Eliz.* 661. *Gay* verſus *Key. Moor* 147. *Sir Peter Carew's* Caſe. *S. P.*

9. Cuſtom of a Manor, that every Feoffment, Deviſe, or Grant made of Lands in that Manor ſhall be preſented by the Tenants in open Court, is a good Cuſtom, and if a Feoffment is made, and 'tis not preſented, the Livery and Seiſin is void, for 'tis not perfect till 'tis preſented. 5 *Rep.* 84. *Perryman's* Caſe.

2 And. 125. *By the Name of* Parnham *v.* Bowes. Cro. Eliz. 668. S.C.

10. Where a Tenant commits a Reſcous, or drives his Cattle off from the Land when the Lord comes to diſtrain, in ſuch Caſe a Cuſtom alledged, that the Tenant ſhall be amerced by the Homage, and that the Lord may diſtrain for it, is good. *Hill.* 39 *Eliz. Godb.* 135.

11. A Biſhop was Lord of a Manor, and the Temporalties of the Biſhoprick were in the Hands of the King, during which Time a Copyhold eſcheated, and the King granted it in Fee; adjudged, that the Grant was good. *Paſch.* 42 *Eliz. Cro. Eliz.* 754. *Covert's* Caſe.

12. Cuſtom for a Copyholder to name his Succeſſor, is good; and if the Lord refuſe to admit him, the Homage, by Cuſtom, may ſet a Fine, and the Party ſhall be admitted. 1 *Brownl.* 132. *Rolles* verſus *Maſon*, but it muſt be by Decree in Chancery. 2 *Cro.* 368. *Ford* verſus *Hoskins.*

1 Roll. Rep. 125. 195. 2 Bulſt. 337.

So where a Copyholder pleaded a Cuſtom of a Manor, that every Copyholder for Life, might, in the Preſence of two other Copyholders, appoint who ſhall have his Copyhold after his Death, without any Surrender to his Uſe, and that the two Copyholders might aſſeſs a Fine, ſo as it was not leſs than uſually had been paid; this was adjudged a good Cuſtom, 4 *Leon.* 238. *Ball's* Caſe.

13. Upon a Special Verdict in Treſpaſs, the Queſtion was, whether a Feme covert, by the Cuſtom of the Manor, could deviſe her Lands to her Husband, or to any other Perſon by his Aſſent; and adjudged this was a reaſonable Cuſtom, but it ought not to be alledged by Way of Juſtification, as it was in this Caſe, (*viz.*) that *quælibet fœmina, &c. poterit deviſare*, but that *quælibet fœmina uſa fuit deviſare* by Way of Excuſe. *Moor* 123. *Poſtea* (H) 4. *S. C.*

14. The Copyholders of a Manor claimed a Cuſtom, that after the Death of a Copyholder for Life, the Lord of the Manor is *compellable* to grant another Eſtate for Life to the eldeſt Son of ſuch Copyholder, and if he have no Son, then to his eldeſt Daughter, and ſo *in perpetuum*; the two Chief Juſtices held this to be a Cuſtom againſt Law to *compel a Lord to make a Grant*, but it may be good to admit a Tenant. *Moor* 788. *Lord Grey's* Caſe.

15. Cu-

March 28. W. Jones 421, 434. Cro. Car. 497.

15. Cuſtom of a Manor, that the Steward might make Orders for the better ordering the *Commons*, and to aſſeſs a Sum by Way of Penalty on thoſe Tenants who broke thoſe Orders, and alſo to preſcribe to diſtrain for that Penalty; the Steward made an Order, that he who ſhould put his Cattle beyond ſuch a Boundary ſhould pay 3 *s.* 4 *d.* the Plaintiff *James* offended againſt this Order, and thereupon a Penalty was aſſeſſed on him, for which *Tutney*, the Defendant, diſtrained, and in Replevin made Cognizance for the Taking, *&c.* adjudged, this was a reaſonable Cuſtom, for it did not take away the Profit of the Commons, but this Order ſets limits and bounds to them. *Winch* 30. *James* verſus *Tutney*.

W. Jones 41. S. C.

16. Special Verdict in Ejectment, wherein the Caſe was, that a Copyholder in Fee ſold all his Copyhold Lands by a Deed of Bargain and Sale out of Court to one who had a *Leaſe* of the Manor for a certain Term of Years, and the Vendee entered and took Poſſeſſion, and afterwards the Copyholder died, and his Son and Heir was *admitted* upon the Preſentment of the Homage, that his Father died ſeiſed, and afterwards he ſurrendered to the Uſe of the Plaintiff, who brought this Ejectment; adjudged, that tho' a Copyholder cannot convey his Copyhold Eſtate to a Stranger any otherwiſe than by Surrender and Admittance, yet he may *grant* it to the Lord of the Manor out of Court by *Bargain and Sale*, becauſe the Cuſtom is not between the Lord and Tenant, but between the Tenants themſelves, without the Lord, therefore in this Caſe the Admittance made by the Leſſee of the Manor amounts to a Grant, becauſe the Heir had a good Title before. *Winch* 66. *Haſſett* verſus *Hanſon*. *Hutton* 65. *S. C. Poſtea* (P) 15. *S. C.*

17. The Cuſtom was, that if a Copyholder ſuffer his Houſe to be out of Repair, that he might be amerced, and that the Lord might diſtrain his Tenant's Cattle, and likewiſe the Cattle of any Under-tenant, levant and couchant on the Copyhold Lands, for the ſaid Amerciament, which was done accordingly; adjudged, this was a good Cuſtom, and that the Amerciament is not only perſonal, but 'tis a Charge upon the Land, and therefore the Cattle of a Stranger might be diſtrained. *March* 161. *Thorn* verſus *Tyler*. *Poſtea* (S) 2. *S. P. contra.*

18. A Copyholder of Inheritance made a *Letter of Attorney* to two Copyholders of the Manor to ſurrender his Copyhold *after his Death*, the Cuſtom of which Manor was, that any Copyholder might make a *Writing in the Nature of a Letter of Attorney*, to two Copyholders, to ſurrender *after his Death*; it was adjudged, that this Cuſtom was good, and that the Death of the Copyholder was no Revocation of his Writing, which he made in Nature of the Letter of Attorney, for this is not like an ordinary Letter of Attorney, which becomes void by the Death of him that made it, for this is ſtrengthened by the Cuſtom, *&c.* and that makes the Authority ſurvive. *Style* 422. *Roby* verſus *Twelves*. See *Poſtea* (H) 10. *contra.*

19. In Ejectment, *&c.* upon Evidence, the Cuſtom of the Manor was found to be, that the Land was demiſable for twenty-one Years, paying the treble Value of the Rent, and that if the Leſſee died within the Term, that the Reſidue ſhould go to his Heir, paying a Fine certain of one Years Rent, and if he aſſigned the Term, then the Aſſignee ſhould have it, paying the like Fine; and that whoever had the Reſidue of the Term, might by the Cuſtom, renew it for twenty-one Years, paying three Years Rent; and this was adjudged a good Cuſtom. *Mich.* 21 *Jac.* 2 *Cro.* 671. *Page*'s Caſe.

2 Mod. 56.

20. Treſpaſs, *&c.* for Taking away the Plaintiff's Fleſh Meat, being a Butcher; the Defendant juſtified by Vertue of a Cuſtom of the Manor of *H.* that the Homage uſed to chooſe every Year a Surveyor to take Care that no unwholeſome Victuals were ſold in the Precincts of the Manor, and that he was ſworn to execute that Office, *&c.* and had Power to deſtroy corrupt Victuals there expoſed to Sale; that he was choſen Surveyor, and ſworn, *&c.* and found a Side of Beef of the Plaintiffs, corrupt and unwholſome, and there expoſed to Sale, which he took away and burnt, *prout ei bene licuit*; and upon a Demurrer to this Plea it was objected, that it was an ill Cuſtom, becauſe it gave too great a Power of ſeiſing and deſtroying Men's Goods; but adjudged a good Cuſtom, for 'tis to prevent evil which may happen by eating unwholſome Meats, and Laws and Cuſtoms for Prevention are better than for Puniſhment of Evils; and as to the Power given by this Cuſtom, 'tis at the Peril of the Surveyor if he abuſe it; for if he deſtroy Meat which is not corrupt, and juſtify by Vertue of this Cuſtom, it will be found againſt him, and he muſt anſwer it in Damages. 1 *Mod.* 202. *Vaughan* verſus *Atwood.*

1 Lev. 177.

21. In a Special Verdict in Ejectment in *Northumberland*, the Caſe was, a Copyholder in Fee held of the Manor of *Tinmouth*, had Iſſue two Daughters, and died; that the Cuſtom of that Manor was, that the *eldeſt Daughter* ſhall inherit the Whole for her Life, and after her Death the next Heir Male to the Father, *who can make a Deſcent by Males*, ſhall have the Lands to him and his Heirs, and if there is no ſuch Heir Male, then they ſhall eſcheat to the Lord; after the Death of this Copyholder, his Widow entered, having her Widow's Eſtate, and in her Life-time the *eldeſt Daughter died*, and then the Widow died; and the Queſtion was, whether the ſecond Daughter ſhould have the Land, or it ſhould eſcheat to the Lord; it was argued, that if ſuch a Cuſtom had been annexed to Lands in Fee at Common Law, it had been void, becauſe a Fee-ſimple can never eſcheat as long as there are Heirs to inherit it; but this Eſtate being created by *Cuſtom* may be modified by Cuſtom, not only as to the Enjoying, but to the Extent of it; now ſuch a general Cuſtom may be good *ratione loci*, becauſe this Manor borders on *Scotland*, and the *Scots* in former Times making Inroads often into the Borders, therefore the Lords there bordering, provided Men to be their Tenants for the better ſecuring their Poſſeſſions, and that the Lands ſhould not deſcend to Women; that there are Cuſtoms *ratione loci*, as a Feme ſole Merchant in *London*; ſo the Cuſtom of the *Iſle of Man*, where a Thief ſhall be hanged for Stealing a Capon,

but not for Stealing an Ox; ſo there is a Cuſtom of the Manor of *Bemiſter* in *Dorſetſhire*, that the Copyholder ſhall nominate his Succeſſor, otherwiſe it ſhall eſcheat; and of the Manor of *Taunton-Dean*, that the Widow of a Copyholder ſhall inherit her Husband's Lands, and if ſhe marry again, and then dies, her ſecond Husband ſhall have the whole Inheritance; upon the whole Matter this was adjudged a good Cuſtom, and that the Daughter was within this Cuſtom, for the *eldeſt Daughter*, in this Caſe, ſhall not be only *primogenita Filia*, but the Eldeſt at the Death of her Mother, who derived her Eſtate from her Husband by the Cuſtom. *Sid.* 267. *Newton* verſus *Shaftoe*. *See* Cuſtom. (A) 13. *S. P.*

22. In Replevin, the Defendant avowed the Taking, for not doing Suit to Court-Baron from three Weeks to three Weeks, of the Manor of *St. Mary Ottory* in *Devon*; the Plaintiff replied in Bar to the Avowry, a Cuſtom within that Manor, (*viz.*) that any Copyholder who lived above ten Miles diſtant from the Court, and who would come thither and give 8 *d.* to the Lord, and 1 *d.* to the Steward, ſhall be diſcharged from Suit of Court for one Year next after the ſaid Payment, and averred, that he was ready at ſuch a Court to pay the Money, * and tendered it to the Lord, and that the Lord and the Steward refuſed to accept it; adjudged a good Cuſtom. *Sid.* 361. *Portbury* verſus *Lodgingham*. See 1 *Mod.* 77. and *Vent.* 167. Poſtea (H) 11. S. C. * 1 Mod. 77.

23. In Treſpaſs for cutting and carrying away two Oaks, *&c.* the Defendant pleaded, that one *B.* was ſeiſed in Fee of the Manor of *S.* and that there was a Cuſtom for the Lords of that Manor to grant Eſtates for Lives, by Writing ſealed, or by Writing ſigned and not ſealed; and that the ſaid Lord granted the Lands to the Defendant, by a Writing ſigned *Habendum* for the Lives of the ſaid Lord and the Defendant, *&c.* then he ſets forth another Cuſtom, for the Tenants of the ſaid Manor to cut Oaks growing on their Lands to repair their Buildings, and that an old Barn was in Decay, and that the Defendant cut the Oaks for the neceſſary Repairs thereof, which *he kept for that Purpoſe, and in convenient Time did apply to that Uſe.* 2 *Lutw.* 1390. *Fletcher* verſus *Fiſher*. *See* Repairs. (A) 11.

24. In Replevin, the Defendant made Conuſance for Fealty, Rent, and Suit to the *Court of a Manor* twice a Year; the Plaintiff, in his Replication, confeſſed the Tenure by Fealty and Rent, but traverſed the Tenure by Fealty, Rent, and *Suit to the Court of the Manor* twice in a Year; the Jury found, that there was but one Copyholder, Tenant of the Manor, and that Time out of Mind, the antient Court had been held *before the Steward, &c.* and that the Plaintiff held by the *Service of doing Suit to the Court of the Manor twice in a Year*; and upon arguing this Special Verdict, it was objected, that the Court claimed in the Conuſance, and that found by the Jury was not the ſame, becauſe *Curia Manerii* is the Court-Baron incident to the Manor, and *the Service of doing Suit to the Court of the Manor held before the Steward* is another Thing, for there *Curia Manerii* muſt be a ſpecial *Cuſtomary Court*, for which the Defendant ought to make Title in his Conuſance: But adjudged, that there may be a *Manor-Court held before the Steward* twice in a Year, and this may be to enquire of Rents arrear and Services, and the *Suit to ſuch Court* ſhall be intended by Reſervation before the Statute of *Quia emptores*; ſo that the Suit ſet forth in the Conuſance is the ſame as found by the Special Verdict. 2 *Salk.* 604. *Tomkins* verſus *Crocker*. Antea (F) 13. S. C. 2 Lutw. S. C.

25. In a Special Verdict in Ejectment, the Caſe was, the *Cuſtom of the Manor of Tregoan* (of which the Biſhop of *Exceſter* was Lord) was to grant Lands by Copy, *&c.* to two or three Perſons, for their Lives, and the Life of the Survivor, *Habendum ſucceſſive ſicut nominantur in charta & non aliter*; that the Lord of the Manor granted the Tenements in Queſtion by Copy of Court-Roll *to T. S. and his Aſſigns, for the Lives of* B. *and* C. *and of the ſaid* T. S. the Queſtion was, whether this Grant was warranted by this Cuſtom; it was objected, that it was not, becauſe *T. S.* had the whole Eſtate, and that *B.* and *C.* were not named to take an Intereſt but by Way of Limitation, for he hath the Eſtate during his own Life, and the Lives of *B.* and *C.* and if he die there is Room for an *Occupant*, which would be, to put a Tenant upon the Lord againſt his Will; 'tis true, if a Cuſtom warrants a greater Eſtate, it will warrant a Leſs, but then it muſt be of the ſame Nature, for if the Cuſtom is to leaſe for three Lives, he cannot leaſe for 500 Years, tho' that is a leſs Eſtate in the Eye of the Law; but adjudged, this was no greater Eſtate than what the Cuſtom allowed, nay, 'tis not ſo great, for that enables a Man to grant for three Lives, and this is a Grant for one Life. 1 *Salk.* 188. *Smartle* verſus *Penhallow*. Mod. Caſes 63.

(H)

Cuſtoms of a Manor and grants of Copyholds, not good. See (P) 4. (T) 7.

1. A Cuſtom for the Lord to grant Copies in Reverſion, *but not without the Conſent and Agreement of the Tenant in Poſſeſſion*, is a void Cuſtom. *Goldſ.* 103. *Plimpton* verſus *Dolinet*.

2. The Husband died ſeiſed of a Manor in which there were Copyholds, and his Widow demanded the third Part of the Manor for her Dower, *by the Name of* 100 *Meſſuages*, 100 Gardens, *&c.* and accordingly ſhe was endowed of the third Part of the Demeſnes, and of a third Part of the Services, and afterwards ſhe made a Grant of a Copyhold; and adjudged, that it was not a good Grant, becauſe ſhe did not demand the *Thirds of the Manor*, but the third Part of 100 Meſſuages, *&c.* and ſo ſhe had no Manor, and by Conſequence could not grant a Copyhold. *Mich.* 29 *Eliz. Speck's* Caſe.

3. In Replevin, the Defendant avowed, for that there is a Cuſtom in the Manor of *W.* that the greater Number of Tenants appearing at any Court held within the Manor, might make *By-Laws* for the Profit and Government of themſelves, and that the ſame ſhould bind *all the Tenants*; that at ſuch a Court held within the Manor, the Homage, who were the greater Part of Tenants there appearing, made a *By-Law*, that *no Tenant of the ſaid Manor ſhould put into ſuch a Common any Steer*, being a Year old, or more, upon Pain of Six-pence for every Offence, and that it ſhould be lawful to diſtrain for the ſame, and ſo he aſſigns the Breach of this By-Law, and avows for Taking the Diſtreſs; and upon Demurrer to this Plea the By-Law was adjudged to be void and againſt common Right, for where a Man hath a Right of Common for *all commonable Cattle*, he ought not to be reſtrained from putting in any which are commonable; but if it had been, that none ſhould put in a Steer *before ſuch a Day*, it had been good, for that doth not take away the Common, but is for the better Government thereof. *Mich.* 32 *Eliz.* 1 *Leon.* 189. *Erbury* verſus *Latton.*

Godb. 143. 3 Leon. 81. 2 Brownl. 218. S. C. contra

4. The Cuſtom of a Manor was, that every married Woman *poterit deviſare* her Copyhold Lands of Inheritance to her Husband, and ſurrender the ſame in the Preſence of the *Reeve*, and ſix other Perſons; and it was found, that *G. D.* was ſeiſed of the Copyhold Lands in which the Treſpaſs was ſuppoſed to be done, and that he had iſſue *two Daughters*, and died, and that one of the ſaid Daughters being married, deviſed her Moiety to her Husband, *&c.* and afterwards ſurrendered the ſame to him, and that he was admitted, and then the Wife died, and that her Huſband continuing in Poſſeſſion, the ſurviving Siſter and her Husband brought an Action of Treſpaſs againſt him; adjudged, that this Cuſtom was not good, becauſe it was incertain of what Eſtate ſhe might make a Deviſe; beſides, 'tis againſt Reaſon, that the Wife ſhould *ſurrender* to the Huſband, or that ſhe ſhould deviſe Lands to him, becauſe her Will is the Will of her Husband, and ſo he would convey the Lands to himſelf; and laſtly, the Cuſtom is not purſued, if it had been good, for that is to *deviſe* and *ſurrender*, which muſt be at *one Time*, and this was done at *different Times*, and all Cuſtoms ought to be ſtrictly performed: but this Cuſtom is not good for another Reaſon, for 'tis laid to be, that every married Woman *poterit deviſare*, when it ought to be *poteſt deviſare*, for Cuſtoms and Preſcriptions muſt be in *Things done*, and not in Things which might be done. *Godbolt* 14, 15. *Shipwith*'s Caſe. *Poſtea* (T) 7. *S. C.*

5. The Lord of a Manor being only Tenant for Life, granted a Copyhold *in Reverſion* to *M. B.* for Life, and died, afterwards the Copyholder in Poſſeſſion died, and then the ſucceeding Lord of the Manor granted this Copyhold to Doctor *A.* the better Opinion was, that this grant of a Copyhold in Reverſion was not good, but they all agreed, that if it come into Poſſeſſion during the Life of the Lord of the Manor who granted it, then it had been good. *Moor* 95.

6. The Cuſtom of the Manor was, that a Copyhold might be granted for three Lives; the Lord granted it to *W. R.* for his Life, Remainder to ſuch Woman which he ſhould marry, and to the firſt Son of their Bodies; adjudged, that the two Remainders were void, but that the Eſtate for the Life of *W. R.* himſelf, was good. *Moor* 677. *Webſter* verſus *Allen.*

2 Cro. 368. Moor 842.

7. Caſe, *&c.* againſt the Defendant, who was Lord of a Manor, ſetting forth a Cuſtom, that every Copyholder of that Manor might nominate one to ſucceed to the Copyhold Eſtate, who, upon tender of a Fine to the Lord in Court, ought to be admitted by him, *&c.* adjudged, that the Action doth not lie againſt the Lord for refuſing to admit, becauſe the proper Remedy is in Chancery. 2 *Bulſt.* 336. *Ford* verſus *Hopkins.*

8. Caſe, *&c.* ſetting forth, that the Plaintiff was poſſeſſed of an antient *Water-mill* in *G.* called *Santon-mill*, and that the Cuſtom of the Manor of *Bolton*, within the Pariſh of *G.* was, that *every Tenant* dwelling in an antient Meſſuage, and to which twenty Acres of Land did belong within the ſaid Manor, did always bring his Corn yearly, growing on the ſaid twenty Acres, and as long as he dwelt in the ſaid Houſe, to this * Mill to be ground; that the Defendant was ſeiſed of an Houſe, and of twenty Acres of Land in the ſaid Manor in which Houſe he dwelt, but did not bring his Corn, *&c.* to the Mill; upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe 'tis againſt the Nature of a *Cuſtom* of a Manor to apply it to *one particular Tenant* within that Manor; 'tis true, a Copyholder may apply a Cuſtom in a Pariſh to a particular Place therein, and the Reaſon is, becauſe he cannot preſcribe. 1 *Lutw.* 126. *Nicholſon* verſus *Smith.* *Cro. Car.* 418. *S. P.* 1 *Vent.* 97. *S. P.*

* Poſtea 12. S. P. 2 Bulſt. 195. Higgs *v.* Gardner. S. P.

9. In Treſpaſs, *&c.* *quare clauſum fregit*, *&c.* and putting in his Cattle, *&c.* The Defendant juſtified, for that the Place where is Parcel of the Manor of *Haye*, in which Manor there is a Cuſtom, that it ſhall be lawful for the Lord of the Manor to have Common in the Lands of the Tenants thereof for Life, or Years, when they lie freſh; and upon a Demurrer this was adjudged a void Cuſtom, and againſt Law, for the Lord of a Manor to have Common againſt his own Grant. *Palm.* 211. *White* verſus *Sawyer.*

10. Copyholder of Inheritance made a *Letter of Attorney* to Two, *&c.* to ſurrender his Copyhold Lands *after his Death* to certain Uſes, according to the Cuſtom of the Manor, *&c.* adjudged, that this is a void Cuſtom, becauſe 'tis to convey Lands againſt the Rules of Law for conveying Copyholds, for that muſt be either by Surrender into the Hands of the Lord, or into the Hands of two cuſtomary Tenants, to the *Uſe of his Will*, which muſt be executed *in his Life-time.* *Style* 311. *Wallis* verſus *Bucknall.* See *Antea* (G) 18. *contra.*

Antea (G) 22. S. C.

11. In Replevin, the Defendant avowed for Suit to Court; the Plaintiff, in his Replication, confeſſed, that he was Tenant of the Manor, and ſaith, that there are many Tenants thereof, and that there is a Cuſtom for thoſe Copyholders who live remote from the Manor to pay 8*d.* to

the Steward, *&c.* for the Uſe of the Lord, and 1 *d.* for him for entring it; that they ſhould be excuſed from doing Suit for one Year after the Payment, and ſo brings himſelf within the Cuſtom; and upon Demurrer to this Replication the Plaintiff had Judgment; for as 'tis Cuſtom which creates the Suit to Court, ſo Cuſtom may reſtrain it. 1 *Vent.* 167. *Iſaac* verſus *Ledgingham.* 1 *Mod.* 77. *S. C. Sid.* 361. *S. C.*

12. Upon a Bill in the Exchequer, the Caſe was, there was a Manor held of the *King in Fee-Farm*, and a Cuſtom therein, that all the Tenants and Reſiants of the Manor ſhould grind all their Corn and Grain *baked and brewed in their Houſes*, at the * Lord's Mill, *and not elſewhere*, and that the Defendant had built another Mill near the Plaintiff's Mill, *but out of the Manor*, by Reaſon whereof many of the Tenants of the ſaid Manor ground their Corn, *&c.* at the new built Mill, to the Prejudice of the Lord's Mill, and therefore the Scope of the Bill was to have the new Mill demoliſhed; but adjudged, that any Man might build a Mill on his own Ground out of the Manor, but if the Owner or Tenant of ſuch Mill ſhould entice or perſwade the Tenants of the Manor to grind there, *&c.* they may be prohibited by Decree, *&c.* but the Court could not Decree any Mill to be demoliſhed, unleſs built within the King's Manor, to the Prejudice of the King's Mill, ſo the Bill was diſmiſſed. *Hardres* 174. *Green* verſus *Robinſon.* Hardres 184. *Mayor of* Scarborough *v.* Skelton. S. P. * Antea 8. S. P.

13. Upon a Bill in the Exchequer, the Caſe was: *Ff.* A Cuſtom of a Manor held of the King in Fee-Farm, that all the Copyhold Tenants of the ſaid Manor ſhould grind all their Corn and Grain * baked and brewed in their antient Copyhold Meſſuages, at a Copyhold Mill within the Manor, and not elſewhere, of which the Plaintiff *Snoak*, was Tenant for Life, and the other Plaintiff *White* had purchaſed the Reverſion, and that the Defendant had built a new Mill *within the Manor*, at which ſeveral of the Copyhold Tenants ground their Corn, *&c.* This Caſe differs from the laſt precedent Caſe, for here the new Mill was built *within the Manor*, and in the other Caſe it was built *without the Manor*; it was decreed, that this new Mill is within the Cuſtom, and that the Tenants could not grind elſewhere, unleſs the Toll was exceſſive, or that their Corn could not be ground in convenient Time, that it was a perſonal Prerogative in the King to compel all the Tenants within his Manor to grind at his Mill, which no other Lord could do without a *Tenure*, or a *Cuſtom or Preſcription* ſo to do, that the Cuſtom in this Caſe doth not go to the *Eſtate*, but to the *Thing* it ſelf, and runs with the Mill, into whoſe Hands ſoever it comes; it was decreed againſt the Defendant, that he ſhould not take away any Griſt from the other Mill, but it was not decreed, that the new Mill ſhould be demoliſhed, becauſe that cannot be done, but in the King's own Caſe, or in that of his Patentee. *Hardres* 177. *White* verſus *Porter.* * Cro. Eliz. 203. Farmer *v.* Brook. 1 Leon. 143. S. C. Owen 67. S. C. *It muſt be averred, that the Oven is ſufficient to bake all the Bread. See* 2 Bulſt. 195. 3 Bulſt. 61. 8 Rep. 125.

14. In Treſpaſs for Breaking his Cloſe in *C.* the Defendant pleaded, that the Manor of *C.* was an antient Manor, and that there is a Cuſtom therein, that every Tenant *Haberet* a Way over the Place where, *&c.* and upon a Demurrer to this Plea it was adjudged ill, becauſe the Defendant did not ſhew that the *Locus in quo* was within the Manor; beſides, 'tis that every Tenant *haberet* a Way, it ſhould have been *uſi fuerunt habere*, becauſe *Haberet* is not a direct Affirmation. *Sid.* 238. *Cornelius* verſus *Tayler.*

15. In Replevin, *&c.* the Caſe upon the Pleadings was, that there is a Cuſtom in the Manor of *Mounckton in Kent*, that after every Alienation, either in Fee, or *for Life*, *of any Parcel of the Land* held of the ſaid Manor, the Lord thereof for the Time being had a *Year and an half Rent* of the Tenant, to whom the ſame was aliened in the Name of a *Fine for the Alienation*, and lays a Cuſtom to diſtrain for the *Fine*; and upon a Demurrer to this Plea, this was adjudged an unreaſonable Cuſtom, that a Year and an half's Rent ſhould be paid as a Fine for Alienation of the leaſt Part of an Acre of Land, for ſo it muſt be, as this Cuſtom is laid, and there is no Apportionment can be made after the Alienation; and it may be a Queſtion, whether it be a good Cuſtom to claim a *Fine* upon an *Alienation for Life*, becauſe the Tenure of the Lands aliened is not altered, for the Reverſion is ſtill as it was before. 2 *Vent.* 134. *Holland* verſus *Lancaſter.*

(I)

Of entailing Copyhold Lands.

1. IT was a Queſtion, that if a *Copyholder in Fee* ſurrendered to the Uſe of another *in Tail*, there being no *Cuſtom* to warrant ſuch Entail, whether it be good by the Statute *de Donis*, *&c.* or whether 'tis a *Fee-ſimple conditional at Common Law*; it was adjudged, it could not be *entailed* within the *Statute de Donis*, either within the Letter or Meaning of it; not *within the Letter*, becauſe the Statute mentions only Tenements given *per Chartam*, and Copyholds do not paſs by *Deed*, but by Surrender and Admittance, *&c.* neither are they *within the Meaning* of it, becauſe, before 7 *Ed.* 4. 19, they were of no Account in Law, being only *Eſtates at Will.* *Godbolt* 367. *Royden* verſus *Malſter.* *Reeves* verſus *Malſter.* Cro. Car. 131, 411. 2 Roll. Rep. 383. W. Jones 360. S. C.

2. A Surrender was made to the Uſe of another in Tail, with ſeveral Remainders over in Tail; adjudged, that a Recovery ſhall not be allowed to bar this Entail without a ſpecial Cuſtom. 37 *Eliz.* *Lane* verſus *Hill.* Poſtea 9. S. C.

3. The Court was divided in Opinion, whether a Copyhold Eſtate might be entailed. *Trin.* 36 *Eliz.* *Cro. Eliz.* 307. *Gravener* verſus *Rooks.* Poph. 32.

4. In Ejectment for Copyhold Lands held of the Manor of *Iſtleworth*, it was adjudged, that there cannot be an Eſtate-tail of ſuch Lands, unleſs there is a *ſpecial Cuſtom* of the Manor to warrant it; but admitting that Copyhold Lands might be entailed, then a Surrender thereof by the Tenant in Tail is a *Diſcontinuance*, and ſhall put the Iſſue in Tail to his Action, for he muſt take it ſubject to all the Inconveniences which an Eſtate-tail at Common Law is ſubject unto. *Mich.* 41 *Eliz. Cro. Eliz.* 717. *Iriſh* verſus *Reeves*.

Poſtea (O) 5, 6. *See* Moor 358. 4 Rep. 23.

5. In Treſpaſs, upon Not guilty pleaded, the Jury found a Special Verdict, that the Lands were *Copyhold*, demiſable in Fee, in Tail, or for Life, and that *W. R.* was ſeiſed thereof in Tail, Remainder to *R. R.* in Tail, and that the ſaid *W. R.* ſuffered a Recovery thereof in the Court of the Manor, and afterwards died without Iſſue; and they found that there was *no Cuſtom for Common Recoveries* before that Time, uſed in the ſaid Manor; adjudged, that this Recovery ſhall not bind the Remainder in Tail, becauſe 'tis not to bind, but upon a Recompence in Value, and here he cannot have any Land in Value from the common Vouchee, for if he ſhould, then the Lord by ſuch Conveyance would loſe his Fine, and the Tenant would hold his Land as a Copyholder, without any Admittance or Grant from the Lord, which is contrary to the Nature of a Copyhold. *Mich.* 37 *Eliz. Cro. Eliz.* 372. *Dell* verſus *Higden*. 391. *Clunn* verſus *Peaſe*.

Poſtea 7.

6. Where the Cuſtom of a Manor is to grant Lands in Fee-ſimple, by the ſame Cuſtom Lands may be granted in Tail, or upon any other Limitation or Condition, becauſe ſuch Grants are not ſo large as an Eſtate in Fee-ſimple is. 3 *Rep.* 9. In *Heydon*'s Caſe. 4 *Rep.* 25. *Gravener* verſus *Tedds. S. P.*

7. Tho' the Statute *de Donis* enures only to Eſtates at Common Law, and not to cuſtomary Lands, yet the *Statute co-operating with the Cuſtom*, makes it lawful for Copyholders to entail their Land, and ſuch an Eſtate-tail may be barred or deſtroyed by Cuſtom. *Popham* 32. *Gravener* verſus *Brooks*. 42 *Eliz.* * *Iriſh* verſus *Ives. S. P.* 2 *Brownl.* 43. *Reyner* verſus *Powell. S. P.* 1 *Roll. Rep.* 48. *Warne* verſus *Sawyer. S. P.* 9 *Rep.* 105. *Margaret Podger*'s Caſe.

*Antea 4.

Poſtea 9. S. C.

8. So that admitting a Copyhold Eſtate may be *entailed by Cuſtom*, a Plaint may be made in the Court of the Manor, in the Nature of a real Action, and a Recovery ſhall be had in that Plaint againſt the Tenant in Tail, and ſuch a Recovery ſhall be a Diſcontinuance to the Eſtate-tail. *Poſtea* Copyhold. (O) 5. 1 *Brownl.* 121. *Hill* verſus *Upchurch*.

Antea 8. S. P. Antea 2. S. C.

9. In Ejectment, *&c.* the Defendant pleaded a Cuſtom, that a Copyhold might be entailed, and that if a Copyholder, who is *Tenant in Tail*, ſurrenders to the Uſe of *W. R. in Fee*, that this ſhall bind his Iſſue; adjudged, that a Copyhold could not be entailed without ſuch a Cuſtom to entail it. *Trin.* 27 *Eliz. Moor* 188. *Hill* verſus *Morſe*.

10. Adjudged, that a Surrender made of a Copyhold by a Tenant in Tail is no Diſcontinuance, but a Recovery ſuffered by him is a Diſcontinuance, and that a Copyhold may be entailed by the Equity of the Statute *W.* 2. without a Cuſtom to warrant it. *Moor* 358, and 637, and 753. *Oldcott* verſus *Levell. S. P.*

11. In a Special Verdict in Treſpaſs, the Caſe was, that *W. W.* being ſeiſed of a Copyhold of Inheritance, made a Surrender to the Uſe of his Laſt Will, and having a Daughter then born, and his Wife being with Child, he deviſed Part of his Lands to the Child in the Mother's Womb, *& hæredibus ſuis*, lawfully to be begotten, the Reſidue to his Daughter and to the Fruit of her Body, and if ſhe die without Fruit of her Body, then to remain to the Child in the Mother's Womb, *&c.* and his Will was, that one ſhould be Heir to the other, afterwards the Wife was delivered of a Daughter, *&c.* adjudged, that this was an Eſtate-tail in the after-born Daughter, for the Words *Hæredibus ſuis, and that one ſhould be Heir to the other*, made it an Eſtate-tail without the Word *Body*; adjudged alſo, that a Copyhold might be entailed by Special Cuſtom, and barred by a Common Recovery, and that a Surrender might bar the Iſſue in Tail by a Special Cuſtom. *Moor* 637. *Church* verſus *Wiatt. Hill.* 37 *Eliz.*

12. An *Eſtate-tail* of a *Copyhold* cannot be barred by a Surrender, without a ſpecial *Cuſtom* for that Purpoſe, and to maintain ſuch Cuſtom, it ought to be ſhewed, a Plaint had been brought upon ſuch Surrender, and Judgment given in the Plaint. *Poph.* 128. *Lee* verſus *Brown. Moor* 637. *S. P.*

Style 450. Poſtea (O) 7.

13. Upon a Trial at Bar in Ejectment, for Lands held of the Manor of *Wakefield*; it was admitted, that by the Cuſtom of that Manor, Copyhold Lands might be entailed, and that the Cuſtom to bar ſuch Entails is for the Tenant in Tail to commit a Forfeiture, and then, after three Proclamations, the Lord may ſeiſe, and then regrant it to the Copyholder and his Heirs, and another Cuſtom to bar ſuch Entails is, for the Tenant in Tail to make a Surrender to the Purchaſer and his Heirs, and then for the Purchaſer to commit a Forfeiture, and the Lord to ſeiſe as aforeſaid, and by his Regrant to the Purchaſer, the Iſſue in Tail is barred, tho' the Tenant in Tail did not join. *Sid.* 314. *Pilkington* verſus *Stanhope*.

(K)

Where it ſhall be forfeited, or not, for refuſing to appear at Court and doing Services. See Poſtea (Q) 8.

1. ADjudged, that if a Copyholder doth not come to Court to do his Services, having been often required to come, but ſtill defers it, tho' this is not an abſolute Refuſal, yet 'tis a *Forfeiture*; but if he makes any Doubt whether ſuch Services ſhould be performed, and ſays he will not pay them till 'tis proved by Law that they are due, ſuch a Denial is no Forfeiture. *Paſch.* 26 *Eliz. Barnham* verſus *Higgins. Hill.* 22 *Jac. Latch* 14. *Johnſon*'s Caſe, and *Trin.* 1 *Car. Latch* 122. *Grey* verſus *Uliſſes. S. P.*

2. The *Summons* to appear at the Lord's Court was made at the Church, the Copyholder did not appear; adjudged, this was not any Cauſe of Forfeiture, becauſe it was not ſpecially ſhewed, that it was the Cuſtom for the Tenants to appear upon ſuch Summons, and even in ſuch Caſe it would be hard to make a Forfeiture, becauſe he might not have any *Notice* of it, therefore it ought to be *perſonal Notice*, for his Refuſal muſt be wilful to make a Forfeiture. 1 *Leon.* 104. *Branch*'s Caſe. *Godb.* 142. *S. P. Lord Dacres* verſus *Hurlſtone. S. P. Poſtea* (Q) 7. *S. P.* See *Taverner* verſus *Cromwell. Cro. Eliz.* 353. *Co. Ent.* 288. *S. C.*

3. A Copyholder was *ſummoned* to appear at Court, and to do and perform his Suit and Services as a Copyhold Tenant, *&c.* but he made Default; and it was laid in the Declaration, that *ſectam voluntarie & contemptuoſe ſubſtraxit, & illam facere recuſavit*, and that on ſuch a Day Notice was given to him by the Bailiff of the Manor to appear, but did not ſay by the Command of the Lord; yet adjudged, a Breach of the Cuſtom and a Forfeiture of his Copyhold, for he holds his Land *per ſervitia & conſuetudines*, as well as *per Redditum.* 3 *Bulſt.* 268. *Hammond* verſus *Winnibank. Poſtea pl.* 4. *S. P. Sir Chriſtopher Hatton*'s Caſe. *S. P. Moor* 350, cited in * *Criſp* and *Fry*'s Caſe.

1 Roll. Rep. 429. *by the Name of* Buttivant *v.* Pickſtuff. * Cro. Eliz. 148. S. C. Moor 350. Noy 58. S. C.

4. *In Ejectment, &c.* the Queſtion was, whether a Copyholder not coming to the *Lord's Court* to do his Suit for three Years together, be ſuch a voluntary Neglect as to make a Forfeiture; and adjudged it was not, unleſs he had *abſolutely denied* to do Service, eſpecially ſince no Cuſtom was alledged to make a Forfeiture *for Non-feazance*, by the Space of three Years, 'tis an Offence only finable, but 'tis a Forfeiture, if warning be given to the Tenant himſelf, of the Time when the Court will be kept, and he doth not appear at that Time and Place. 3 *Bulſt.* 80. *Belfeild* verſus *Adams. Antea* (K) 3. *S. P.* See *Poſtea* (P) 1. (Q) 8.

1 Roll. Rep. 256. S. C. *By the Name of* Southcot *v.* Adams.

(L)

Where it ſhall be forfeited, or not, by refuſing to pay Fines, or Rents. See Poſtea (P) 8.

1. WHere the *Fine, upon Admittance*, is not certain, the Lord cannot aſſeſs an *unreaſonable Fine*, if he doth, the Copyholder may *refuſe* to pay it, and ſuch Refuſal ſhall be no *Forfeiture*, and the Reaſonableneſs of the Fine ſhall be determined by the Courts in *Weſtminſter-Hall*, upon Proof of the Value of the Land; and if the Lord aſſeſs a reaſonable Fine, the Copyholder is not obliged to pay it preſently, becauſe he could not know what would be aſſeſſed where the Fine is incertain, and in ſuch Caſe he ſhall have convenient Time to pay it, but no Fine is due before *Admittance*; and if afterwards the Tenant deny to pay it, 'tis a Forfeiture. 4 *Rep.* 28. *a. Hubbard* verſus *Hammond.* 8 *Rep.* 43. *Greiſly*'s Caſe. *S. P. Moor* 622. *S. C. Dalton* verſus *Hammond. Poſtea* 15.

Moor 622. S. C. Cro. Eliz. 779. *By the Name of* Dalton *v.* Hammond.

2. No Fine is due to the Lord, either upon a Surrender or Deſcent, *before Admittance*; and if 'tis a reaſonable Fine, and afterwards the Tenant refuſe to pay it, 'tis a Forfeiture. 4 *Rep.* 28. *Sands*'s Caſe, cited in *Hubbard* and *Hammond*'s Caſe.

3. Where the Eſtate of a Lord of a Manor ceaſes, and is transferred to another, who demands Rent of the Copyholder, and he refuſes to pay it, 'tis no Forfeiture of the Copyhold, *without Notice* given of the Alteration of the Eſtate. 8 *Rep.* In *Frances*'s Caſe. See *Poſtea* (Q) 3. *S. C.*

4. *Copyholder in Fee* ſurrendered to *P. G. for Life*, Remainder to *R. L.* in Fee; the Tenant for Life was admitted, afterwards the Remainder-man ſurrendered his Reverſion in Fee to *W. R.* and he was admitted to the Remainder, then the Tenant for Life died; adjudged, that *W. R.* ſhall have the Land, and that the * Admittance of the Tenant for Life was the Admittance of him in Remainder; beſides, in this Caſe, the Lord of the Manor † accepting the Surrender, hath admitted the Surrenderor to have a Remainder, which he might ſurrender; and 'tis no Objection to

Antea (C) 3. S. C. Moor 465. S. C. Gouldsb. 95. S. C. * Cro. Eliz. 662. 4 Leon. 111. 4 Rep. 22. † 3 Bulſt. 237. Rawlinſon *v.* Greeves. S. P. Bridgm. 81. S. C. *by the Name of* Robinſon *v.* Greeves.

ſay,

** Moor 358. S.P. 3 Lev. 308. S.P. ſay, that by this Means the Lord will loſe a *Fine*, becauſe there is but ** *one Fine* due, which the Tenant for Life muſt pay upon his Admittance, unleſs there is a ſpecial Cuſtom for the Lord to have two Fines, (*viz.*) one upon the Admittance of the Tenant for Life, and the other for the Remainder, when it comes into Poſſeſſion. *Cro. Eliz.* 504. *Gyppin* verſus *Bunney*. *Antea* (C) 3. *S. C.*

5. *Treſpaſs* by a Copyholder againſt the *Lord*, for entring an Houſe and an Acre of Land; the Defendant pleaded, that he had admitted the Plaintiff into the Houſe and Land, and had aſſeſſed a *Fine* of twenty Nobles, *&c.* and appointed him to pay it at his Bailiff's Houſe, *&c.* within three Months after it was aſſeſſed, *&c.* and then he alledged, that the Plaintiff had not paid the Fine, wherefore the Defendant entered on the Houſe and Land as forfeited; and upon Demurrer it was adjudged, that the Lord was not bound to aver, or ſhew that the Fine was reaſonable, for if it was otherwiſe, the Plaintiff muſt ſhew that it was unreaſonable, but he ought to lay a *Demand of the Fine* at the very Time when it became due, and of the very Perſon of the Tenant, or in ſome ſhort Time after, otherwiſe 'tis no Forfeiture not to pay it. *Hob.* 135. *Denny* verſus *Lemmon*. 13 *Rep.* 2. *S. P. Style* 387. *Fanſhaw* verſus *Bond. S. P.*

6. Surrender of a Cottage and an Acre of Land, the Steward, upon the Admittance of the Surrendree, aſſeſſed a Fine of 5 *l.* 6 *s.* 8 *d.* being *two Years* Rent, or Value of the Cottage, *&c.* and that the Lord afterwards *required* the Tenant to pay the Fine, which he refuſed, thereupon he entered for a Forfeiture; adjudged, that this was an unreaſonable Fine for a Cottage and an Acre of Land, but if it had been reaſonable, the Lord ought to have appointed a certain Day and Place on which it ſhould be paid, becauſe the Penalty is ſo great as the Forfeiting the Eſtate. *Mich.* 6 *Jac. Willows* verſus *Willows*. 13 *Rep.* 1.

7. In Treſpaſs, *&c.* the Point in Iſſue was, whether Copyholders, upon *Admittances*, have uſed to pay Fines at the *Will of the Lord*, or *Fines certain*, (*viz.*) the Value of *two Years Rent*, and no more; and to prove that the Fines were incertain, the Plaintiff produced ſeveral Court-Rolls, by which it appeared, that the Lord had taken for Admittances *upon Surrenders*, ſometimes more and ſometimes leſs, but always under the Value of *two Years Rent*, and no Sum above that Value; adjudged, that Court-Rolls, to prove the Incertainty of Fines taken by Lord, ought to be *above the Value of two Years Rent*, and that in Caſes of Admittances upon Deſcents, the Lord hath taken incertain Sums *above that Value*, for if under that Value, 'tis no Proof that the Fines are incertain, becauſe 'tis a good Cuſtom to pay *two Years Value*, or any Sum of Money under that Value, for a Fine, upon an Admittance on Deſcent; but in Caſes of Surrender or Purchaſe, the Lord may take what Fine he will, but ſuch Fines ſo taken will not prove the Taking incertain Fines by the Cuſtom. 2 *Bulſt.* 32. *Allen* verſus *Abraham*.

8. In Ejectment, *&c.* the Caſe was thus, (*viz.*) Cuſtom of a Manor, that upon the *Death* of every Copyholder, his *Heir* ſhould pay ſuch a *Fine* as ſhould be reaſonably aſſeſſed, and that if he did not come at the next Court to be admitted, Proclamation ſhould be made for that Purpoſe; and if he came not after three Proclamations, that then the Lord might ſeiſe the Copyhold; it was found, that a Copyholder died, and that his Death was preſented, *&c.* and that *W. R.* was his Heir, and that Proclamations were made at three ſeveral Courts, *&c.* but the Heir did not come in, whereupon the Lord ſeiſed, *&c.* it was likewiſe found, that at that Time the * Poſtea (O) 3. S.P. * *Heir was beyond Sea*, and that afterwards having Notice of the Death of his Anceſtor, he tendered the Fine to the Lord, and entered and made a Leaſe of the Land to the Plaintiff; adjudged, that his being *beyond Sea* ſhall excuſe the Forfeiture, for it ſhall be intended, that he had no Notice of the Death of his Anceſtor, or of the Deſcent to him, or of the Proclamations, and therefore is excuſable. 2 *Cro.* 226. *Underhill* verſus *Kelſea*.

9. In Treſpaſs, the Queſtion was, whether the Lord might aſſeſs *two Years and an half's* Value of the Land for a Fine, according to the Rack-Rent, and for Non-payment enter for a Forfeiture, and adjudged he could not, for 'tis unreaſonable, and that one Year and an half's Rent, according to the improved Value, is high enough, but that the Tenant might refuſe to pay two Years and an Half. *Cro. Car. Dow* verſus *Golding*. 142.

10. The Lord aſſeſſed a Fine of 12 *l.* and appointed the Payment to be made at his Manor-houſe three Months afterwards, on a Day certain, but the Copyholder pretending that the Fine was only the Value of two Years Quit-Rent, offered to pay the ſame on the Day when the other Fine was aſſeſſed, but did not appear on the Day, and at the Place where the ſame was appointed to be paid; adjudged, this was a Forfeiture; but if he had appeared at the Day and Place, and tendered the two Years Rent, as he did when the Fine was aſſeſſed, it had been no Forfeiture. 2 *Cro.* 616, 617. *Gardner* verſus *Norman*.

3 Mod. 132. S. C. 11. In Replevin, *&c.* the Defendant avowed Damage-feaſant in his Freehold; the Plaintiff replied in Bar to the Avowry, that the Land is Copyhold, and that he was admitted thereunto by the Defendant, *&c.* who rejoined, that the Copyhold was of the yearly Value of 28 *l.* and that at ſuch a Court, *&c.* a Fine of 35 *l.* was ſet, and for Non-payment thereof the Lands were forfeited, and the Defendant entered for the Forfeiture; the Plaintiff ſurrejoined, that 35 *l.* was not a reaſonable Fine, *&c.* then he ſets forth a Cuſtom in the ſaid Manor to pay a *Year's Value* of the Land for a Fine, upon an Admittance, and that he tendered the Value, (*viz.*) 28 *l.* which was refuſed; and upon a ſpecial Demurrer, for that the *Value* conſiſts in Eſtimation, and therefore both that and the Cuſtom are Incertain, for ſometimes more, and at other Times leſs may be given; it was adjudged, that this is certain enough, for 'tis iſſuable, and may be tried by a Jury, whether

whether it was of ſuch an yearly Value at the Time of the Admittance, or not; the Plaintiff had Judgment. 3 *Lev.* 255. *Titus* verſus *Parkins.*

12. *Aſſumpſit* by a Widow, who was Executor of her Husband, late Lord of the Manor of *Burbon* for a Fine, upon an Admittance of a Copyholder, ſet in his Life-time; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that an *Aſſumpſit* would not lie for a Copyhold *Fine*, on an *Aſſumpſit in Law*; and of that Opinion was the Chief Juſtice *Holt*, becauſe it was a Duty ariſing out of an *Inheritance*, out of a *Cuſtom*, and out of a *Tenure*, but the other three Judges held that it would lie, that 'tis like the Caſe where an *Aſſumpſit* was brought for *Scavage* on a Promiſe in Law, and this was the Caſe of the *Mayor of London, &c. and Goree*, and yet they had the Inheritance in the *Scavage*, but here the Fine was ſet, and ſo doth not depend on the Inheritance. 3 *Lev.* 262. *Shuttleworth* verſus *Garnett.* 3 Mod. 239.

13. The Defendant was admitted Tenant to a Copyhold, and the Steward ſet a Fine of 8 *l.* upon his Admittance, which being perſonally demanded, and he refuſing to pay it, the Lord brought an Ejectment to recover the Lands as forfeited; the Reaſon why he refuſed to pay it was, becauſe upon a Survey of the Manor, in the Reign of *Queen Elizabeth*, by Vertue of a Commiſſion directed to ſome Men of Credit, and by the Conſent of the Lord of the Manor, and his Tenants, a Decree was then made by the Court of Chancery, by which the Fine was aſcertained, according to the Value of the Lands at that Time, and which was a Year and half's Value, upon Deſcents, and this was to be binding for ever; the Queſtion was, how the Year's Value ſhould now be computed, whether as at that Time, or according to the improved Value, and the Tenant refuſing to pay according to the improved Value, but being willing to pay as it was ſet in the Reign of Queen *Elizabeth*, upon the Survey by the Commiſſioners, this Ejectment was brought; and the better Opinion was, that it did not lie, for no Man ſhall forfeit his Eſtate, but upon a wilful Default; the Lord had a more proper Remedy, and that was by an Action of Debt for this Fine, and that would have brought the Right in Queſtion; but let the Right be as it will, if the Copyholder hath a probable Cauſe to induce him to believe, that he ought not to pay the Fine demanded, he ſhall not forfeit his Eſtate for Non-payment. 2 *Mod.* 229. *Trotter* verſus *Blake.*

14. Upon Evidence at a Trial at Bar in Ejectment, the Caſe was, the Defendant was a Copyholder of the Manor of *Latham* in *Middleſex*, and upon his Admittance the Lord aſſeſſed two Years Purchaſe for a *Fine*, and appointed him to pay it within half a Year, who replied he would pay three Years Quit-Rent for the Fine, according to the Cuſtom, and not any incertain Fine; afterwards the Lord entered for a Forfeiture, in not paying the Fine he had aſſeſſed, and brought this Ejectment; it was the Opinion of the Court, if the Fine was incertain, there ought to be both Time and Place appointed for the Payment, and an *actual Demand* made of it, otherwiſe there ſhall be no *Forfeiture* for Non-payment, but in this Caſe the Jury found, that the Fine was certain, and ought to be three Years Quit-Rent, and no more. *Raym.* 41. *Wheeler* verſus *Honour.* See * *Dalton* verſus *Hammond*, and † *Gardiner* verſus *Norman.* Sid. 58. *Antea 1. † Antea 10.

15. It hath been formerly doubted, whether an *Action of Debt would lie for a Fine upon an Admittance to a Copyhold*; but now 'tis generally held, that the Action will lie, and that the Plaintiff muſt ſet forth, that he is Lord of the Manor of, *&c.* of which ſuch a Meſſuage and ſuch Lands are Parcel, and uſually granted by Copy of Court-Roll, that *W. R.* was ſeiſed thereof in Fee, and ſurrendered to two cuſtomary Tenants, to the Uſe of the Defendant and his Heirs, who was admitted at ſuch a Court, *&c. by the Steward*, and thereupon, at the ſame Court, he aſſeſſed a Fine of 10 *l.* and appointed a Day of Payment to the Lord of the Manor, which was not paid, then he muſt ſet forth a Demand and a Denial *ad damnum, &c.* 1 *Lutw.* 597. *Bellet* verſus *Cartwright.* *Sid.* 58. *S. P.* in the Caſe of * *Wheeler* verſus *Honour.* See *pl.* 12. * Antea 14.

(M)

Where it ſhall be forfeited, or not, by the Copyholder making Leaſes, &c.

See Poſtea (P) 9.

1. A Copyholder made a Leaſe of his Copyhold Lands for Years by Indenture, and he endeavouring to prove a Cuſtom to warrant it, ſhewed, that there were Leaſes made of it, *Anno* 27 *H.* 8. and ſeveral Times ſince, ſome for twenty, and ſome for forty Years; adjudged, that this was not ſufficient to prove a *Cuſtom*, for that muſt be Time out of Memory, but this is of a freſh Date, therefore the making this Leaſe is a Forfeiture. *Cro. Eliz.* 351. *Jackman* verſus *Haddeſdon.*

2. A Copyholder made a Leaſe of his *Freehold Lands* for ten Years, and of his *Copyhold Lands* for one Year, but covenanted with the Leſſee, that he ſhould enjoy the Copyhold *from Year to Year during the ten Years*; adjudged this was a Leaſe for ten Years, and by Conſequence a Forfeiture; but where a Leaſe is made of a Copyhold for a Year certain, according to the Cuſtom, and the Leſſor covenanted in the ſame Leaſe, that the Leſſee ſhall hold it longer, at the *Will of the Leſſor*, it may be a Queſtion, whether this is a Forfeiture; but if it be, and the Lord die without taking Advantage of it by * Entry or Seiſure, he in Reverſion ſhall never do it. 2 *Cro.* 301. *Mountague*'s Caſe. 1 Bulſt. 190. S. C. 1 Mod. 200. S. P. * Poſtea (P) 19, 25. S. P.

3. A Copyholder made a Leaſe of his Copyhold for a Year, excepting the *laſt Day* of the Year, and ſo from Year to Year, excepting the laſt Day of each Year, as long as he lived; adjudged, this 1 Bulſt.

was

was a Forfeiture, for 'tis a Leaſe for two Years excepting two Days, and is only a Shift to avoid a Forfeiture. 2 *Cro.* 308. *Lutterel* verſus *Weſtover.* *Antea* (B) 7. *S. P.*

* *The Leſſee may aſſign ſuch a Leaſe, or make an Underleaſe without a* 102. S. C.

4. Copyholder for Life had * Licenſe from the Lord to make a Leaſe *for three Years, if he ſo long lived*, and he made a Leaſe for three Years abſolutely, without any ſuch Limitation, *if he lived ſo long*; adjudged, this is no Forfeiture, becauſe ſuch a Limitation is made to his Leaſe by Operation of Law, for if he doth not live three Years, the Leaſe is determined. *Poph.* 105. *Hall* verſus *Arrowſmith.* 2 *Cro.* 436. *Worlidge* verſus *Banbury.* *S. P.*

new Licenſe, and if the Copyholder dies, the Leaſe ſhall be good againſt the Lord during the Term. Poph. 188. Hutt. Johnſon *v.* Smart.

5. The Lord of a Manor gave Licenſe to a Copyholder to make a Leaſe for twenty-one Years, to commence on *Michaelmas-Day* next, and he made a Leaſe accordingly, and before *Michaelmas* he made another Leaſe to *W. R.* and this ſecond Leaſe was likewiſe for twenty-one Years, and to commence on *Michaelmas-Day* following, but ſince the Licenſe was ſatisfied by making the firſt Leaſe; adjudged, that the ſecond Leaſe was made without any Licenſe, and by Conſequence was a Forfeiture. *Moor* 184.

Palm. 385. 2 Roll. Rep. 344. 361. 372. Godb. 345.

6. A Woman, who was a Copyholder in Fee, married, her Husband made a Leaſe for Years, not warranted by the Cuſtom, which was a Forfeiture; the Husband died; adjudged, that the Lord ſhall not take Advantage of this Forfeiture after his Death, but the Wife ſhall enjoy the Eſtate. *Cro. Car.* 7. *Saverne* verſus *Smith*; *aliter* if he commit Waſte, 4 *Rep.* 27, or refuſe to pay Rent. *Poſtea* (P) 3. *S. C.*

7. The Cuſtom of a Manor was, that if a Copyholder make a Leaſe for more than one Year, it ſhall be a Forfeiture; a Copyholder committed this Forfeiture, and afterwards the Lord of the Manor made a Leaſe of his ſaid Manor to *T. S.* for ſeven Years, and that Leſſee entered for a Forfeiture, but it was held it was not lawful, for tho' the Heir may enter in the Time of his Anceſtor for a Condition broken, becauſe he is privy in Blood, yet the Leſſee cannot ſo do, for he is a Stranger: But if the Forfeiture is preſented by the Homage, and enrolled in the Court-Rolls, in ſuch Caſe the Leſſee may enter, becauſe by the Forfeiture the Copyhold Eſtate was determined. 4 *Leon.* 223.

* *Leaſe for three Years, and ſo from three Years to three Years, is a Forfeiture, for 'tis a Leaſe for ſix Years. See* 1 Bulſt. 190 2 Cro. 301. Wilcock's *Caſe* contra.

8. In a Special Verdict in Ejectment, the Caſe was, *Thomas Sely* had an Eſtate for Life in Copyhold Lands, and one *Peter Sely* being bound with him for a Debt of 100 *l.* which was the proper Debt of *Thomas*, he executed a Deed to *Peter*, by which he did *covenant*, *grant*, *and agree*, with *Peter*, &c. that *he ſhould have and enjoy* thoſe *Lands for ſeven Years*, and ſo from * ſeven to ſeven Years, for and during forty-nine Years, if *Thomas* ſhould ſo long live; but that the ſame ſhould be void, if the ſaid 100 *l.* was paid by *Thomas*, *&c.* it was inſiſted, that this was not a Leaſe ſo as to entitle the Lord to a Forfeiture; 'tis true, the Word *Covenant* will make a Leaſe, ſo will the Words *to have*, *hold*, *and enjoy*, for theſe are Words which give an Intereſt, but this muſt be underſtood in Caſes of *Freehold*, and if conſtruing it to be a Leaſe will work a Wrong, then 'tis only a *Covenant*; and no Intereſt veſts, therefore this being in the Caſe of a *Copyhold*, ſhall never be conſtrued to be a Leaſe, becauſe it would work a Wrong both to the Leſſor and Leſſee, for the one would forfeit the Eſtate, and the other would loſe his Security: *Sed per Curiam*, it was the plain Meaning of the Parties to make a Leaſe, if the Words had been doubtful, it might have amounted to a Covenant, and no more; but this is a Leaſe, and by Conſequence a Forfeiture. 2 *Mod.* 79. *Richards* verſus *Seely.* *See* Leaſes. (O) 10.

(O)

Of Fines and Recoveries had of Copyholds. See *Poſtea* (Q) 12, 14.

1. *Sſ.* A *Recovery* was ſuffered in the Court of the Manor by Plaint, in Nature of a Writ of Right, and it was moved in the Court of Common Pleas, whether a Precept might be awarded out of *that Court*, to execute the Recovery, and to put the Recoveror in Poſſeſſion by the *Poſſe Manerii*, if there ſhould be Occaſion; and adjudged, that it could not, for Force in ſuch Caſe is not to be juſtified, with Leave of the King's Courts. 3 *Leon.* 99.

2. Tenant for Life, Remainder for Life of Copyhold Lands; the Tenant for Life accepted a *Bargain and Sale of the Freehold* from the Lord, and afterwards levied a Fine with Proclamations, and the five Years paſſed; adjudged, that this ſhall not be a Bar to the Remainder-man for Life, for the Acceptance of the Bargain and Sale of the Freehold doth not determine the Eſtate of the Tenant for Life as to him in Remainder, but only as to himſelf and the Lord, for it ſhall ſtill be in *Eſſe* as to all Strangers, and the Eſtate of him in Remainder is ſo well preſerved by the Cuſtom, that no Act of the particular Tenant for Life ſhall Prejudice it; as where there is Tenant for Life, Remainder for Life of a Copyhold, and the Tenant for Life commits a Forfeiture, he in Remainder cannot take Advantage of it, but the Lord ſhall have it during the Life of him by whom it was forfeited. 2 *Brownl.* 153. *Bicknell* verſus *Tucker.*

* Antea (L) 8. S. P.

3. Copyholder in Fee levied a Fine, his Heir being then * *beyond Sea*, and Proclamations being made at three Courts, according to the Cuſtom of the Manor, and the Heir not claiming, the Lord ſeiſed the Eſtate as forfeited; adjudged, that this Fine and Nonclaim ſhall not bar the Heir, becauſe he was *beyond Sea*; but if he had been in *England* at the Time when the firſt Proclamation

tion was made, and had afterwards gone out of the Realm, in ſuch Caſe he ſhould be barred, becauſe he ſhall not defeat the Lord of his Fine or Forfeiture, by his own Act. 8 *Rep.* 100. *Sir Rich. Lechford*'s Caſe. See *King* verſus *Dilliſton.*

4. The Father was *Tenant for Life* of a Copyhold (where the Cuſtom was to grant for two or three Lives ſucceſſively) *Remainder* to his eldeſt Daughter for Life, *&c.* the Father, by Bargain and Sale enrolled, and by Fine purchaſed the Inheritance of the Lord; the Father died, and his Son levied a Fine, and five Years paſſed; adjudged, that this Fine did not bar the Daughter, who had the *Remainder for Life*, becauſe her Eſtate was not deveſted by the Bargain and Sale, or Fine, for the Lord did what was lawful for him to do, and the Father, who was Tenant in Poſſeſſion, did accept what he might lawfully accept, for he being in Poſſeſſion, was not active, but paſſive, and therefore could not deveſt the Eſtate of thoſe in *Remainder.* 9 *Rep.* 107. *Margaret Podger*'s Caſe.

5. Adjudged, that where by Cuſtom of a Copyhold Manor, *Plaints* have been made in the Court in the Nature of real Actions, if a Recovery be had in ſuch a Plaint, 'tis a *Diſcontinuance*, and ſhall bar the Iſſue in Tail, for ſuch Plaints being warranted by Cuſtom, 'tis an Incident which the Law annexeth to ſuch Cuſtom, that a Recovery ſhall make a Diſcontinuance. 4 *Rep.* 23. *Deal* verſus *Rigden. Mich.* 37 *Eliz. Cro. Eliz.* 391. *Clan* verſus *Peal. S. P. Poſtea 6. S. C.* Antea (I) 5.

6. Special Verdict in Treſpaſs, wherein it was found, that the Land was Copyhold, demiſable in Fee, in Tail, or for Life, and that Tenant in Tail being ſeiſed thereof, Remainder in Tail to another, the Tenant in Tail ſuffered a Recovery in the Court of the Manor, and afterwards died without Iſſue, and it was found, that there was *no Cuſtom to ſuffer Common Recoveries* in the ſaid Manor; adjudged, that this Recovery ſhall not bind the Remainder, becauſe in this Caſe he can have no Recompence of other Lands in Value; beſides, if ſuch a Recovery ſhould be a good Conveyance, then the Lord would loſe his Fines, and the Copyholder would hold his Eſtate without Grant or Admittance by the Lord, which is contrary to the Nature of a Copyhold. *Mich.* 37 *Eliz. Clan* verſus *Penſe.* Antea (I) 5.

7. The Manner of barring Entails of Copyholds in ſome Places, is for the Copyholder to commit a Forfeiture, either by making a Leaſe not warranted by the Cuſtom, or by refuſing to pay Rent, or do his Services, and then the Lord enters and ſeiſes the Lands for the Forfeiture, and grants them over to another by the Conſent and Appointment of him who made the Forfeiture; but there could be no Cuſtom for this, becauſe the Seiſure for a Forfeiture deſtroys the Copyhold Eſtate, and 'tis at the Lord's Election, whether he will grant again by Copy of Court-Roll, or not. *Pilkington* verſus *Bagſhaw. Style* 450. *Antea* (I) *pl.* 13. *S. P.*

(P)

Of Forfeitures and other Determinations of the Eſtates of Copyholders, and who may enter, and who not, and what Actions lie againſt him for Waſte, and what not.

See *Extinguiſhment.* (B) per totum. Antea (B) 3, 4, 8. (D) per totum.

1. A Woman Copyholder married, and then her Husband made a Leaſe for Years, not warranted by the Cuſtom of the Manor; the Court doubted, whether this was a Forfeiture to bind the Wife, becauſe ſuch a Leaſe can be no great Prejudice to the Lord; but to deny to pay Rent, or to do Suit to Court, are preſent Forfeitures. *Cro. Eliz.* 145. *Hide* verſus *Challoner.* *See* Copyhold. (B) 7.

2. Copyholder for Life told the Lord of the Manor, that he would no longer hold his Land by Copy, but by a Bill ſigned by the Lord himſelf for Life, and accordingly the Lord agreed, and gave him ſuch Bill under his Hand, which the Tenant accepted; and adjudged, that by this Means the Copyhold Eſtate for Life was determined. 1 *And.* 199. *Coleman* verſus *Bedell.*

3. In Ejectment, it was found ſpecially, that a Copyholder ſeiſed in Right of his Wife, made a Leaſe for Years, not warranted by the Cuſtom of the Manor; and Juſtice *Dodderidge* held this to be a Forfeiture, and took this Difference, (*viz.*) where a *Feme ſole* is a Copyholder, and afterwards ſhe marrieth, and her Husband makes a Leaſe for Years, without Licence, this is a Forfeiture, becauſe it was her Folly to marry a Man who will forfeit her Eſtate; but where a Copyhold is granted to a *Feme Covert*, and her Husband makes ſuch a Leaſe, 'tis no Forfeiture. *Godb.* 345. *Severne* verſus *Smith.* Cro. Car. 7. S. C. Palm. 385. S. C. 2 Roll. Rep. 344. 361, 372. S. C.

4. Cuſtom of a Manor was, that where a Copyholder in Fee died ſeiſed, his Widow ſhould have *Free Bench*, and be admitted Tenant to the Land, and that the Heir ſhould not be admitted during her Life; alſo the Cuſtom was, that *if a Copyholder commit Felony*, and the ſame was preſented by the Homage, that in ſuch Caſe the Lord might ſeiſe, *&c.* the Father died ſeiſed, the Son was convicted of *Felony*, and his Mother was admitted to her Free Bench, and afterwards died; it was objected, that the Lord could not ſeiſe in this Caſe, becauſe the Widow was the Copyholder during her Life, and the Son who had committed the Felony was not within the Cuſtom, becauſe he was not a Tenant or Copyholder at that Time, and a Cuſtom ſhall be taken ſtrictly, and not according to Equity; but adjudged, that the Lord might ſeiſe this Copyhold as forfeited. *Hill.* 25 *Eliz.* 1 *Leon.* 1. *Borniford* verſus *Packington.* Antea (M) 6. S. C.

5. The Husband purchaſed a Copyhold for himſelf, his Wife and Child, during their Lives; and he who had the Inheritance granted theſe Lands to another for Life, rendring Rent, and made Livery and Seiſin, and afterwards he *levied a Fine* of the ſame Lands to the Husband, who was the firſt Copyholder, and afterwards he accepted Rent of the ſecond Grantee for Life; adjudged, that the Copyhold was determined. 28 *H.* 8. *Dyer* 30. *Compton's* Caſe. 3 *Rep.* 64. *Pennant's* Caſe. *S. P.*

6. If a Copyholder accepts a *Leaſe* from the Lord of his Copyhold Lands, or accepts a Leaſe of the Manor, his Copyhold Eſtate is determined, but ſuch Leſſee may aſſign the Copyhold to whom he pleaſes, for it was always demiſable. *Paſch.* 17 *Eliz. Hide's* Caſe. *Moor* 185. *S. C. Hide* verſus *Newport. Mich.* 19 *Eliz.* 4 *Rep.* 31. *French's* Caſe. *Mich.* 29 *Eliz. Godb.* 101. *S. P.*

7. Copyhold Lands were demiſable for three Lives, the Lord demiſed the ſame to three Siſters, to have and to hold to them *for their Lives ſucceſſively*, and afterwards the Lord made a *Leaſe* of the ſame Lands to the eldeſt Siſter, *&c.* Remainder to the ſecond Siſter, *who agreed to it*; the Queſtion was, if the Eſtate of the eldeſt Siſter was gone by the Acceptance of this Leaſe, then whether the Intereſt of the ſecond Siſter was not likewiſe determined by her *agreeing to it*, ſo that ſhe could not enter upon her eldeſt Siſter; and adjudged, that the Eſtate of the eldeſt Siſter was not ſo determined, that any other Perſon might take Advantage of it, for the Lord could not enter againſt his own Leaſe, and the ſecond Siſter could not enter if ſhe had not agreed to the Leaſe, becauſe her elder Siſter was living, and her Remainder was not to take Effect till after the Death of her elder Siſter. 2 *Leon.* 72. *Curtis* verſus *Cottell.*

Moor 350. S. C. Noy 58. S. C. *cited, and* Style 241. S. C. *cited.*

8. The Copyholder of Inheritance rendring Rent at *Michaelmas* and *Lady-Day*, the Rent was arrear for three Years, the Lord, at the laſt Inſtant of the Day of Payment, demands the Rent on the Land, and the Copyholder, or any for him, was not there to pay it; the Court was divided in Opinion, whether this was a Forfeiture, or not, without an actual Refuſal in Words. *Trin.* 38 *Eliz. Cro. Eliz.* 505. * *Criſpe* verſus *Fryer.* The voluntary Negligence for three Years amounts to a wilful Refuſal.

*Co. Ent. 281. S. C.

9. The Queen ſeiſed of a Manor in Right of her Crown, granted a Copyhold in Fee, and afterwards by Letters Patents under the *Exchequer Seal*, made a Leaſe of thoſe Lands for twenty-one Years, and the Leſſee granted the Term to the Copyholder; adjudged, that by the Acceptance of this Leaſe he had determined his Copyhold Eſtate, for tho' the Lord cannot determine his Intereſt by any Act he can do, yet the Acceptance of this Leaſe will do it, becauſe 'tis the proper Act of the Copyholder. 2 *Rep.* 16. *Lane's* Caſe.

10. Where a *Fine* is denied after Admittance, 'tis a Forfeiture of the Copyhold. 4 *Rep.* 28.

11. Copyholder *ſowed the Land*, and afterwards committed a Forfeiture, the Lord entered, he ſhall have the *Crop.* 4 *Rep.* 21. *Brown's* Caſe.

Cro. Eliz. 699. S. C.

12. A Copyholder was attainted of Felony, the Lands ſhall eſcheat to the Lord, and the Steward may grant it over without Special Warrant. 4 *Rep.* 30. *Harris* verſus *Jay.*

13. Copyholder in Fee ſurrenders out of Court into the Hands of two Cuſtomary Tenants, to the Uſe of the Surrenderee and his Heirs, upon certain Conditions; this Surrender was preſented at next Court, but the Conditions were omitted; the Surrendree died, the Lord admitted his Heir, who being in Poſſeſſion, the Surrenderor releaſed to him, and afterwards entered againſt his own Releaſe; adjudged, that the Surrender was void, it being preſented, leaving out the Conditions; yet becauſe the Surrenderor had made a Releaſe to the Heir of the Surrendree, who was admitted and in actual Poſſeſſion, this ſhall enure as an Extinguiſhment of the Copyhold Eſtate of the Surrenderor. 4 *Rep.* 25. *Kite* verſus *Quinton.*

14. Adjudged, that where there is a *Copyholder for Life*, and the Lord makes a Leaſe for Years to another of his Copyhold Lands, and afterwards the Copyholder for Life commits a Forfeiture, that the Leſſee for Years, tho' he had but an *Intereſſe Termini*, may enter for the Forfeiture, becauſe the particular Eſtate for Life was determined by the Forfeiture. *Paſch.* 8 *Jac. Godb.* 177. *Meers* verſus *Ridout.*

W. Jones 41. S. C.

15. Leaſe for Years of a Manor, a Copyholder *bargained and ſold* his Copyhold Eſtate to the Leſſee; adjudged, that the Copyhold is extinguiſhed. *Hutt.* 59. *Haſſet* verſus *Humberſton. Winch* 66. *S. C. Antea* (G) 16. *S. C.*

W. Jones 449. S. C. *by the Name of* Downcliffe *v.* Minors. Cro. Car. 521.

16. Copyholder in Fee ſurrendered his Copyhold to the Lord of the Manor, who made a Leaſe of his Manor for Years, and alſo of this Copyhold, by the Name of his Tenement in *L.* adjudged, that this was not a Determination of the Copyhold, becauſe it being leaſed with the Manor, 'tis included in the Leaſe as Parcel of the Manor, but if it had been leaſed by it ſelf, that would have extinguiſhed the Copyhold, becauſe, during the Leaſe, it was ſevered from the Manor, and ſo could never again be demiſed by Copy. *Cro. Car.* 521. *Lee* verſus *Boothbie.*

17. The Lord demanded the Rent of his Copyholder, who anſwered, he had it not about him, but that he would pay it as ſoon as he could, thereupon the Lord required him to pay it at *the Manor-houſe* on ſuch a Day, which was not done; adjudged, that the firſt Anſwer made no Forfeiture, but when the Lord had appointed a Time and *Place of Payment within the Manor*, and the Tenant failed to pay, that was a Forfeiture; but if the *Place appointed had been out of the Manor*, in ſuch Caſe a Failure of Payment had been no Forfeiture. *Williams's* Caſe vouched in * *Grey* and *Uliſſes's* Caſe, *Latch.* 122.

18. If the Lord of the Manor maketh a Leaſe for Life to one who is a Copyholder, and this Leaſe is made by Word only, without Writing, and the Copyholder accepts it, his Copyhold is deſtroyed, eſpecially if Livery is made, but 'tis deſtroyed without it. *Mich.* 2 *Car. Latch* 213.

19. Adjudged, that a ſucceeding Lord of a Manor ſhall not have any Advantage of Forfeiture by Waſte done by a Copyholder in the Time of his Predeceſſor. 2 *Sid.* 8. In the Caſe of *Chamberlain* verſus *Drake.* See *Antea* (M) 6.

20. In Ejectment, upon Evidence to a Jury, at a Trial at Bar it was ruled, that where a Copyholder commits a Forfeiture, the Lord may grant the Copyhold to another before Seiſure, becauſe the Eſtate is immediately in him as to the Reverſion. 1 *Lev.* 26. *Milfax* verſus *Baker.* See *Antea* (B) 8. *S. C.*

21. In a Special Verdict in Ejectment, the Caſe was, a Copyhold was granted to *T. S.* for Life, the Reverſion to *G. D.* for Life, immediately after the Death, Surrender, *Forfeiture*, or other Determination of the Eſtate of *T. S.* who was afterwards *attainted of Felony, the Lord did not enter*, but the King pardoned *T. S.* and he in Reverſion entered, and adjudged lawful; upon which a Writ of Error was brought, and the Error aſſigned was, that the Reverſioner for Life could not take Advantage of this Forfeiture, but the * Lord ſhould have entered and determined the Eſtate of *T. S.* and then the Reverſioner might have entered on him, but the Judgment was affirmed, becauſe a Copyholder is but a Tenant at Will, and by the Attainder his Will was determined, ſo that he is diſabled to hold any Eſtate, and then he in Reverſion may take Advantage of this Determination. 3 *Lev.* 93. *Strode* verſus *Denniſon.* T. Jones 189.

* *By Cuſtom upon a Preſentment of a Conviction of Felony, the Lord may ſeiſe, but in this Caſe there needs no Preſentment.*

22. Caſe, *&c.* in which the Plaintiff declared, that *T. S.* a Copyholder in Fee ſurrendered to *E. E. for Life, Remainder to the Plaintiff in Fee*, that afterwards *W. W.* married the ſaid *E. E.* and *ad exhæreditationem* of the Plaintiff, pulled down Part of the Houſe, and carried away the Materials; and upon a Demurrer to the Declaration it was objected, that the Plaintiff being a *Reverſioner*, could not bring an Action on the Caſe for *Waſte done by a Termor*; 'tis true, my *Lord Coke* tells us, that at Common Law he had no Remedy, but that muſt be underſtood he had no Remedy *by Action of Waſte*; 'tis likewiſe true, that where Leſſee for Years commits Waſte, no Action of Waſte lies againſt him at Common Law, becauſe it was the Folly of the Leſſor, that he had not ſecured himſelf by Covenants againſt it; but that Reaſon fails in this Caſe, becauſe the Plaintiff was not a *Leſſor* but a Remainder-man by Copy of Court-Roll, in which there are no Covenants, and he is without Remedy if he cannot have an Action on the Caſe; and 'tis a frivolous Objection to ſay, that a Jury cannot know what Damages to give in this Caſe, becauſe 'tis incertain how long the Wife may live, and it may be repaired at any Time during her Life; but if the Parties ſhould die before 'tis repaired, then the Action is gone, becauſe it muſt be founded on a perſonal Wrong: The Court was divided. 3 *Lev.* 130. *Jefferſon* verſus *Jefferſon.* See *Jermy* verſus *Lowther.*

23. A Copyholder committed *Treaſon* in the Murder of *King Charles*, and afterwards *Anno* 1655, he ſurrendered his Copyhold into the Hands of the Lord of the Manor, for the Uſe of his Children, and died, the Children were admitted, and *Anno* 1659, the Manor was ſold to the Plaintiff, *Anno* 12 *Car.* 2. the Regicides were attainted by Act of Parliament, by which it was enacted, that all their Eſtates, Real and Perſonal, * *and other Things of that Nature, whatſoever they ſhall be*, ſhall be forfeited to the King; one Judge was of Opinion, that this Copyhold was given to the King by theſe general Words *Other Things of that Nature whatſoever*; but all the reſt of the Court were of Opinion, that Copyholds were never included in a Statute where the Lord might have any Prejudice, unleſs *expreſly* named. 2 *Vent.* 38. *The Lord Cornwallis's* Caſe. See the Caſe of the * *Duke of York* verſus *Sir John Marſham. S. P.*

* *See* Antea (A) 13.

* Antea (A) 10.

24. In a Special Verdict in Ejectment, the Caſe was, a Copyholder of Inheritance was convicted of *Felony*, but before Attainder had his *Clergy*; the Queſtion was, whether the Lord might enter for a Forfeiture, without a *ſpecial Cuſtom* for that Purpoſe; and the better Opinion was, that he could not. 1 *Lev.* 263. *Jorey* verſus *Pawley.* See * 1 *Bulſt.* 13. 1 *Leon.* 1, there a Cuſtom was found.

See 2 Vent. 38. * Gittins v. Cowper 2 Brownl. 217. Godb. 267.

But a Cuſtom to ſeiſe upon the Preſentment of the Homage, that a Copyholder had committed Felony, is not good, becauſe he may be acquitted at his Trial. 1 *Lev.* 34.

25. Two Siſters were Coparceners of a Manor, a Copyholder ſuffered the Buildings to be out of *Repair*, and made a *Leaſe* of his Copyhold Lands for a Year, and ſo from Year to Year for ten Years; one of the Coparceners died, and her Moiety deſcended to her Siſter, then *William Weekes*, the Copyholder, who ſuffered his Houſe to be ruinous, died, and his Widow claimed her Free Bench, but the ſurviving Siſter *entered* for a Forfeiture; adjudged, that ſhe could not take Advantage of this Forfeiture, ſhe could not have an Action of Waſte for Waſte done in the Life-time of her Siſter, and the Reaſon is the ſame why ſhe ſhall not *enter* for this Forfeiture, for 'tis not a Forfeiture *Nolens Volens*, but at the Election of the Lord; now Coparceners are as one Lord; and tho' 'tis true, that when one dies, the other ſhall be *Heir* to her Moiety, yet ſhe ſhall not * *enter* for this Forfeiture as Heir, becauſe it was done when ſhe was not compleat Heir. *Powell Juſtice contra.* 1 *Lutw.* 799. *Eaſtecourt* verſus *Weekes. Palm.* 416. *Cornwallis* verſus *Hammond. S. P. Latch* 226. *S. C.*

1 Salk. 186. S. C. *See* Sid. 8, 9.

* Antea (M) 2. S. P.

(Q)

What ſhall not be a Forfeiture. See Antea (A) per totum.

1. TEnant for Life of a Copyhold, Reverſion in Fee to *W. R.* the *Tenant for Life bargained and ſold this Copyhold in Fee*, and to make the Title good to the Vendee, it was agreed between the Tenant for Life and the Lord, that he ſhould *commit Waſte*, and that the Lord ſhould enter for a Forfeiture, and ſhould then grant the Lands to the Vendee, upon Condition, that he ſhould repair the Waſte, and pay a Sum of Money to the Vendor; adjudged, that this Colluſion and Fraud to which the Lord of the Manor was Conſenting, ſhall not Prejudice him in Reverſion, but that he may enter, and that the Lord ſhall not take Advantage of the Forfeiture. *Cro. Eliz.* 598. *Raſtal* verſus *Turner.*

2 Brownl. 197. 2. Where the Cuſtom was, that a *Copyholder for Life might Name his Succeſſor*, this is ſuch a Privilege, that if the Copyholder *cuts down Trees*, 'tis no Forfeiture, becauſe he hath a greater Eſtate than a Tenant for Life. 1 *Brownl.* 132. *Rolls* verſus *Maſon.*

3. If a Lord of a Manor ſells his Eſtate, and the Vendee demandeth *Rent* of a Copyholder, and he refuſeth to pay it, 'tis no Forfeiture, without Notice given to him of the Purchaſe and Alteration of the Eſtate; and tho' the Manor is ſold by Bargain and Sale enrolled, the Bargainee ſhall not take Advantage of the Forfeiture, without Notice given to the Copyholder of the Bargain and Sale. *Hill.* 1 *Jac. Beconſhaw* verſus *Southcote*, vouched in 8 *Rep.* 92. *Frances's* Caſe. *Antea* (L) 3. *S. C.*

* Godb. 268. S. C. 4. If a Copyholder *is beyond Sea*, and doth not come and be admitted after three Proclamations, this is no Forfeiture. 2 *Cro.* 101. *Whitton* verſus *Williams. Godbolt S. C.* 2 *Cro.* 226. **Underhill* verſus *Kelſea. S. P. Noy* 41. *S. P. Yel.* 1. *S. P.*

Cro. Eliz. 789. S. C. *See* Raym. 204. 5. Surrender to the Uſe of *B. G.* for Life, Remainder to *W. R.* in Fee; the firſt Surrendree did not come to be admitted, but ſuffered three Proclamations to paſs; adjudged, that this ſhould not work a Forfeiture of his Eſtate *in Remainder*, becauſe the Eſtate of the Surrendree for Life, and of him in Remainder, are divided Eſtates, and the Cuſtom only extends to an entire Eſtate given to one Perſon in Poſſeſſion; but if the Surrender had been made to *B. G.* and *W. R.* and their Heirs, in ſuch Caſe they had been *Jointenants*, and if one comes in and is admitted, and the other ſuffers three Proclamations to be made, 'tis a Queſtion whether he who was admitted ſhall have the Whole, or whether his Moiety ſhall be forfeited to the Lord. *Yel.* 1. *Baſpole* verſus *Young. Noy* 42. *S. C.* The Lord ſhall hold it till the Remainder happens.

6. Copyholder made a Leaſe for *three Lives*, and Livery and Seiſin was made, but not endorſed on the Deed; adjudged, this was no Forfeiture of which the Lord might take Advantage, and ſo was one *London's* Caſe, where a Copyholder ſold his Copyhold Lands by Bargain and Sale enrolled; adjudged no Forfeiture, of which the Lord might have any Benefit. *Mich.* 5 *Jac. Godb.* 269.

7. *Rent* was demanded of a Copyholder, who replied, he had no Money; adjudged, this was not a Forfeiture, for it muſt be a wilful and obſtinate Denial to pay Rent, which makes a Forfeiture. *Godbolt* 142. *Winter's* Caſe. *Antea* (K) 2. *S. P.* in *Sir John Branch's* Caſe.

3 Bulſt. 80. *by the Name of* Belfeild v. Adams. Antea (K) 4. S. C. 8. In Ejectment this Point was reſolved, (*viz.*) That where a Copyholder in Fee withdraws his Suit to the Lord's Court, and doth not attend for many Years, and was never ſummoned to attend, that this is only a Negligence and no Forfeiture; but if he had been warned to attend, and afterwards had refuſed, it had been a Forfeiture. 1 *Roll. Rep.* 256. *Southcote* verſus *Adams.*

Winch 8. S. C. Hetl. 5. S. C. Litt. Rep. 267. S. C. 9. Cuſtom of a Manor, that the Lord ſhould have a *fold Courſe* in all the Land of the Copyholders not encloſed, and that no Copyholder might encloſe without Leave of the Lord, but if encloſed without Leave, then to pay a reaſonable Fine; a Copyholder encloſed Part of his Copyhold, but left ſome Spaces about nine Foot broad, and being required to open the Encloſure, he refuſed, whereupon the Lord entered for a Forfeiture; adjudged, that it was not a Forfeiture, becauſe it was not *all encloſed*; beſides, this Encloſure made the Lord's Fold Courſe better, and not the Copyhold Lands, which are never forfeited unleſs ſomething is done to them. *Hutton* 102. *Paſton* verſus *Uther.* No Forfeiture to dig Marle, but he muſt lay it on his Copyhold Lands.

10. In Treſpaſs, *&c.* the Caſe was, that the Defendant being Lord of a Manor, and holding Court, and the Plaintiff being a Copyholder and preſent in Court, and there being a Diſcourſe whether the Court was lawfully held, or not, and he being asked whether he did appear, made anſwer, that if it was a lawful Court, he did appear, but if it was not a lawful Court, then he did not appear; adjudged, that this was no Contempt, or Non-appearance, ſo as to make a Forfeiture. *Style* 241. *Parker* verſus *Cook.*

* Hardres 432. Antea (A) 10. 8. C. 11. In the Caſe of the * *Duke of York* and *Sir John Marſham*, this Caſe was cited by the *Lord Chief Baron Hale*, (*viz.*) *Holland* purchaſed a Copyhold in Fee, in Truſt for an *Alien*, and upon an Inquiſition found, the Lands were ſeiſed to anſwer the Profits to the King; the Queſtion in *B. R.* was, whether they were ſeiſable; and adjudged, that they were not, neither was the *Truſt forfeited* to him, and therefore an *Amoveas manum* was granted; the Reaſons were, becauſe, if the Lands were forfeited, as purchaſed for an *Alien*, then the Lord of the Manor would loſe his Fines and Services; beſides, it may be prejudicial to a Stranger, who may claim this

Copyhold, becauſe, if it was not in the King's Hands, he might ſue for it in the Lord's Court, but the King cannot be ſued there, *&c.* *Hardres* 436. *King* verſus *Holland.*

12. *Tenant for Life* of a Copyhold, ſuffered a *Recovery* as *Tenant in Fee*; adjudged, this was no Forfeiture, becauſe it was in a Court-Baron, where the Freehold is not concerned; beſides, the Lord of the Manor is to take Advantage of all Forfeitures, which 'tis not reaſonable he ſhould do in this Caſe, becauſe he is a Party to the Recovery. 1 *Mod.* 199, 200. *Bird* verſus *Kirke.*

13. A Surrender was made out of Court to the Lord of the Manor, to the Uſe of *Robert Freeman* and his Heirs, who died before the next Court, and the Jury found, that *John Freeman, an Infant*, was his Son and Heir, that this Surrender was preſented at the next Court, and afterwards three Proclamations were made at ſeveral Courts, and no Perſon coming to be admitted, the Lands were ſeiſed by the Lord of the Manor (who was the Leſſor of the Plaintiff in Ejectment); the Cuſtom was found, that if after a Surrender made and preſented, the Perſon who hath Right to be admitted doth not come in after three Proclamations in three ſeveral Courts, then the Steward commands the Bailiff to ſeiſe it to the Lord's Uſe; and the Queſtion upon this Special Verdict was, whether an *Infant*, during his Nonage, ſhall be compelled to be admitted to a Copyhold Eſtate, which he hath by *Deſcent*, or if upon his Neglect or Refuſal the Lord may ſeiſe it as forfeited; three Judges were of Opinion, that the *Infant* was privileged by his Infancy; but the Chief Juſtice *Holt* was of a contrary Opinion, becauſe the Eſtate continued in the Surrenderor till the Surrendree was admitted, therefore 'tis abſurd to ſay, that Infancy ſhall protect the Right of the Infant, when he hath no Manner of Right till he is *admitted*; 'tis true, Infancy hath been extended to delay a Remedy for the recovering a Right, but never to deſtroy it; now 'tis plain, that the Lord hath a Right to a Fine upon the Admittance of his Tenant; but if this Infant ſhould die in his Nonage, and before he is admitted, then the Lord loſes his *Fine*; therefore he ought to be admitted or forfeit his Eſtate. 1 *Lutw.* 765. *King* verſus *Dilliſton. S. C.* See 1 *Leon.* 100. 3 *Leon.* 221. 8 *Rep.* 44. 99. *Whittingham's* Caſe. 2 *Cro.* 226. See *Sir Rich. Lechford's* Caſe. 3 Mod. 221. 1 Salk. 386.

14. The Father was Tenant for Life, and he ſuffered a Common Recovery in the Lord's Court, this being thought a Forfeiture of his Eſtate, the Son entered and ſurrendered to the Plaintiff; this being found in a Special Verdict in Ejectment, it was adjudged, that the Surrender was void, becauſe the Suffering a Common Recovery would make no Forfeiture, unleſs there was a particular Cuſtom for that Purpoſe; but if it did, 'tis the Lord muſt enter, therefore the Son was a Diſſeiſor by his Entry, and by Conſequence the Surrender which he made is void. 2 *Mod.* 32. *Keen* verſus *Kirby.*

(R)

Of Free Bench.

1. CUſtom, that the Widow of a Copyholder ſhall enjoy the Copyhold for *her Life*, and the Evidence to maintain it was, that ſhe had a Title to a *Widow's Eſtate*; this is not ſufficient to prove the Cuſtom, becauſe the Proof is of a leſſer Eſtate than is claimed by the Cuſtom. *Dyer* 192. *Linſey* verſus *Dixon.* 4 *Rep.* 29. *Down* verſus *Hopkins. S. P.*

2. Cuſtom, that the Widow ſhall have Free Bench *quam diu caſte vixerit*, if ſhe live otherwiſe, and the Lord having no Notice of it, admits her, this Admittance ſhall bind the Lord. 4 *Leon.* 240. *Wheeler's* Caſe.

3. A *Widow ſowed the Land*, and before the Corn was cut ſhe married, the Lord ſhall have the Crop, becauſe her Eſtate was determined by her own Act. 5 *Rep.* 16. *Oland's* Caſe, but if ſhe had leaſed the Land, and afterwards married, the Leſſee having firſt ſowed the Lands, he ſhall have the Corn, and not the Lord, becauſe her Act ſhall not prejudice a third Perſon. Moor 394. Gouldsb. 189.

4. The *Widow* claimed her Free Bench, and prayed to be admitted, which the Steward refuſed, thereupon ſhe brought an Ejectment; and adjudged, that her Eſtate ariſeth out of that of her Husband's Eſtate, and his Admittance is the Admittance of her in Remainder; and if her Admittance had been neceſſary, ſhe did all in her Power to procure it, and where an Eſtate is created by Cuſtom, that ſhall be an Admittance in Law. *Hutton* 18. *Jordan* verſus *Stone.*

5. Copyholder of Inheritance held of the Manor of *C.* became a *Bankrupt*, there was a Cuſtom in the ſaid Manor, that if ſuch Copyholder died ſeiſed, *&c.* his Wife ſhould enjoy it during Life; upon a Commiſſion of Bankruptcy taken out, the Commiſſioners by a *Deed of Bargain and Sale, conveyed the Copyhold to the Creditors*; afterwards, at a Court held for the ſaid Manor, the Homage preſented the Death of the Husband, and that his Wife was admitted Tenant, before any Admittance of the *Bargainee*, or any other Creditors; adjudged, that after the *Bargain and Sale enrolled*, the Husband was no longer a Copyholder, and when the Bargainee is admitted, it ſhall have *Relation to the Bargain and Sale*, and deveſt the Eſtate of the Wife, who claimeth by the Cuſtom, for ſhe can have no Right by the Cuſtom, becauſe her Husband did not die ſeiſed of the Copyhold. *Cro. Car.* 568. *Parker* verſus *Bleek.* *Antea* Bankrupt. (B) 2. *S. C.* W. Jones 451.

6. The Cuſtom of a Manor was, that the Widows of Copyholders for Life ſhould, during their Widowhood, enjoy the Cuſtomary Lands of which their Husbands died ſeiſed; and the Caſe was, Palm. 111. 2 Cro. 573. 2 Roll. Rep. 178. Walter *v.* Bartlett. S. C. Hutt. 18. (*viz.*)

(*viz.*) The Lord of a Manor granted a Copyhold Tenement to the *Husband for Life*, and afterwards *conveyed the Manor to another and his Heirs*, and the Grantee of this Manor conveyed the Inheritance of this Copyhold Tenement *to another, and to his Heirs, during the Life of the Husband*, Remainder to his Wife, *Remainder to the Husband in Fee*, who granted his Remainder to his Son in Fee, *&c.* the Son died, leaving Iſſue, then the Wife died, and the Husband married again, and afterwards died ſeiſed, and his ſecond Wife entered; adjudged, that the cuſtomary Eſtate of the Husband remained as it was at firſt during his Eſtate for Life, not extinguiſhed or altered by the Purchaſe of the Fee-ſimple, which, during his Life, was in others, and not in him, and by Conſequence all cuſtomary Incidents to ſuch cuſtomary Eſtate ſtill remained, whereof the Widow's Eſtate was one, it being an Excreſcence, which by the Cuſtom and Law grows out of the Eſtate of the Husband, and therefore ſhe ſhall enjoy that Eſtate. *Hob.* 181, 185, 244. *Howard* verſus *Bartlett. Paſch.* 16 *Jac.* * *Remmington's* Caſe. *S. P.* See *Poſtea* 9.

* Noy 29. S. C. Moor 758.

7. Adjudged, that where the Husband, who is a Copyholder, makes a Leaſe for Years of his Copyhold Lands, warranted by the Cuſtom, and where his Wife is to have her Widow's Eſtate, if ſhe ſurvive him, that ſhe ſhall not avoid this * Leaſe, unleſs there is a *ſpecial Cuſtom* for that Purpoſe. 2 *Cro.* 36. *Farley's* Caſe, *Moor* 758. By the Name of *Holder* verſus *Farley.*

* *So if he accept a Leaſe from the Lord, the Copyhold is extinguiſhed.* W. Jones 462. Dugworth *v.* Radford.

8. In a Special Verdict in Ejectment, the Caſe was, that the Cuſtom of a Manor was, that if a *Copyholder in Fee* died ſeiſed, his Widow ſhould have it during her Life, as her Free Bench, the Lord of the Manor made a *Feoffment of the Copyhold to the Husband*, who died ſeiſed; and the Queſtion was, whether the *Widow* ſhould have the Lands during her Life; and adjudged ſhe ſhould not, becauſe the Cuſtom was deſtroyed by the Feoffment; but if it had been made to a Stranger, and not to the Husband, it had ſtill remained Copyhold as to the Widow, and ſhe ſhould have it during her Life. 2 *Cro.* 126. *Laſhmere* verſus *Averie.* See *Antea* 6.

9. Copyholder for Life, where the Cuſtom of the Manor was, that the Wife ſhall have her Widow's Eſtate, the Husband was attainted of *Felony* and executed; the Queſtion upon a Demurrer was, whether his Wife ſhould have her Widow's Eſtate; and Juſtice *Winch*, who was alone in Court, was of Opinion ſhe ſhould not, without a Special Cuſtom. *Hill.* 19 *Jac. Allen* verſus *Booth.*

1 Lev. 20. 10. In Ejectment, the Caſe upon a Special Verdict was, that one *Ruſſel* being ſeiſed in Fee, *&c.* granted the Lands by Copy of Court-Roll, according to the Cuſtom, *&c.* to three Perſons, for their Lives ſucceſſively, and afterwards he made a Leaſe of the ſame Lands to *W. R.* for thirty-one Years, *habendum* from and immediately after the *Death, &c.* or other Determination of the ſaid Copyhold; the ſurviving Copyholder died, his Widow entered and claimed her Free Bench, and aſſigned her Intereſt to the Plaintiff, who brought this Ejectment; the Queſtion was, when this Leaſe of thirty-one Years ſhould commence, either upon the Death of the ſurviving Copyholder, or after the Determination of his Widow's Eſtate; 'tis true, ſuch Eſtate is Parcel of the Eſtate of the Husband to ſome Purpoſes, but not as to this Leaſe, being in the Caſe of a collateral Limitation, for it ſhall commence preſently in Point of Limitation, (*viz.*) after the Death of the Husband, tho' not in Point of Intereſt till after the Death of the Wife. 2 *Sid.* 165. *Clerke* verſus *Candle*, but *Levinz* tells us, two Judges were of Opinion, that the Leaſe ſhould not commence till after the Death of the Wife; for then, and not before, the Eſtate of the Husband was determined. 2 *Sid.* 165. *Clerke* verſus *Candle.* 1 *Lev.* 20. by the Name of *Chantrell* verſus *Randle.*

Moor 293.

4 Mod. 251. 3 Lev. 385.

11. In a Special Verdict *in Ejectment*, the Caſe was, a Cuſtom, that the Tenants of the Manor having a Mind to *alien* their Copyholds, might *ſurrender* into the Hands of two Copyholders, *&c.* that *Scott* being a Copyholder in Fee, did *ſurrender, &c.* to the Uſe of the Plaintiff in Fee, and died, leaving a Wife, who claimed her Free Bench by the Cuſtom, *&c.* that at the next Court after his Death the Surrender was preſented, and the Surrendree admitted, and whether he or the Widow had the better Title, was the Queſtion; and adjudged againſt the Widow, becauſe her Title did not commence till after the Death of her Husband, nor then, but only to ſuch Lands of which he died *ſeiſed*, but the Title of the Plaintiff began from the *Surrender*, for the *Admittance* relates to it. 1 *Salk.* 185. *Benſon* verſus *Scott.* See 1 *Inſt.* 59. *b.* See (h) 17.

(S)

Of Heirs to Copyhold Eſtates. See Antea (C) 2, 4, 33, 34, 49. Antea (O) *Fines levied.*

See (C) 10. S. C. *and* (C) 35. S. C.

1. IN a Special Verdict in Treſpaſs, the Caſe upon the Pleadings was, that a Copyholder of Inheritance of the Manor of *Fulham*, had Iſſue a Son and a Daughter by one Venter, and a Daughter only by another Venter, and died, his Son being an Infant of two Months old, and the Copyhold being then in Leaſe for twelve Years, rendring Rent; the Death of the Copyholder was preſented, and the Infancy of his Son and Heir, afterwards, and before the Son was admitted, or any Guardian aſſigned, or Rent due, he died; and the Queſtion was, whether his Siſter of the whole Blood ſhall inherit; and adjudged, that ſhe ſhall, and not jointly with the other Siſter of the half Blood, becauſe the Deſcent of the Reverſion, after the Determination of the Leaſe for Years,

Years, and before any Rent due, was *poſſeſſio fratris*, and ſuch a Poſſeſſion makes his own Siſter Heir of a Copyhold. *Moor* 125.

2. If the Heir, after Proclamations made, will not come and be admitted, the Lord may ſeiſe *quouſque*, without a particular Cuſtom ſo to do, but he cannot ſeiſe it as forfeited, without a Cuſtom for that Purpoſe, and the ſafeſt Way would be to mention in the Proclamation what Lands he is to be admitted unto. 1 *Lev.* 63. *Earl of Salisbury*'s Caſe.

(S)

Of Heriots. See *Cuſtoms of Manors. Extinguiſhment.* (B) 1. *Fraud.* (A) 1. *Grants of Copyhold.* Title *Heriots* per totum.

1. THE Tenant held of ſeveral Lords by *Heriot Cuſtom*, and he made a fraudulent Deed of all his Cattle, to deprive the Lords of their Heriots; one of them brought an Action upon the Statute 13 *Eliz. of fraudulent Conveyances*; two Judges were of Opinion, that the Action was well brought, but *Manwood* held the contrary, becauſe the other Lords were grieved, and the Statute ſhall not be conſtrued to aid one alone; and one Judge was of Opinion, that *all the Lords might join in one Action.* *Trin.* 18 *Eliz. Dyer* 351.

2. Cuſtom, that the Lord of the Manor uſed to have the beſt Beaſt *of his Tenant* there dying; and if ſuch Beaſt be taken away before Seiſure, that then the Lord may take the Beaſt *of any other levant and couchant on the Land*, within his Manor; adjudged a void Cuſtom. *6 Eliz. Dyer* 229. *Antea* (G) 17, and 3 *Eliz. Dyer* 199. *S. P. Moor* 16. *Wilſon* verſus *Wiſe. S. P.* Heriot. (A) 9. S. C.

3. In Treſpaſs for Taking his Horſe; the Defendant juſtified as Lord of the Manor of *L.* ſetting forth a Cuſtom, that he and all the Lords of the ſaid Manor, Time out of Mind, have uſed to have the beſt Beaſt in the Name of an *Heriot*, after the Death of *every one dying within that Manor*, and that the Teſtator of the now Plaintiff died in the ſaid Manor, poſſeſſed of the Horſe, which he ſeiſed, *&c.* upon a Demurrer to this Plea, ſeveral Reaſons were offered to ſhew, that *a Cuſtom to ſeiſe* for an Heriot, upon the Death of *every one dying within the Manor* might have a reaſonable Commencement, and by Conſequence be good; firſt, becauſe the dead Man was reſident in the Manor in his Life-time, and had the Comfort and Help of the *Tenants* in the Time of his Sickneſs, and their attending him to his Grave, during which Time the Lord of the Manor might loſe their Service; and laſtly, becauſe he was buried there: But adjudged, that this Cuſtom could not bind *Strangers*; it might have a reaſonable Beginning in reſpect to *the Tenants* of the Manor, becauſe it might begin when their Tenures were created, but it can never be good in reſpect *to Strangers*; ſo the Plaintiff had Judgment, which was affirmed on a Writ of Error in *B. R. Trin.* 41 *Eliz. Cro. Eliz.* 725. *Parker* verſus *Combleford.*

4. All *entire Services*, as to render an intire Chattel of Profit or Pleaſure, upon the Death of any Tenant dying ſeiſed, by Alienation of Part, ſhall be multiplied, and by Purchaſe of Part by the Lord ſhall be extinct; therefore if a Man holds Lands by Fealty, Suit of Court, and *Heriot to be paid* after his Death, this is *Heriot-Service*, and in ſuch Caſe, if the Lord purchaſe Parcel of the Land, the *Heriot* is extinct, but *Heriot-Cuſtom* is otherwiſe, (*viz.*) if the *Cuſtom* be, that the Lord ſhall *have an Heriot* upon the Death of the Tenant there, if he purchaſe Part, he ſhall have an Heriot ſtill. 8 *Rep.* 102. *Talbot*'s Caſe. *6 Rep.* 1. *Bruerton. S. P.*

5. In Treſpaſs, the Jury found a Special Verdict, that the Father being ſeiſed in Fee of Lands held of the Manor of *R.* by Fealty, Rent, and rendring an *Heriot* after the Death of every Tenant in Fee-ſimple, in Conſideration of natural Love, and of the Marriage of his Son with *R. W.* made a Feoffment of the ſaid Lands to his Son, and to his Heirs; afterwards the Son, to the Intent that his Wife ſhould not be endowed of the Lands during the Life of his Father, redemiſed the Lands to him for forty Years, if he ſhould ſo long live, and then the Marriage took Effect: The Son did Suit to the Court, and the Father conſtantly paid the Rent; and upon his Death the Lord took a Beaſt for an Heriot; the Jury likewiſe found the Statute 13 *Eliz. of fraudulent Conveyances*; adjudged, that becauſe the Verdict hath found no Fraud, the Court cannot judge the Feoffment was fraudulent, and made to deceive the Lord of his Heriot. 2 *Brownl.* 187. *Trye* verſus *Littleton.*

(T)

Concerning Husband and Wife. See (P) 3.

1. A *Woman Copyholder for Life* married, the Reverſion was granted to *A. B. C. cum acciderit*, after the Death, *Surrender*, or Forfeiture of the Tenant for Life; the Husband ſurrendered to the Uſe of *A.* for Life, who was admitted accordingly, *B.* died; reſolved, that *C.* ſhould not be admitted, becauſe, after the Death of the Husband, the Wife hath a good Title; and during his Life the Lord ſhall have it as an *Occupant.* *Dyer* 264.

2. The Cuſtom of a Manor was, that the Lord and Steward, or his Deputy, might demiſe by Copy; the Lord granted Authority to Two, to make cuſtomary Eſtates of their Lands for Payment of their Debts, and died; they held Court in their own Names, and granted Copies in Reverſion,

verſion, according to the Cuſtom; the Widow of the Lord recovered a third Part of the Manor in a Writ of Dower, and one of the Copyhold Eſtates was aſſigned to her by the Sheriff; and it was held, that ſhe ſhould avoid the Grant made by theſe two Aſſignees, and yet about eighteen Years afterwards it was adjudged, that where a Lord of a Manor married, in which Manor there were Copyholders for Lives, and one of the Copyholders died, and the Lord granted the Land again, according to the Cuſtom of the Manor, for Life, and then he died, his Widow ſhould not avoid this Grant in a Writ of Dower; for tho' the Grant was made after her Title of Dower accrewed, (*viz.*) after the Marriage, yet the Cuſtom of the Manor, upon which that Grant was founded, was long before that Time. *Paſch.* 8 *Eliz. Dyer* 251.

3. Copyholder of Inheritance ſurrendered to the Lord, to the Intent that he ſhould grant the ſame again to himſelf for Life, Remainder to his Wife, *until his Son ſhould come to the Age of twenty-one Years*; and after the Expiration of the ſaid Term, the Remainder to his ſaid Son in Tail, and died; ſoon afterwards the Son likewiſe died, being five Years old, and no more, and then the Lord granted the Lands to the Wife, *until the Son ſhould have come to full Age*, Remainder over, the Wife married again, and died Inteſtate, and the Husband being in Poſſeſſion, the Adminiſtrator of the Wife entered on him; adjudged, that his Entry was unlawful, becauſe the Intereſt, which was in the Wife, was a *Term of Years* of a Copyhold, which by her Death was veſted lawfully in the Husband, unleſs there is a Cuſtom of the Manor to the contrary. *Hill.* 8 *Eliz. Dyer* 251. *Hanchett*'s Caſe.

4. In Treſpaſs, the Defendant juſtified, for that *W. R.* was Lord of the Manor of *L.* within which Manor the Cuſtom is, that if a Man marries a Copyhold Tenant, and hath Iſſue by her, and ſurvives her, in ſuch Caſe he ſhall be *Tenant by the Curteſy*; then he pleaded, that he married one *R. R. to whom, during the Coverture*, a Copyhold Tenement of the ſaid Manor did deſcend, and that he had Iſſue by her, and that ſhe is ſince dead, and ſo he hath a Right to the Copyhold as Tenant by the Curteſy; and upon Demurrer to this Plea it was adjudged againſt the Husband, that he could not be Tenant by the Curteſy by Vertue of this Cuſtom, admitting it to be good, becauſe his Wife was not a cuſtomary Tenant of the Manor, *at the Time of their Marriage*, for the Copyhold Eſtate deſcended to her afterwards, during the Coverture. *Trin.* 29 *Eliz.* 1 *Leon.* 109. *Sir John Savage*'s Caſe.

5. A Copyholder ſurrendered to the Uſe of his Will, and then deviſed his Lands to his Wife *for Life*, and that ſhe ſhould ſell the Reverſion for the Payment of his Debts, and died; then the Widow made a Surrender, *upon Condition*, to pay 12 *l.* adjudged, this was a good Sale. *Cro. Eliz.* 68, *Bright* verſus *Hubbard*. *Poſtea* (g) 1. *S. C.*

6. The Husband may ſurrender a Copyhold to the Uſe of his Wife, becauſe 'tis not done immediately to her, but to the Lord of the Manor to her Uſe, and by his Admittance; for an Eſtate cannot paſs immediately from him to her. 4 *Rep.* 29, in *Bunting*'s Caſe.

* *This muſt be of an Eſtate for Life.*

* So where the Husband is ſeiſed of a Copyhold in Right of his Wife, and commits Waſte, this Forfeiture ſhall bind her after his Death, becauſe the Act done is not a Wrong to her, but to the Lord. 4 *Rep.* 27.
2 Roll. Rep. 272. Palm. 384.

7. The Cuſtom of a Copyhold Manor was, that a *Feme Covert* might give Lands to her Husband; adjudged an unreaſonable Cuſtom, becauſe it cannot have a reaſonable Commencement, for the Wife being always *ſub poteſtate Viri*, it ſhall be intended, that her Lands were not voluntarily given to him, but by Compulſion. *Godb.* 14, 15. *Skipwith* verſus *Sheffeild*. *Antea* (H) 4. *S. C.*

Moor 596. 2 Cro. 105. Antea (C) 32.

8. The *Husband* was ſeiſed of a Copyhold in *Right of his Wife*, who had the Inheritance, and he, without his Wife, *ſurrendered* it to a Stranger, and his Heirs, who was admitted; the Husband died, and then the Wife, and her Heir entered before Admittance; and reſolved, that he had a good Title, becauſe the Surrender of the Husband was no *Diſcontinuance* to the Wife to put the Heir to his Plaint in Nature of a *Sur cui in vita*. *Poph.* 39. *Bullock* verſus *Dibley*. See *Right* verſus *Footman*. *Poſtea* (V) 1. *S. P.* as to an Infant.

(V)

Of Infants Copyholders. Antea (Q) 13.

1. COpyholder in Fee having Iſſue two Sons, ſurrendered his Lands to the Uſe of the eldeſt Son *for Life*, and afterwards to the Uſe of the youngeſt Son *in Fee*, both the Sons being *within Age*, ſurrendered the Lands to the Uſe of *W. R.* in Fee, who was admitted, and both of them died, but the youngeſt Son left Iſſue, who was admitted, and entered upon *W. R.* the Surrendree; and it was adjudged lawful, and that he ſhould not be put to his Plaint in the Nature of a *Dum fuit infra ætatem*. *Hill.* 30 *Eliz.* 1 *Leon.* 95. *Right* verſus *Footman*. *Antea* (T) 8. *Bullock* verſus *Dibley*. *S. P.* as to a Feme Covert.

Cro. Eliz. 224.

A Committee of an Infant was ejected, it was adjudged, that he might bring an Ejectment *ex cuſtodia*. 1 *Leon.* 328. *Cole* verſus *Walls*.

2. The Cuſtom was, that Copyhold Lands ſhould deſcend to the youngeſt Son; the Father died, his youngeſt Son being then an Infant of the Age of about two Years, and about thirty

Years afterward he entered and made a Leaſe to another, who being turned out of Poſſeſſion, brought an Ejectment, without any Admittance of his Leſſor, or any Preſentment, that he was Heir; it was objected, that after ſo many Years, it was *ſupina negligentia* in him, not to enter during all that Time, and that he was after ſo long Time diſabled to make a Leaſe; but adjudged, that becauſe he was very Young when his Father died, and becauſe no Court was kept for a long Time after he came of full Age, that ſhall be a good Excuſe for his Negligence; beſides, an * Infant is not bound at any Time during his Nonage, to come to Court and pray to be admitted, nor after his full Age, till the Death of his Anceſtor is preſented, and Proclamations made for him to come in. 1 *Leon.* 100. *Rumney* verſus *Eves.* * 4 Leon. 30. Anderſon v. Heyward. S.P.

3. An Infant ſurrendered his Copyhold, and afterwards entered at full Age, and adjudged lawful, tho' the Surrendree was admitted, becauſe the Surrender was no Diſcontinuance. *Moor* 597. *Gooles* verſus *Grane.*

4. An Infant Copyholder in Fee made a Leaſe for Years of his Copyhold, without Licenſe, rendring Rent, and afterwards, at his full Age, he accepted the Rent; adjudged, this Leaſe was no Diſſeiſin of the Lord, and that it was a good Leaſe againſt the Infant. *Latch.* 199. *Aſhfeild* verſus *Aſhfeild.* W. Jones 157. Godb. 364. Poſtea Infant (B) 8. S. C.

(W)

Jointenants of a Copyhold.

1. JOintenants of a Copyhold in Fee, one of them made a Surrender to the Uſe of his Will, and died; the Deviſee was admitted; adjudged, that the Surrender and Admittance ſhould bind the Survivor. 2 *Cro.* 100. *Porter* verſus *Porter.*

(X)

Leet. See tit. *Leet.* Antea (E) 3, 4, 5, 6, 9, 10, 13, 14, 16.

1. QUO *Warranto* to know by what Authority the Defendant held a *Court-Leet*; he pleaded, that he was ſeiſed of ſuch a Meſſuage, *&c.* and ſo preſcribed to hold a Leet in that Meſſuage; it was objected, that a Leet could not be appendant to a ſingle Meſſuage, and therefore the Preſcription void; but it was held good, becauſe it may be reaſonably intended, that this was the capital Meſſuage and Seat of the Lord of the Manor, where uſually theſe Courts were held. *Delve's* Caſe in 2 *Brownl.* 217. *Griffin* verſus *Cooper.*

2. The Lord cannot diſtrain *pro certâ Læta*, without a *Preſcription*, becauſe 'tis only for his Benefit, and againſt Common Right, but he may for a *Fine or Amerciament*, becauſe this Court cannot impriſon till the Fine paid. 11 *Rep.* 42. *Godfrey's* Caſe.

(Y)

Of Leaſes by Copyholders, and of Actions by them.

1. SUrrender to the Uſe of his Will, and then he deviſed the Lands to his Wife for Life, Remainder to his Son in Tail; the Wife died, and a Stranger intruded and made three Feoffments to three ſeveral Perſons, he in Remainder entered on *one of the Feoffees*, in the Name of all the Lands deviſed, and made a Leaſe of the Whole to try the Title; adjudged, that his Entry and the Leaſe was good, the Lands being all in one County. *Trin.* 28 *Eliz.* 1 *Leon.* 35. *Troublefeild* verſus *Troublefeild.*

2. The Lord of a Manor gave Licenſe by his Steward to a Copyholder, to make a Leaſe for *three Years, if he ſhould ſo long live*; and the Copyholder made a Leaſe to the Plaintiff for three Years, abſolutely, without ſaying, *If he ſhould ſo long live*; it was objected, that he had not purſued his *Licenſe*, which ought to be ſtrictly purſued; but adjudged, that he had, becauſe the Words, *If he ſo long live*, are but *Surpluſage*; for the Law ſays, if the Copyholder doth not ſo long live, his Leaſe is determined; but where the Lord gives a Licenſe to a Copyholder of Inheritance to make a Leaſe for three Years, *if he ſo long live*, and he makes a Leaſe abſolutely for three Years, this ſhall be a good Intereſt to the Leſſee againſt his Heir; but 'tis otherwiſe in the Caſe of a *Copyholder for Life.* *Owen* 71. *Haddon* verſus *Arrowſmith.* Cro. Eliz. 402. S. C. Poph. 105. S. C.

3. In Ejectment, the Caſe was, the Lord made a Leaſe of his Court-Baron to two of his Copyhold Tenants for 200 Years; the Leſſees kept Court, and a Copyholder ſurrendered to the Uſe of *W. R.* in Fee, who obtained a *Licenſe* in Court to let the Lands for twenty-one Years, to commence *from Michaelmas laſt paſt*, and afterwards he did make a Leaſe for twenty-one Years to the Plaintiff, but it was to commence at *Chriſtmas next following*; adjudged, that this Leaſe was not warranted by this Licenſe. *Cro. Eliz.* 394. *Jackſon* verſus *Neale.* *Antea* (F) 7. *S. C.*

4. A Copyholder had a *Licenſe* to leaſe his Lands *for twenty-one Years*, and he made a Leaſe thereof *for three Years* to the Plaintiff, and being turned out of Poſſeſſion, brought an *Ejectment*; and adjudged, that it was well brought, and that this was a good Leaſe. *Cro. Eliz.* 535. *Goodwin* verſus *Longhurſt*. *Poſtea* Ejectment. (I) 5. *S. C. Moor* 569. *Sprak's* Caſe.

2 Brownl. 40. S. C.

5. Ejectment by a *Leſſee* of a Copyholder; the Defendant pleaded Specialty; the Plaintiff replied, that the Copyholder, by *Licenſe* of the Lord, did demiſe, but did not ſhew *what Eſtate the Lord had, nor the Place or Time when the Leaſe was made*; adjudged, that the Replication is ill, but if the Plaintiff declare generally on a Leaſe, without mentioning a *Licenſe*, and the Defendant pleadeth Not guilty, 'tis ſufficient for the Plaintiff to ſhew the *Licenſe* in Evidence. 2 *Brownl.* 40. *Petty* verſus *Evans* or *Debbans*.

6. Adjudged, that an Ejectment will not lie for a Copyhold, unleſs the Plaintiff declare upon the Cuſtom upon the Leaſe, and upon the Ejectment. *Moor* 679. *Gregory* verſus *Harriſon*. *Hill.* 45 *Eliz.*

Antea (A) 8. S. C.

7. Copyholder in Fee made a Leaſe for Years, with Licenſe of the Lord, rendring Rent, and the Leſſee covenanted for himſelf, his Executors and Aſſigns, *to Repair* the Buildings; afterwards the Copyholder ſurrendered his Eſtate to *W. R.* and his Heirs, who was admitted, and brought an Action of Covenant againſt the Leſſee for not Repairing; adjudged, that the Action was well brought, for a Copyholder is ſuch an *Aſſignee* as may have either an Action of Debt or Covenant upon the Statute 32 *H.* 8. *Cro. Car.* 17. *Platt* verſus *Plomer*.

8. A Copyholder having Licenſe, made a Leaſe of his Copyhold Lands for a Term of Years; the Leſſee died; adjudged, this Term ſhall be Aſſets in the Hands of his Executor, but 'tis clearly ſo, if the Leaſe had been but for one Year, becauſe ſuch Leaſe is warranted by the Common Law, and not by Cuſtom. *Poph.* 188.

9. A Copyholder in Fee had Licenſe to make a Leaſe, where the Cuſtom was, for the Wife to have her Widow's Eſtate, and accordingly he made a Leaſe, reſerving Rent to himſelf and his Wife *during their Lives*, and to his Heirs; adjudged, that the Wife might have this Rent, tho' ſhe was no Party to the Leaſe, and tho' it was reſerved *during their Lives*, without ſaying, or *the Life of either of them*, yet it ſhall continue for the Life of either, becauſe the Reverſion will attract the Rent to it. 1 *Vent.* 163, *Hill* verſus *Hill*, cited in *Sacheverel* and *Frogate's* Caſe.

(Z)

Lord of a Manor, **what Acts he may do, and what Acts bind him, what not, and what Action lies againſt him.** See (C) 45. (a) per totum. *Lunatick Copyholder.*

1. IF a Widow, who is intituled to her Free Bench *dum caſta viveret*, ſhould live incontinently, and the Lord having no Notice of it, admits her, this ſhall bind him. *Wheeler's* Caſe.

2. A Copyholder in *Borough Engliſh* had three Sons, the youngeſt was admitted, and died without Iſſue, the ſecond was beyond Sea, and upon Pretence that he was likewiſe dead without Iſſue, the eldeſt was admitted, and afterwards ſurrendered the Copyhold to the Uſe of another in Fee, who was admitted; the Lord hearing that the Son beyond Sea was living, made three Proclamations for him to be admitted, and he not coming, ſeiſed the Copyhold as forfeited; adjudged, that by his Admittance of the eldeſt Son, and by his Acceptance of a Surrender to the Uſe of another, and his admitting him, the Lord was bound. 2 *Cro.* 226. *Underhill* verſus *Kelſey*, and 101. *Whitton* verſus *Williams*. *S. P.* and *Godbolt* 268. *S. C.*

1 Roll. Rep. 125. 195. 2 Bulſt. 337. 2 Cro. 368. Moor 842.

3. If a Lord of a Manor refuſe to admit a Man named by a Copyholder to be his Succeſſor, he cannot bring an Action on the Caſe againſt him, but muſt prefer a Bill in Chancery, and that Court will decree him to admit the Perſon. 2 *Cro.* 368. *Ford* verſus *Hoskins*. *Antea* (G) 12. *S. C.*

4. The Lord may diſtrain his Copyhold Tenant for Services, or he may ſeiſe his Lands as it was adjudged. *Mich.* 7 *Jac.* in the Caſe of *Rivett* verſus *Downs*. *Noy* 135.

(a)

Lunatick **Copyholder.**

Hutt. 16. 1 Brownl. 197.

1. A Copyholder was a Lunatick, the Lord committed his Eſtate to one who brought an Action of Treſpaſs; adjudged, that he was only as a Servant, and had no Intereſt, and therefore could not bring the Action in his own Name, but it muſt be brought in the Name of the Lunatick, neither can the Lord diſpoſe of the Copyhold without ſpecial Cuſtom. *Hob.* 215. *Cocks* verſus *Darſon*.

2. The King ſhall not have the Cuſtody of the Copyhold Lands of an *Idiot*, becauſe at Common Law 'tis but an Eſtate at Will, and the King, by Reaſon of the Dignity of his Perſon, cannot hold an Eſtate at the Will of another; and if he alien his Copyhold Lands at full Age, ſuch Alienation ſhall be avoided by Office found. 4 *Rep.* 127. *Beverly's* Caſe. *Latch* 224. *S. C.*

3. The Lord of a Manor granted the Stewardſhip thereof to *W. R.* for Life, afterwards he became a *Lunatick*, and was found by Inquiſition to be *Non Compos Mentis*; and the Cuſtody of him and his Lands was granted to *R. R. &c.* the Queſtion was, whether the Steward, by the Conſent of *R. R.* or whether *R. R.* himſelf, by the Steward, might grant Copyhold Eſtates, according to the Cuſtom of the Manor; adjudged, that *R. R.* himſelf could not grant Copies, for that by Law he hath no Eſtate in the Manor, for he is not ſo much as *Dominus pro tempore*, but that the Lunatick, by his Steward, might grant Copies, according to the Cuſtom. *Trin. 9 Jac. Ley* 47. *Blewit's* Caſe.

4. A Copyholder was *Deaf and Dumb*, the Committee of the Lord of the Manor, who was in Ward, granted the Cuſtody of him to *W. R.* who entered, and the *Prochein Amy* of the Copyholder entered upon the Grantee; adjudged, that the Lord ſhall have the Cuſtody of the Copyholder, otherwiſe he might be prejudiced in his Rents and Services. *Mich. 45 Eliz. Cro. Eliz.* 105. *Evers* verſus *Skinner*. 2 Cro. 105.

(b)

Of Manors, &c. See Antea (C) 45. *Reputation* 2.

1. LEaſe of a *Site of a Manor*, with all his Lands thereunto *appertaining*; adjudged, that the *Demeſnes* do paſs, but if it had been with all Lands *appertaining to the Site*, there nothing paſſeth but the Manor. *Mich. 7 Eliz. Owen* 31.

2. *Sir Fra. Askew* being ſeiſed of the *Manor of Cofford*, which extended into *North and South Kelſey*, granted *Manerium ſuum de North Kelſey* to *B. G.* and his Heirs; it was argued, that no Manor paſſed by this Grant, becauſe *North Kelſey* was not then a Manor; 'tis true, the Grantor had * *Demeſnes and Services* there, but thoſe are not a Manor, but Part of a Manor; and if they paſs by this Grant, it muſt not be by the Name of a *Manor*, but in Groſs; but it was adjudged, that the Grantor having *Demeſnes and Services* there before the Grant, a new Manor ſhall ariſe by Operation of Law, by Vertue of the Grant, and *North Kelſey* being within the Manor of *Cofford*, a Court-Baron may be held at any Place within the Manor, and ſo a Manor paſſed. 1 *Leon.* 26. *Marſh* verſus *Smith*. Cro. Eliz. 38. * *See* Antea (C) 45.

A Lord of a Manor died ſeiſed, leaving Iſſue two Daughters, who made Partition of the Demeſnes only; it was held, that the Demeſnes were now become in Groſs and ſevered from the Manor. 1 *Leon.* 204. *Thetford* verſus *Thetford*.

3. In Replevin, the Defendant avowed for a Rent-charge, and ſhewed, that *B. G.* was ſeiſed of the Manor of *R. &c.* and made a Feoffment of the Place, where, to one *O.* rendring *Rent*, and Suit of Court *at the ſaid Manor*, that the Feoffor died, and the Premiſſes deſcended to his Son and Heir, who was ſeiſed of the *Rent*, *as Parcel of the ſaid Manor*, and who bargained and ſold the ſaid Manor and *Rent* to the Avowant, by theſe Words, *Manerium de R. & omnes redditus, reputed or deemed as Part or Parcel of the ſaid Manor*, and averred, that the *Rent*, at the Time of the Bargain and Sale, and long before, was *reputed Parcel of the Manor of R.* it was objected, that this Averment was contrary to the Matter of the Avowry, which is, that when the Rent was firſt created, it was to be paid *at the Manor*, ſo that it was not then *Parcel of the Manor*, but a Rent in Groſs, therefore the Averment, that it was *Parcel of the Manor*, without ſhewing how, is not good; but if he had ſet forth any Special Matter to induce a Belief, that it had been *Parcel of the Manor*, as that the Bailiffs had received it, and accounted for it as ſuch, and that it had been enjoyed as Parcel of the Manor, it ſhould now be taken to be ſo. 1 *Leon.* 13. *Foreman* verſus *Bohun*. *Poſtea* Reputation. (A) 2. *S. C.* Moor 190.

4. The Lord of a Manor leaſed ten Acres, Parcel of the *Demeſnes*, for ten Years, rendring Rent, and afterwards he leaſed the Manor for twenty Years; adjudged, that 'tis a good Leaſe of the ten Acres, not in Reverſion, but as Parcel of the Manor, for the ten Acres were never ſevered from the Manor, but the Freehold remained in the Leſſor ſtill. *Paſch. 18 Eliz. Dyer* 350.

5. A *Parſonage* may be a Manor, as if before the Statute of *Quia emptores terrarum*, the Parſon, Patron, and Ordinary had granted Parcel of the Glebe, to hold of the Parſon by divers Services, that is a Manor. *Paſch. 22 Eliz. Godbolt* 3.

6. A Manor extended into four Towns, (*viz.*) *L. P. B.* and *W.* and the Lord granted *totum illud Manerium de W.* in *W.* adjudged, that by this Grant of a Manor of *W.* in *W.* it ſhall be conſtrued, his Manor in Reputation there. *Owen* 138. *Morris* verſus *Page*. Cro. Eliz. 38. 1 Leon. 26.

7. Where a Man hath a Manor which extendeth into two Towns, and he Grants the *Demeſnes and Services* in one Town, the Grantee hath a Manor in that Town, and the Grantor hath a Manor in the other. *Cro. Eliz. Harris* verſus *Nicholls* 19.

8. A Manor in *Reputation* will not paſs by the Name of a Manor, either in a Fine or Recovery, for theſe are Conveyances which ſhall not be taken by Intendment. *Cro. Eliz.* 524. *Mallett* verſus *Mallett*.

9. *Manerium eſt nomen collectivum*, and comprehends *Meſſuages, Lands, Gardens, Woods, &c.* and therefore Lands in Leaſe will paſs by the Name of the Manor. *Mich. 4 Eliz. Dyer* 207.

10. So where the King made a Leaſe of a Manor; adjudged, that the Rents and the Reverſion of the Demeſnes did paſs. *Mich. 7 Eliz. Dyer* 233.

11. A Widow who had Title to Dower of a Manor, demanded her Dower *by the Name* of the *third Part of certain Meſſuages and certain Acres of Land, &c.* and not by the Name of the *third Part of the Manor*, and ſhe had Judgment and was in Poſſeſſion, and kept Courts and granted Copies; adjudged, that thoſe Grants were void, becauſe ſhe had not a Manor, having demanded only Things *in Groſs*, and her Pleading, that ſhe recovered the third Part of the Manor, *per Nomen* of certain Meſſuages and Lands, will not make it a Manor; but if ſhe had demanded the *third Part of the Manor, &c.* then ſhe would have a Manor, and might keep Courts and grant Copies, *&c. Mich.* 29 *Eliz. Godb.* 135. *Bragg*'s Caſe.

12. Every Manor conſiſteth of *freehold and cuſtomary Tenants*, and that there muſt be at leaſt *Two freehold Tenants*, but yet there may be a Manor where there is but *one freehold Tenant*, for if all the Lands held of the Manor eſcheat to the Lord, except the Lands of one freehold Tenant, or if the Lord of the Manor ſhould refuſe all the Tenures and Services of his free Tenants, except one, the Seigniory ſtill continues between the Lord and that one Tenant, and it cannot be a Seigniory in Groſs, becauſe it was never ſeparated from the Manor; if ſo, then 'tis Parcel of the Manor, and by Conſequence the Manor muſt continue. 1 *And.* 257. See 2 *Lutw. S. P.* in the Caſe of *Tonkin* verſus *Crocker*.

So where there are but two Copyholders, and the Lord made a Feoffment of the Lands of one of them, who died; it was objected, that his Death could not be preſented, nor the Heir admitted, becauſe now but one Copyholder, but not allowed. 4 *Leon.* 230. *Bell* verſus *Langley*.

13. By *Endowment* the *Vicar* was to have the Tithes of the third Part of the Manor of, *&c.* and the Queſtion was, whether this ſhould extend to the *Demeſnes* only, or to the Freeholders alſo: *Et per Curiam*, if the Lord grant a Rent-charge out of his Manor, it ſhall extend to his *Demeſnes* only, for he ſhall not impoſe a new Charge upon others; ſo if the King grants to the Lord free Warren in his Manor, 'tis in his *Demeſnes* only, for otherwiſe this Grant would create a new Charge upon others; but if the King grants Waifs and Strays in his Manor, that ſhall include the Lands of Freeholders, for it creates no new Charge; ſo in the principal Caſe, the Endowment of Tithes of the third Part of the Manor created no new Charge, but diſpoſes of the old one, to which they were before ſubject. *Cro. Eliz.* 462. *Heigham* verſus *Beſt*. *See* Vicar. (A) 4. *S. C.*

2 Cro. 259. Yelv. 190. S. C.

14. A Manor may be held by Copy of Court-Roll, and the Lord of ſuch Manor may grant Copies, and ſuch a cuſtomary Manor may paſs by Surrender and Admittance, and Fines ſhall be paid upon Admittances, as well upon Alienations as Deſcents. 1 *Bulſt.* 57. *The King* verſus *Stafferton*. *Antea* Copyhold. (F) 3. *S. C.*

15. A cuſtomary Manor may be held of another Manor, and ſuch cuſtomary Lord may grant Copies and hold Courts, and ſuch Manor ſhall paſs by Surrender and Admittance, and Fines ſhall be paid upon Alienation or Deſcent. 11 *Rep.* 17. *Sir H. Nevill*'s Caſe. *Kellway* 131. *S. P.* 1 *Bulſt.* 54, 55. *S. P.* 2 *Cro.* 326. *Moor* verſus *Goddard. S. P.*

16. But a Copyholder, Lord of ſuch a Manor, cannot hold a Court-Baron to have Forfeitures, and hold Pleas in a Writ of Right, for 'tis *oppoſitum in objecto*, that a Copyholder, who in the Eye of the Law is but a Tenant at Will, ſhould have ſuch a Court. 2 *Cro.* 259. *The King* verſus *Stafferton*.

17. In Replevin, the Defendant avowed for an Amerciament in a Court-Leet, and ſhewed, that he was ſeiſed of a Manor in Fee, and preſcribed to have a Court-Leet, the Plaintiff traverſed the Seiſin in Fee; and adjudged, that if it was only a *Manor in Reputation*, it would maintain the Avowry. *Mich.* 8 *Jac.* 1 *Brownl.* 170.

18. A Leaſe was made of a *Manor*, and upon an Iſſue, that *Non demiſit Manerium*, a Special Verdict was found, that there were *no Freeholders*, but ſeveral *Copyholders*, and that it was known by the Name of a *Manor*; now, tho' it was not really a Manor for Want of *Freeholders*, yet becauſe the Lands paſſed by the Leaſe, it ſhall be adjudged to be a Leaſe of the Manor. See 6 *Rep.* 63. *Vines* verſus *Durham*, in *Sir Moyle Finch*'s Caſe.

19. By a Grant of the *Demeſnes and Services*, the Manor paſſeth ſo by a Grant and Render of the *Demeſnes*, the Manor is deſtroyed, becauſe, in an Inſtant, the *Services and Demeſnes* are ſevered by the Act of the Party; but 'tis otherwiſe, if by Act of Law, as by Partition. 6 *Rep.* 63. *Sir Moyle Finch*'s Caſe.

20. *In Replevin, &c.* adjudged, that within one Manor there may be another Manor demiſable by Copy, and that within that Manor there may be cuſtomary Tenants at Will, according to the Cuſtom; for as there may be a Tenant at Will of a Manor at Common Law, ſo there may be a Tenant at Will, according to the Cuſtom of the Manor. *Mich.* 11 *Jac.* 2 *Cro.* 326. *Moor* verſus *Goodgreve*. 11 *Rep.* 17. *S. C.* reported by the Name of *Sir Henry Nevill*.

21. Indictment for entring into a *Moiety of a Manor*, it was objected, that a Man cannot enter into a *Moiety* of a Thing which is *entire*, therefore it ought to be, that he entered into the Whole; but adjudged, that after Partition one Coparcener hath a Moiety, which is an half Part ſeparated and divided, but before Partition he has *dimidium*, which is an half Part undivided. *Latch* 224. *Beverly*'s Caſe. 4 *Rep.* 123. *S. C.*

(c)

Pleadings concerning Copyholds. See (C) 36.

1. IN *Ejectment*, the Defendant pleaded, that the Leſſor of the Plaintiff was a Copyholder, and that he ſurrendered to the Uſe of the Defendant in Fee, who was admitted, and that the Leſſor entered on him, *&c.* and upon Demurrer adjudged, that the Plea was not good, for the Action was brought, as upon a Leaſe at Common Law, and the Plea proves the Land was Copyhold, and a Copyholder cannot make a Leaſe without Licence, which the Defendant did not ſhew, ſo he had neither confeſſed or avoided the Leaſe on which the Plaintiff declared. *Cro. Eliz.* 728. *Kenſey* verſus *Richardſon.*

2. *In Replevin*, the Caſe upon the Pleadings was, that the Lands were Copyhold, and that the Father deviſed the Guardianſhip of his Children, being Infants, to one, and the Lord of the Manor granted the Guardianſhip of them to another; and in Pleading, he ſet forth, that *eo quod*, it belonged to him *ſecundum conſuetudinem Manerii*, to aſſign Guardians to Infant Copyholders of his ſaid Manor, he did aſſign *Mary Bennet*, and at ſuch a Court admitted her to be Guardian, *&c.* and then he admitted the Infants, *&c.* it was objected, that this was not a poſitive Allegation of ſuch a Cuſtom, for he ſhould have ſaid, that *infra Manerium præd' talis habetur conſuetudo*, and then have ſet forth the Cuſtom; 'tis true, if he had ſaid *eo quod*, that it belonged to him, *&c.* to aſſign Guardians, *&c.* a *tempore cujus contrarium memoria hominum non exiſtit*, that might have been well enough. *Cro. Eliz.* 185. *Latch* 138. *Allen* 68. *S. P.*

3. If one plead a Seiſin of a Copyholder in Fee, and claims under him, in ſuch Caſe he muſt ſhew of whoſe Grant; but if he ſhew the Admittance of the laſt Heir, that is in Nature of a Grant, and may be pleaded as ſuch. 2 *Cro.* 103. *Piſtor* verſus *Hemling.*

4. The Law permits an *Heir* to plead his *Admittance* as a new Grant, and this is to avoid an Inconvenience, becauſe it may be impoſſible for him to ſhew the firſt Grant, for it may be made Time out of Mind; and if it was within Time of Memory, then the Cuſtom faileth. 4 *Rep.* 22. *b.*

5. The Plaintiff declared, that he was *ſeiſed in his Demeſne, as of Fee,* * *ſecundum conſuetudinem Manerii*, and being ſo ſeiſed, did *ſurrender*, and this was held a good Plea, ſo that it appears there may be a *Cuſtom*, that Lands in Fee-ſimple ſhall paſs by Surrender. 3 *Bulſt.* 230. *Poſtea 9. 1 Roll. Rep. 311. S. P.

6. In Treſpaſs, the Defendant juſtified, becauſe it was the Freehold of *B. G.* and that he entered by his Command; the Plaintiff replied, that the Land was Copyhold and demiſable in Fee, and that *R. L.* was ſeiſed in Fee by Copy, *&c.* but did not ſay it was granted to him, and that he died ſeiſed, and the Land deſcended to his Daughter, and Heirs, who were admitted, and demiſed to the Plaintiff; adjudged, that the Plaintiff had not made a good Title to himſelf, becauſe a Man cannot be entituled to a Copyhold, without ſhewing a Grant, and here he only alledged, that ſuch a one was ſeiſed in Fee of the Copyhold, but did not ſay it was granted to him. *Cro. Car.* 137. *Sheppard's* Caſe.

7. *Accompt, &c.* was brought againſt the Defendant by an Adminiſtrator, who declared, that the Defendant, *as Guardian* of *W. R.* had received the Profits of Lands which were granted to his Father by Copy of Court-Roll *tenendum ſecundum conſuetudinem Manerii, &c.* who entered and died ſeiſed, and that it deſcended to the ſaid *W. R.* who died; and that the Plaintiff, as his Adminiſtrator, brought this Action; the Defendant pleaded, that he did not receive the Profits *as Guardian*, upon which they were at Iſſue, and the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that it appeareth by the Pleading, that the Lands were Copyhold and not Freehold, and that an *Action of Accompt* would not lie againſt a Perſon who received the Profits of Copyhold Lands; but adjudged, that this may be intended a *Freehold*, for 'tis not ſaid *tenendum ad voluntatem Domini*, but only *tenendum ſecundum conſuetudinem Manerii*, and many Freeholds have been granted by Copy, and by the Rod. *Mich. 7 Car. Cro. Car. 166, 229. Hughes* verſus *Harris.*

8. *Caſe, &c.* in which the Plaintiff declared, upon an Agreement between him and the Defendant, that the Plaintiff ſhould *Surrender* to the Uſe of the Defendant, certain Copyhold Lands, and that then the Defendant ſhould pay to the Plaintiff ſo much Money; then he ſets forth, that he did ſurrender *into the Hands of A. and B.* two cuſtomary Tenants, *&c. ſecundum conſuetudinem Manerii*; after a Verdict for the Plaintiff in *C. B.* a Writ of Error was brought in *B. R.* and it was objected, that the Promiſe being to *ſurrender generally*, it muſt be either to the Lord or his Steward, and not to *two Tenants*, as the Plaintiff had declared, and that the Allegation * *ſecundum conſuetudinem Manerii*, is not ſufficient, without alledging, that there was ſuch a Cuſtom; beſides, the Tenants are no more than † Attornies; but notwithſtanding theſe Objections, the Judgment was affirmed. 1 *Mod.* 61. *Turner* verſus *Benny.* 1 Lev. 293. * 1 Cro. 299. 3 Cro. 385. † 9 Rep. 76. Comb's *Caſe.*

9. Caſe, *&c.* for diſturbing a Copyholder in the Enjoying his Common appertaining to his Meſſuage, in which the Plaintiff ſet forth, that he was ſeiſed of an Houſe and of ten Acres of Land in *N. Parcel of the Manor of Wakefield*, which he held by Copy of Court-Roll *in Fee*, according to the Cuſtom of the ſaid Manor, but did not ſay *ad voluntatem Domini ſecundum conſuetudinem Manerii*, and that the Plaintiff *ut tenen' cuſtumar'*, had Right of Common in *Warmlees*, but was diſturbed; upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted Mod. Caſes 19.

reſted in *C. B.* becauſe thoſe Words were omitted, tho' the Verdict had found the Cuſtom of the Manor, and that the Lands were Parcel thereof. 1 *Lutw.* 126. *Crowther* verſus *Oldfeild.* *Poſtea* (d) 5. 1 *Salk.* 364. that Judgment reverſed, becauſe it was both laid and found, that the Tenement was Parcel of the Manor, and that the Plaintiff *ut tenen' cuſtumar'* had Right of Common, which is impoſſible, unleſs the Tenement was Copyhold.

* Antea (C) 36. S. C.

10. 'Tis true, this might have been a good Exception upon a *Demurrer*, (*viz.*) In * Replevin, the Defendant made Cogniſance, for that *M.* was ſeiſed in Fee of a Cloſe, Parcel of the Manor of *L.* which Cloſe he demiſed to *R.* for ninety-nine Years, and being ſeiſed of the Reverſion, according to the Cuſtom of the Manor, (omitting *ad voluntatem Domini*) he ſurrendered it into the Hands of the Lord, according to the Cuſtom, *&c.* and upon a *Demurrer* to this Cogniſance it was held void; for tho' he had alledged that *M.* was ſeiſed in Fee * *ſecundum conſuetudinem Manerii*, yet thoſe Words *Ad voluntatem Domini* being left out, it ſhall be intended a Freehold, which could not be ſurrendered in that Manner without a ſpecial Cuſtom for that Purpoſe. 2 *Vent.* 143. *Rogers* verſus *Bradley.* 2 *Lutw.* 1165. *Hill* verſus *Bolton.* *S. P.*

* Pl. 9. S. P.

* *On a Writ of Error to reverſe a Judgment, the Error aſſigned was, that the Defendant had pleaded, that he was ſeiſed in Fee* De Copiam Rotulorum Curiæ; *adjudged no Error, for Lands in Fee may be ſurrendered according to the Cuſtom of a Manor.*

11. In Treſpaſs, for Breaking and Entring his Cloſe; the Defendant pleaded, that the *Earl of Suſſex* was ſeiſed in Fee of the Manor of *Glaſſonby*, of which one Meſſuage and forty Acres of Paſture Lands were Parcel * *& dimiſſa & dimiſibilia* in Fee, by Copy of Court-Roll *Ad voluntatem Domini*, according to the Cuſtom of the ſaid Manor, *and deſcendable, and which do deſcend from Anceſtor to Heir, in a Courſe of Succeſſion, called Tenant Right, &c.* then he ſets forth a Grant of the Premiſſes to him and his Heirs, by Copy of Court-Roll, and a Cuſtom for every Copyholder of the Manor to have Common in the ſaid Paſture-Lands, and ſo juſtifies the Entring and Chaſing the Plaintiff's Cattle Damage-feaſant; and upon a ſpecial Demurrer, the Plaintiff ſhewed for Cauſe, that this Plea was repugnant and contradictory in it ſelf, becauſe the Defendant had pleaded, that the Premiſſes were, Time out of Mind, *dimiſſa & dimiſſibilia, by Copy of Court-Roll*, and yet, that they were *deſcendable from Anceſtor to Heir*, which is repugnant and abſurd, and for this Reaſon the Plaintiff had Judgment. 2 *Lutw.* 1324. *Hutchinſon* verſus *Jackſon.*

Terra nativa, *and ſurrendered it according to the Cuſtom of the Manor, but did not ſay that it was demiſable* per Rotulorum Curiæ; *adjudged no Error, for Lands in Fee may be ſurrendered according to the Cuſtom of a Manor.* 1 Roll. Rep. 411. Waſſell v. Yelton. 3 Bulſt. 230. S. C.

12. The like Action was brought in *B. R.* 4 *Annæ*, and there one of the Judges was of Opinion, that the Declaration being againſt a *Wrong-doer*, need not be ſo ſpecial as where a Title is claimed, and that the Plaintiff having ſet forth, that he is a cuſtomary Tenant of the Manor, and that he held his Lands by Copy of Court-Roll; if that is true, he muſt hold them *ad voluntatem Domini.* *Paſch.* 4 *Annæ.*

13. *In Ejectment*, the Defendant pleaded, that the Lands were held of the Manor of *D.* which is *antient Demeſne*; the Plaintiff replied, and confeſſed, that the Lands were held of the Dean and Chapter of *Worceſter*, *ut de Manerio, &c.* which is *antient Demeſne*, but that the Lands are *Copyhold*; the Defendant rejoined *ex quo, &c.* the Plaintiff acknowledged the Lands to be *antient Demeſne*, 'tis not material, whether they are *Copyhold or Frank-fee*; and upon Demurrer to this Rejoinder it was adjudged, that the Replication was repugnant, becauſe Lands held *ut de Manerio* muſt be *Frank fee*, for Copyhold Lands are Parcel of the Manor it ſelf, and cannot be pleaded to be held *ut de Manerio*, therefore 'tis repugnant to ſay, that they are held *ut de Manerio*, and yet that they are *Copyhold:* But the Rejoinder is ill, for if they are Copyhold Lands, then an Ejectment lies, becauſe a Writ of Right will not, by Reaſon of the Baſeneſs of the Nature of Copyholds. 1 *Salk.* 185. *Brittle* verſus *Dade.* 3 *Lev.* 405.

14. In Treſpaſs for Taking and Impounding his Cattle; the Defendant pleaded, that at the Time of the ſuppoſed Treſpaſs *he was ſeiſed* of ſeveral Lands, *&c. ut de ſtatu cuſtumario hæreditario*, deſcendable from Anceſtor to Heir, *&c.* according to the Cuſtom of the Manor, and ſo juſtifies Damage-feaſant; and upon a Demurrer to this Plea, it was inſiſted for the Defendant, that tho' he ſet forth, that *ſeiſitus fuit*, and doth not ſhew in what Manner, yet being charged with a Wrong, it was ſufficient, without ſetting forth a *Title*; it had been certainly ſo, if inſtead of *Seiſitus* he had ſaid *Poſſeſſionatus: Sed per Holt* Ch. Juſt. where *Seiſin* is pleaded of a Copyhold, by Way of Juſtification of a Wrong, the Commencement of the Title muſt be ſet forth, which in this Caſe might have been done, by ſetting forth the Admittance of the Heir upon a Surrender or Deſcent, which amounts to a new Grant. 4 *Mod.* 346. *Robinſon* verſus *Smith.*

(d)

Of Preſcriptions by Copyholders. See *Cuſtom.* (C) 3.

1. IN *Caſe, &c.* a Copyholder declared, that in the Manor of *R.* there had been, *Time out of Mind*, Copyholders, and that during that Time, there had been an *Uſage in the ſaid Manor*, that every Copyholder, for every Acre of Land, ſhould have Common in the Waſte, *&c.* adjudged, that tho' a Copyholder cannot *preſcribe* but in the Right of the Lord, yet by *Way of Uſage*, as this Caſe is, he may make a Title to himſelf. *Goldſ.* 133. *Peirce* verſus *Baker.* *Moor* 461. *S. P.* and *S. C.*

2. If

2. If a Copyholder claim Right of Common in ſuch a Place in the Manor, he cannot *preſcribe in his own Name*, becauſe of the Baſeneſs of his Eſtate, but he muſt preſcribe in the Name of the Lord of the Manor, (*viz.*) That he and all his Anceſtors, and all thoſe whoſe Eſtate he had, *&c.* have had Common in ſuch a Place for him and his Tenants at Will; but when a Copyholder claimeth Common, or other Profit out of the Soil of the Lord, then he cannot preſcribe in the Lord's Name, but he muſt alledge, that *within the Manor*, &c. *there is ſuch a Cuſtom.* 4 *Rep. Gateward's* Caſe.

3. A Copyholder of Inheritance preſcribed to have reaſonable Eſtovers, and the Preſcription was thus, *Quod infra Manerium*, to which he was a Copyholder *talis habetur conſuetudo, &c. quod quilibet cuſtumarius tenens ejuſdem tenementi*, but did not ſay, *ejuſdem Manerii habuit & habere conſuevit communiam tanquam pertinen' ad tenementum prædictum, &c.* and for that Reaſon it was held ill. *Hill.* 21 *Eliz. Dyer* 70. *Iſham's* Caſe.

4. *In Replevin* for ſix Sheep, *&c.* The Defendant made Conuſance for Damage-feaſant; the Plaintiff replied, that the Place *where*, *&c.* was Part of a great Waſte, and Parcel of ſuch a Manor, in which there were Copyholders, Time out of Mind, and there is a *Cuſtom in that Manor*, that the Copyhold Tenants ſhould have *ſolam & ſeperalem paſturam* of the ſaid Waſte, as belonging to their Tenements; then the Defendant ſets forth, that the Copyhold Tenants *licenſed* him to put in the Sheep, *&c.* The Defendant traverſed the Cuſtom, and it was found againſt him, that there was ſuch a Cuſtom: It was inſiſted for him in Arreſt of Judgment, that the Cuſtom to have the *ſole Paſture*, and thereby to exclude the *Lord*, was void; beſides, if it was good, the Plaintiff ought to have ſhewed, that the Tenants had the ſole Feeding, *&c.* for Beaſts *Levant and Couchant*, *&c.* and having juſtified under a *Licenſe*, he ought to have ſhewed, that it was by *Deed*; but adjudged, that the Preſcription was good, for it doth not exclude the Lord from all the Profits of the Soil; for there may be *Trees* and *Mines*, *&c.* and that 'tis not neceſſary, that the Cattle were *Levant and Couchant*, becauſe the Plaintiff claims the *ſole Feeding*, and that may be by any Cattle whatſoever; neither is it neceſſary to alledge, that the Licenſe was by Deed, becauſe it paſſeth no Intereſt; 'tis only an Excuſe for the Treſpaſs. 1 *Vent.* 123, 163. *Hoskins* verſus *Robbins.* 1 *Lev.* 269. *S. P.* 2 Saund. 324. 1 Mod. 74. 2 Lev. 2.

5. Where a Copyholder hath Common of Paſture in the *Waſtes of the Lord, but out of the Manor*, he hath it as belonging to his Land, and if the Lord enfranchiſe the cuſtomary Eſtate, the Common ſtill remains; and in Pleading, he may make a Title to it thus, (*viz.*) That the Lord of the Manor, Time out of Mind, had Common in ſuch a Place for himſelf and his cuſtomary Tenants; but if the Common is in the *Waſte within the Manor*, there, by an Enfranchiſement, 'tis extinct, becauſe in this Caſe the Common *belongs to this Eſtate*, but if out of the Manor, it belongs *to the Land*, and not to his Eſtate. 1 *Salk.* 170. *Crowther* verſus *Oldfeild.* See *Co. Ent.* 9, 10.

(e)

Of Preſentments.

1. COpyholder in Fee ſurrendered into the Hands of two Tenants, to the Uſe of another and his Heirs, to be *preſented at the next Court*, and there was not any Court held in thirty Years afterwards, within which Time all the Parties concerned were dead, the Heir of the Surrenderor entered and made a Leaſe for Years accordingly; adjudged, that the Leaſe was good. *Mich.* 14 *Jac. Godbolt* 268.

(f)

Of the Steward of the Courts, and his Deputy-Steward.

See Antea (E) 3. *Coſts.* (E) at the End. For Services, *Extinguiſhment.* (C) per totum. *Inferior Courts* 11.

1. ONE entered a Plaint againſt the Defendant, and had a Summons for him to appear on ſuch a Day, at which Time the Steward came after Sun-ſet, and held the Court, and the Summons being returned ſerved, and the Party making Default, there was Judgment againſt him; and adjudged good, tho' the Court was held at Night; but if it had been otherwiſe, the Party hath no Remedy by Writ of falſe Judgment, or otherwiſe, but only by Petition to the Lord, who ought to relieve in ſuch Caſe, according to Conſcience, for he is the Chancellor in his own Court. *Mich. 6 Eliz. Owen* 63.

2. Adjudged, that a Steward may be retained without Deed, and that he may have an Action of Debt for his Salary, but he cannot have a Writ of Annuity without he had been retained by Deed. *Hill.* 8 *Eliz. Dyer* 248.

3. *Scire facias* upon a Judgment in a Writ of Annuity granted to the Plaintiff for Life, for the exerciſing the Office of Steward of the Manor of *L.* and this was brought for the Arrears of one Year incurred after the Judgment; the Defendant pleaded, that pending the Writ, the Plaintiff was

was required, *&c.* to keep Court which he refuſed, and this was adjudged a good Plea. *Trin.* 23 *Eliz. Dyer* 377.

4. One had a Grant of the Stewardſhip of a Manor, and afterwards the Biſhop of *Lincoln* granted the ſame to *W. R.* for Life, *Habendum & exercendum*, after the Death of the firſt Grantee, which laſt Grant was confirmed by the Dean and Chapter; and adjudged good, being in the Caſe of a common Perſon. *Hill.* 7 *Ed.* 6. *Dyer* 80. *Stanton* verſus *Green.*

5. There was a Grant of the Office of a Steward of a Manor to *B. B.* for Life, with a Fee of 40 *s.* for the Exerciſe thereof; afterwards the Grantor, by Deed reciting this firſt Grant for Life, granted the *Reverſion* of the ſaid Office, after the Death of the firſt Grantee, to *R. W.* together with a *Fee of* 40 *s.* for the Exerciſe thereof; the firſt Grantee died, and the ſecond Grantee held Court, and for the Arrears of his Fee of 40 *s.* diſtrained and avowed; adjudged, that the Grant made to him was void, becauſe there could be no *Reverſion* of ſuch an Office, and the Grant of the Fee of 40 *s.* was likewiſe void, becauſe it was an executory Recompence for exerciſing an Office. *Paſch.* 9 *Eliz. Dyer* 259. *Sir John Savage*'s Caſe.

6. Husband and Wife, ſeiſed of a Manor for their Lives, Remainder to the Heirs of the Huſband; he granted the Stewardſhip of the Manor to *G. D.* for Life, and in the ſame Deed he granted the Reverſion to the Son of *G. D.* for Life, and a Rent to them jointly out of the ſaid Manor for exerciſing the ſaid Office; the Rent was behind, the Grantor died, the Father, who was the Steward in Poſſeſſion, died, the Son diſtrained a Copyholder for the Rent-arrear; adjudged, that the Diſtreſs was lawful, and in his Avowry he ought to ſhew, that he continued to exerciſe the Office of Steward, for if he ceaſes, then an Action of Debt only lies for the Arrears. 10 *Eliz. Dyer* 270.

7. A Surrender made to the Steward of the Manor, to the Uſe of him the ſaid Steward, is good, for the Entry is, that the Party ſurrendered, *&c. in manus Domini*, and the Steward is but the Lord's Servant. *Cro. Eliz.* 317. In *Eriſh* verſus *Rive*'s Caſe.

8. A Lord may retain a Steward by *Word* to hold Courts, and that he ſhall have 40 *s.* and this Retainer ſhall be good till diſcharged. 4 *Rep.* 29. *Down* verſus *Hopkins*. *Cro. Eliz.* 323. *S. C.* 1 *Leon.* 227. *Blagrave* verſus *Ward*. *S. P.* 4 *Rep.* 30. *Harris* verſus *Jay*, he may have an Action of Debt for his Salary.

9. The Lord of a Manor made a Steward *ad exequendum per ſe vel ſufficientem Deputatum*; the Steward made a Deputy *pro hac vice*, to take a Surrender from Husband and Wife, *to the Uſe of them for their Lives*, the Remainder *over in Fee, & ulterius faciend' quantum in me eſt*; now this was an Authority to take an * *abſolute Surrender* from the Husband and Wife, which Authority the Deputy-Steward did not purſue, for he took a Surrender from them, *upon Condition, that the Lord ſhould regrant the Eſtate to them* for their Lives, Remainder over in Fee; yet it was adjudged, that the Deputation was good *pro hac vice*, and the Surrender was well taken, by Reaſon of the Words *& ulterius faciendum, &c. Cro. Eliz.* 48. *Burdet*'s Caſe.

* 1 Leon. 289. Burges v. Foſter. S. P. 4 Leon. 215. S. C. Godb. 142. S. C.

10. In Treſpaſs, a Special Verdict was found, upon which the Caſe was, that *W. R.* was retained by the Lady of the Manor, to be her *Steward* there for the *Keeping the Courts of the ſaid Manor*, which Retainer was by *Word* only, and no Fee or Annuity for exerciſing the ſaid Office; afterwards he took ſeveral Surrenders, as well out of Court as in Court; the Queſtion in this Caſe was, whether he was ſuch a *Steward* as might *take a Surrender out of Court*, becauſe he was retained *to keep Court*, which muſt be intended *pro hac vice*, and when that is over, his Authority is determined, and what he doth afterwards, is void; on the other Side it was inſiſted, that he was a Steward at the Will of the Lady, which Will ſhall not be determined till ſhe diſcharges him, and here he was not retained to keep one Court, but all the Courts of the Manor, and his Retainer was good without Deed, and 'tis not material, whether he hath any Fee for exerciſing the Office, becauſe he cannot be compelled to do the Service without the Fee; the Caſe was not adjudged. *Paſch.* 33 *Eliz.* 1 *Leon.* 227. * *Blagrave* verſus *Ward.*

2 Cro. 536. *See* pl. 7. S. C.

11. A Steward, without a Patent, or without any Cuſtom to warrant it, may take a Surrender, and the Admittance upon it ſhall be good. 2 *Cro. Simpſon* verſus *Cage* 526.

12. Husband and Wife Copyholders in the Right of his Wife, they ſurrender out of Court into the Hands of the Steward, and the Wife is examined by him; and it was not proved that he was Steward by Patent, nor any Cuſtom to warrant it, yet adjudged good. *Paſch.* 17 *Jac.* 2 *Cro.* 126. *Smithſon* verſus *Gage.*

13. A Patent was granted to Two joint Stewards, to hold Courts and grant Copyhold Lands; and one of them, without the other, granted a Copyhold, and adjudged good, becauſe he had a good Pretence or Colour ſo to do, tho' in Strictneſs of Law he could not do it with the other; for if one who hath ſome Colour to hold a Court, and to ſummon the Tenants to appear, *&c.* the Acts which he doth are good; as for Inſtance, if an Under-Steward holds a Court without any Diſturbance by the Lord of the Manor, tho' he hath no Patent, nor any Deputation to hold the Court from the Head Steward, yet 'tis good, becauſe the Tenants are not to examine what Authority he hath, nor is he bound to give them any Account of it. *Moor* 110. *Knowles* verſus *Lucy.* See 1 *Leon.* 218.

14. A Prohibition was prayed to a Court-Baron, and an Attachment againſt the Steward for dividing of Actions, to bring them within the Juriſdiction of the Court, and by that Means to defeat the Proceedings at Common Law, and a Prohibition was granted, and the Steward to ſtand committed till he had anſwered to Interrogatories concerning this Miſdemeanor. *Mich.* 17 *Car. Darcie*'s Caſe.

15. In Ejectment, *&c.* the Caſe was, *Charles Kett* being ſeiſed in Fee of a Copyhold, ſurrendered it to the Uſe of his Wife for Life, Remainder to his Son *Charles* in Tail; and if he died without Iſſue, and under Age, then to his Wife in Fee: Mr. *Keck* was Steward of this Manor, for which he had a Patent to exerciſe it, either by himſelf *vel per Deputatum*; he appointed Mr. *Clerke* to be his Deputy, who acted as ſuch for many Years; Mr. *Clerke*, by a Writing under his Hand and Seal, appointed *T. S.* to be his Deputy, *only to take this Surrender*, which was done accordingly, and afterwards preſented, and thereupon the Wife was admitted by the Lord by Mr. *Clerke*, *&c.* and a Caſe being made of this Matter for the Opinion of the Court; it was adjudged, that 'tis eſſentially incident to a Deputy to do any Act or Thing which the *principal Steward* might have done; that tho' a *Deputy cannot make a Deputy*, becauſe that implies an Aſſignment of his Power, which is not aſſignable by Law, yet he may authorize another to do a *particular Act*; and tho' ſuch Perſon act in his own Name, yet 'tis good; but if he had not been conſtituted to do a particular Act, but had been only a Deputy of a Deputy, tho' this would have been void, becauſe he had no real Authority, yet even ſuch a Conſtitution would have given him the Reputation to act as a Steward *de facto*, and what he doth as ſuch, would be ſufficient amongſt the Tenants, who are neither to examine his Authority, nor is he to give them any Account by what Power he Acts. 1 *Salk.* 95. *Parker* verſus *Kett.*

16. Adjudged, that a Steward of a Copyhold Manor may, without any Cuſtom, take *Surrenders out of Court*, becauſe the Lord may do it, and he hath the ſame Authority; and there is as much Reaſon, that he may take Surrenders *out of the Manor* as out of Court, for it may be convenient, and it cannot be prejudicial to any Body. 1 *Salk.* 184. *Dudfeild* verſus *Andrews.* See 2 *Cro.* 526. 1 *Leon.* 227.

17. Upon a Bill in the Dutchy Court, the Queſtion was, whether a Stewardſhip of a Manor might be granted in Reverſion; it was held, that it might, becauſe it may be granted in Fee, or for any leſs Eſtate, and ſo in Reverſion, for it might be executed by Deputy. 2 *Mod.* 173. *Sir Robert Howard* verſus *Attorney General & al'.* T. Jones 126.

(g)

Surrender, where good.

1. A Copyholder deviſed his Lands to his Wife for Life, and that ſhe ſhould ſell the Reverſion for Payment of his Debts, and afterwards he ſurrendered it in Court to the Uſe of his Will, and died; adjudged, that ſhe might make a good Title to ſell it, and that the Purchaſer ſhould be in under the Will. *Cro Eliz.* 68. *Bright* verſus *Hubbard.* *Antea* (T) 5. *S. C.*

2. The Cuſtom of a Manor was, that a *Copyholder* might ſurrender *out of Court* into the Hands of the Lord *by two cuſtomary Tenants*; adjudged, that in ſuch Caſe he cannot ſurrender *out of Court by Attorney*, *&c.* for every ſurrender ought to be warranted by Cuſtom, and without a ſpecial Cuſtom to warrant ſuch a Surrender *out of Court by Attorney*, 'tis not good, and this differs from *Comb*'s Caſe, for there the Surrender was by *Attorney in Court*, and in ſuch Caſe it was warranted by the Common Law, without any Cuſtom. *Hill.* 28 *Eliz. Chapman*'s Caſe, cited in *Comb*'s Caſe. 9 *Rep.* 76.

3. If a Surrender of a *Feme Covert* being alone examined, ſhall bind her by the Cuſtom, then if ſhe make ſuch Surrender out of Court before two cuſtomary Tenants of the Manor, who examine her, ſuch Surrender may be good, but not without a ſpecial Cuſtom to warrant it. *Cro. Eliz.* 717. In *Eriſh* verſus *Rive*'s Caſe.

A Copyholder ſurrendered to the Uſe of his Wife for Life, and afterwards to the Uſe of his Daughter in Fee, the Wife was admitted; adjudged, that the Daughter, after the Death of her Mother, might ſurrender the Land without any new Admittance, becauſe the Admittance of the Wife was ſufficient; in this Caſe it was held, that a Steward of a Manor may depute another to take a Surrender of a Copyholder, tho' he is in *Ireland.* 4 *Leon.* 111. *Higger* verſus *Helſton.*

The Entry of the Date of the Court is no Matter of Record, for if the Parties ſhould be at Iſſue upon the Time when the Court was held, or the Surrender made, it ſhall not be tried by the Court-Rolls, but by the Country. 4 *Leon.* 215.

4. Two Coparceners of a Copyhold in Poſſeſſion, the one ſurrendered the *Reverſion* of her Moiety *after her Death*; adjudged, that the Surrender was void. *Godbolt* 451. *Barker* verſus *Tayler.* 26 *Eliz.* *Platt*'s Caſe. *S. P.* *Cro. Car. Simpſon*'s Caſe. *S. P.*

5. The Teſtator deviſed *Part of his Copyhold Lands* to his Wife for Life, Remainder to his Brother and his Heirs, and afterwards in the Preſence of three Tenants, being Copyholders, he ſaid, *I have made my Will, and have appointed all Things therein as I would have it*, and then he ſaid, now here I ſurrender *All my Copyhold Lands* into your Hands accordingly; adjudged, that the Deviſe being only of *Part*, and the ſurrender being of *all* his Copyhold Lands, yet the ſame is reſtrained by the Will, and theſe general Words ſhall not enlarge it, ſo as to carry more to the Wife than what was appointed by the Will. 3 *Leon.* 18.

Adjudged, that where there is Tenant for Life of a Copyhold, Remainder over in Fee to another, that this Remainder-man may ſurrender his Eſtate, if there is no Cuſtom to the contrary; for the Eſtate of Tenant for Life, and of him in Remainder, are but one Eſtate, and the Admittance of Tenant for Life is the Admittance of him in Remainder. 4 *Leon.* 9. *Butler* verſus *Lightfoot.*

In a Special Verdict in Ejectment, the Caſe was, (*viz.*) The Lands were Copyhold, held of the Manor of *D.* of which *Sir Hugh Portman* was Lord, and the Plaintiff was a *Copyholder of Inheritance*, and that *Sir Hugh* pretending the ſaid Copyhold Lands were forfeited, diſcourſed with the Plaintiff about it, and thereupon it was agreed between them, that the Plaintiff, upon Payment of 5 *l.* to *Sir Hugh* (which he paid) ſhould enjoy the ſaid Copyhold *for his Life*, and his Wife ſhould have it during her Widowhood, and that he ſhould make his Choice, whether he would have it aſſured by Deed or by Copy of Court-Roll, and he choſe by Deed, excepting one Wood, which the Lord enjoyed; adjudged, this was a good Surrender of the Lands for Life only, *&c.* 1 *Leon.* 191. *Coleman* verſus *Sir Hugh Portman.*

6. A Copyholder in Fee made a *Letter of Attorney* to two Tenants of the Manor, to ſurrender his Copyhold to the Uſe of *B. G.* and his Heirs, who at the *next Court* did ſurrender the ſame accordingly, no Cuſtom being found to warrant ſuch ſurrender; adjudged, that it was good, becauſe he might do it *de communi jure.* 9 *Rep.* 75. *Comb's* Caſe.

2 Cro. 3-6. 1 Roll. Rep. 135. 253. S. C.

7. A Copyholder of Inheritance lying ſick, ſurrendered into the Hands of the Lord, to hold after his Death, to the Uſe of an Infant *then in the Womb*, and if *ſuch Infant die before he ſhall be of Age, and before Marriage, or without Heir*, then to the Uſe of *B. G.* and his Heirs; the Child was born, and died within Age; adjudged, that this Surrender to the Uſe of the *Infant*, *&c.* was void, becauſe it was to begin *at a Day to come*, and that the Remainder to *B. G.* was void, becauſe it was to begin upon a Condition precedent, (*viz.*) upon the Death of the Infant dying after full Age, and not marrying, which never happened. 1 *Bulſt.* 273. *Simpſon* verſus *Southern.* *Godbolt* 264. *S. C.* *Antea Bambridge* verſus *Whitton. S. P.*

8. Copyholder ſurrendered upon *Condition*, and afterwards releaſed the Condition by Deed: *Et per Curiam*, this is good, for a Right or Condition cannot properly be determined otherwiſe. 2 *Cro.* 36. *Hall* verſus *Shadbrook.*

Antea Condition. (G) 14. S. C.

So where there are two joint Copyholders, and one of them releaſes to the other, this is good without any Surrender or Admittance of him to whom the Releaſe was made, becauſe the firſt Admittance was of both and either of them, and their Ability to releaſe did ariſe from the firſt Admittance. *Winch* 3. *Waſe* verſus *Petty.*

9. A Copyholder bargained and ſold his Lands to the Lord, who was only *Dominus pro tempore*; adjudged a good Surrender.

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So if he come into Court, and ſays, he is weary of his Copyhold, and Requeſts the Lord to take it, for there needs no Conveyance between Lord and Tenant, according to the Cuſtom of the Manor, for a Copyholder hath no other Benefit of the Cuſtom, than to convey his Lands to a Stranger, and that muſt be by Surrender. *Hutt.* 65. *Blennerhaſſet* verſus *Humberſtone.*

10. A Surrender to two Tenants out of Court to the Uſe of *R. B. after the Death* of the Surrenderor is void, becauſe it was to commence *in futuro.* *March* 177. *Bambridg* verſus *Whitton.*

11. Copyholder of Inheritance ſurrendered to the Lord, *without ſaying to whoſe Uſe*, and at the next Court the Copyholder himſelf was admitted, *habendum* to him and *his Wife* in Tail, Remainder to his right Heirs; it was objected, that this Surrender was void, becauſe *no Uſe* was limited in it; and therefore by Conſtruction of Law it ought to be in the Surrenderor, neither was this *Admittance* good to paſs any Eſtate to the *Wife*, becauſe ſhe was not named in the Premiſſes, but only in the *Habendum*; but adjudged, that this Copyholder being in before he made the Surrender, and afterwards accepting a new Admittance, the Law intends, that the Surrender was made to ſuch Uſe as is mentioned in that Admittance, for the Lord is only an Inſtrument to convey the Eſtate and grant Seiſin to both; then, as to the Admittance it ſelf, the Wife ſhall take an Eſtate by it, tho' ſhe was not named in the Premiſſes, for the Caſe of a Copyhold is like that of a Will, where an Eſtate ſhall paſs by the *Habendum*, tho' the Party is not named in the Premiſſes. *Poph.* 125. *Brook's* Caſe. *Antea* (C) 20. *S. C.*

(h)

Surrender, what paſſes by it, and what not. See Antea (C) 36, 40, 41, 44, 47, 48, 49.

1. THE Father ſurrendered a Copyhold to the Uſe of his Son in Fee, upon a Condition to perform Covenants in an Indenture; the Son was admitted, and afterwards made a conditional Surrender to *W. R.* to be void upon the Payment of 10 *l.* on a certain Day; the Son neither paid the Money nor performed the Covenants in the Indenture, and thereupon the Father entered, and ſoon afterwards died, and the Copyhold deſcended to his Son; adjudged, that by the Entry of the Father, both the Surrenders were avoided, and that now the Son might enter and avoid the Surrender which he made to *W. R.* for the Payment of the Money. *Cro. Eliz.* 239 *Simmonds* verſus *Lownds.*

2. In Treſpaſs, *&c.* the Caſe was, the Lord of a Manor granted a Copyhold of Inheritance to *W. R.* upon Condition, that he ſhould pay yearly to *B. B.* 20 *s.* during his Minority, and 100 *l.* at his full Age; the Copyholder did not pay 20 *s.* every Year, but made a Surrender to *L. R.* and his Heirs, the Lord admits the ſaid *L. R.* and afterwards *B. B.* attained his full Age, and the 100 *l.* was not paid to him; then the Lord, and not the ſaid *B. B.* entered for the Condition broken, and granted the Land to the ſaid *B. B.* it was ſaid, that the Entry of the Lord was good,

notwithſtanding he had admitted *L. R.* becauſe he came in by him who ſurrendered, and not by the Lord, for he is only an Inſtrument to convey the Land. *Cro. Eliz.* 582. *Pay* verſus *Brown.*

3. *Tenant in Tail* of a Copyhold ſurrendered the ſame to another *in Fee*; this doth not make any *Diſcontinuance*, but that the Iſſue in Tail may lawfully enter. 1 *Leon.* 95. *Right* verſus *Footman.*

4. Copyholder in Fee ſurrendered to a Stranger *for Life*, and afterwards to the *Right Heirs* of the Surrenderor; then he made another Surrender of his *Reverſion*, to the Uſe of another Stranger *in Fee*, and died; the Tenant for Life died, and the Right Heir of the Surrenderor entered; adjudged, that by the firſt Surrenderor nothing remained in him, but the Fee was reſerved to his Right Heirs, and if he had not the ſecond Surrender of the Reverſion, his Right Heir would have in by Purchaſe, and not by Deſcent; and there is a Difference, where a Surrender is made *to the Uſe of the Surrenderor himſelf for Life*, and afterwards to another in Tail, Remainder to the Right Heirs of the Surrenderor, and where the firſt Limitation is not to the Surrenderor for Life, *&c.* for in the firſt Place his Right Heir ſhall be in by *Deſcent*, and in the other by *Purchaſe*: Adjudged likewiſe, that where a Copyholder Surrenders to the Uſe of his *Right Heirs*, in ſuch Caſe the Eſtate ſhall remain in the Lord of the Manor till the Surrenderor dies, for then, and not before, his Right Heir will be known. 1 *Leon.* 101. *Allen* verſus *Palmer.*

5. A Copyholder made a Leaſe for Years, with Licenſe, *&c.* rendring Rent, and afterwards he ſurrendered the Reverſion, together with the Rent, to the Uſe of *W. R.* who was admitted; it was adjudged, that the Leſſee for Years need not attorn, either to ſettle the Reverſion, or to create a Privity; becauſe the Surrender and Admittance were in Nature of an Attornment. *Hill.* 28 *Eliz.* 1 *Leon.* 297. See *Poſtea pl.* 19.

6. Several *Copyhold Lands* were appertaining to a Meſſuage, which Meſſuage, *cum pertinentiis*, were ſurrendered to the Lord, and the Surrendree was admitted; adjudged, that only the Meſſuage, Curtilage, Orchards and Yards paſſed by this Surrender, and not the Right which the Surrendree had in the other Lands. 2 *Cro* 526. *Simpſon* verſus *Cage.*

7. A Copyholder ſurrendered to the Lord, to the Uſe of his Wife and Younger Son, without mentioning what Eſtate; adjudged, that they have an Eſtate for Life; for Copyhold Eſtates, as well as Freehold, ſhall be directed by the Rules of Common Law, as neceſſary Conſequents on the Cuſtom, except there is a Special Cuſtom, that *ſibi & ſuis*, or *ſibi & aſſignatis*, ſhall make a Fee. 4 *Rep.* 29. *the* 4*th Reſolution in Bunting's* Caſe.

8. A Copyholder ſurrendered to the Uſe of the Surrendree *for ever*, the Lord admits him to hold to him and *Heirs*, if this had been a Surrender to the Uſe of his Will, and then he had deviſed to one *for ever*, and the Admittance had been to him and *his Heirs*, it had been good; but it was a Queſtion, whether 'tis good upon a bare Surrender. *Godb.* 137. *Allen* verſus *Patſhall.*

9. The Cuſtom of a Manor was, to ſurrender out of Court into the Hands of two Tenants of the Manor, and that if the ſame is not preſented at the next Court, 'tis void; there was no Court held in many Years, the two Tenants, who took the Surrender, died before the next Court; adjudged, that nothing paſſeth till 'tis preſented into Court, and that in the mean Time the Eſtate is in the Heir of the Surrenderor; and ſince the two Tenants are dead, if it be preſented by any other Copyhold Tenants of the Manor at the next Court, 'tis well enough. 2 *Cro.* 403. *Fraſier* verſus *Welch.* *Godb.* 268. *S. C. reported by the Name of Froſwell* verſus *Welch.* *Antea* (C) 4. *S. C.*

10. A Copyholder, by Licenſe of the Lord, leaſed his Copyhold for twenty-one Years, and afterwards the *Reverſion* of one Moiety to *B. G.* to which he was admitted; adjudged, that this Surrender, by the Name of a *Reverſion*, was good, and that there needed no Attornment of the Leſſee, becauſe the Eſtate did not paſs by Way of a Grant of the *Reverſion*, but by the *Admittance* of the Lord. *Hob.* 177. *Swinnerton* verſus *Miller.*

11. Upon a Special Verdict in Ejectment, it was found, that a Surrender was made to his ſecond Son for Life, *after the Death of the Tenant and his Heirs*; adjudged, that the Tenant had not a Fee-ſimple *by Implication* in the Copyhold Lands; for tho' it might be good in a Will, 'tis not ſo in a Surrender, and where the Lord admits in another Manner than the Surrenderor appoints, 'tis void. 1 *Brownl.* 127. *Allen* verſus *Naſh.*

12. The Queen being Lady of a Manor, granted Part of it, being antient Copyhold to *W. R.* and his Heirs, and afterwards ſhe *granted the Inheritance of the ſame Copyhold to a Stranger*; the firſt Grantee ſurrendered to the Uſe of his Wife, and deviſed this Copyhold to the Plaintiff and his Heirs; the Defendant, who was Son and Heir, ſet forth the Grant made to his Father *W. R.* by Vertue whereof he was ſeiſed, *&c.* and died ſeiſed, and that the Lands deſcended to him; adjudged, that Cuſtom had ſo eſtabliſhed the Eſtate of the Copyholder, that by the * Severance of the Inheritance from the Manor, the Copyhold was not deſtroyed, if ſo, then the ſame deſcended to the Defendant as Son and Heir to his Father; for his Surrender to the Uſe of his Will, after the Copyhold was ſevered from the Manor, was void, and the Deviſe alone, without a Surrender, could not tranſfer a Cuſtomary Eſtate. 4 *Rep.* 24. *Murrell* verſus *Smith*, *and* 4 *Rep.* 27. *Melwich* verſus *Luter.* *S. P.* Cro. Eliz. 252. S. C. * *See* 2 Leon. 208. 4 Rep. 26. Cro. Eliz. 103.

13. In a Special Verdict in Treſpaſs, the Caſe was, one *Lane* was ſeiſed of a Copyhold in Fee, and being married, he ſurrendered his Copyhold to the Uſe of one *Dixon*, and the Wife, for *their Lives*, and afterwards to the Uſe of the *Heirs of the Body of Lane* (the Surrenderor) *and his Wife, begotten, &c. Dixon* and the Wife were admitted *to them and their Heirs*, and afterwards *Dixon* ſurrendered

his Moiety to *Lane* and his Wife, and their Heirs, whereupon they were admitted to that Moiety, and afterwards *Lane* ſurrendered it to the Uſe of one *Davis* in Fee, who was admitted; then the Wife died, leaving Iſſue, and afterwards *Lane* died: The Queſtion was, whether this was an Eſtate-Tail, executed *in the Wife*, or whether it was a contingent Remainder? and the Court inclined, that it was a contingent Remainder; if ſo, then this being only a Fee conditional, becauſe it was in the Caſe of a Copyhold, and the Husband having only a Poſſibility of Reverſion, whether his Surrender to *Davis in Fee*, had not extinguiſhed that Poſſibility? and the Court inclined, that it had. It was likewiſe adjudged, that this Surrender being made to the Uſe of his *Wife and Dixon, for their Lives*, Remainder to the Right Heirs of the Husband and Wife, tho' the *Wife and Dixon were admitted in Fee*, that it did not alter the Eſtate, but that they were ſtill Tenants for Life, according to the Surrender; and that when *Dixon* ſurrendered his Eſtate in a Moiety, to the Uſe of the Husband, this was a Severance of the Jointenancy for Life between *Dixon* and the Wife, and the Alienation made by the Husband to the Defendant *Pannell*, he had one Moiety during the Life of the Wife, and the other Moiety during the Life of *Dixon*; then when the Wife died, the Eſtate of *Pannell* was determined as to one Moiety, and then the Remainder, as to that Moiety, ought to veſt; but the Plaintiff being the Heir of the Body of the Wife, begotten by the Husband, could not take the Remainder limited to the Right Heirs of the Body of his Father and Mother; becauſe the Husband could have no *Right Heirs* of his Body during his Life, and he, who ought to take this Remainder, ought to be Heir of the *Body of the Husband* and Wife; therefore the Remainder, as to that Moiety, by the Surrender to *Davis* in Fee: So Judgment was given againſt the Son, who was Plaintiff in this Action. 1 *Roll. Rep.* 317, 338, 418. *Lane* verſus *Pannell.*

14. In Ejectment this Point was adjudged, that where a Copyholder *in Fee*, accepted of the Lord an Eſtate by Copy of Court-Roll of the ſame Lands to *himſelf for Life*, Remainder to his Wife for Life, Remainder to his Son for Life, that this is not a Determination of his Inheritance; for 'tis no more than a Surrender to the Lord, to the Uſe of himſelf for Life, Remainder over to the others for Life, and the Reverſion in Fee ſtill continues in him; but it might be a Queſtion, if he had accepted an Eſtate only to himſelf for Life, without any Remainders over. 1 *Roll. Rep.* 257. *Southcote* verſus *Adams.*

Jon. 342. 15. A Copyholder ſurrendered out of Court, *&c.* to the Uſe of his two Sons, and the Survivor, and *if the eldeſt ſhould die without Iſſue*, then the Lands ſhould remain to the youngeſt, with this Clauſe, (*viz.*) *Memorandum, This Surrender not to ſtand and be of Force until after the Death of the Surrenderor*; adjudged, that the Surrender was good and perfect in the Beginning, and ſhall not be made void by the ſubſequent Clauſe, but that ſhall be rejected, becauſe repugnant to the Premiſſes. *Cro. Car.* 367. *Seagood* verſus *Hone.* *See* Tail. (D) 10.

W. Jones 229. S. C. 1 Mod. 200. S. C. *cited.* 16. Where a Copyholder *for Life* ſurrendered generally to another, who was admitted *for Life*, and afterwards *died* in the Life-Time of the Surrenderor, he ſhall not have the Copyhold again, *for after the Surrender, nothing remains in him; but if a Copyholder *in Fee* ſurrender to *the Uſe of* another for Life, who is admitted, and the *Surrendree die* in the Life-Time of the Surrenderor, he ſhall have it again. *Cro. Car.* 205, 148. *King* verſus *Loder.*

W. Jones 306. S. C. 17. In a Special Verdict in Ejectment, the Caſe was, that a Copyholder of Inheritance made a conditional Surrender into the Hands of two Cuſtomary Tenants, to the Uſe of the Surrendree, to be void upon the Payment of 100 *l.* to the ſaid Surrendree on a Day certain; but *before that Day came*, he made another Surrender of *Part* of thoſe Lands contained in the firſt Surrender to the Uſe of *W. R.* and his Heirs, and afterwards he paid the 100 *l.* and then he made another Surrender of the Lands into the Hands of the Steward, to the Uſe of *L. R.* and his Heirs, and the two laſt Surrenders were firſt preſented, and *W. R.* was admitted into that Part ſurrendered to him, and *L. R.* into the Reſt, but it was found, that the firſt Surrender was never preſented: The Queſtion was, whether the ſecond Surrender made to *W. R.* of *Part* of the Lands contained in the firſt Surrender, *before the Condition was performed*, was good or not? and it was inſiſted that it was not good; becauſe by the firſt Surrender all the Eſtate was out of the Surrenderor till he had performed the Condition; ſo that he had no Manner of Intereſt to make a Surrender, tho' he performed the Condition afterwards; but adjudged, that nothing paſſed by the firſt Surrender, till it was preſented in Court, and an Admittance of the Surrendree; for the Surrender into the Hands of the two cuſtomary Tenants, was only the Commencement of the Eſtate of the Surrendree, which could not be perfected but by Preſentment and Admittance; and if ſo, then the Right and Intereſt of the Copyhold remained ſtill in the Surrenderor, and he might transfer it by a ſecond Surrender, to another. *Cro. Car.* 273, 283. *Burgoine* verſus *Spurling.* See 3 *Cro.* 422. *Yelv.* 16. See *Antea* (R) 11.

18. Cuſtom, *&c.* that a Copyholder might Surrender out of Court into the Hands of two Cuſtomary Tenants, to the Uſe of another, and that at the next Court the Surrendree is to be admitted: In a Special Verdict in Ejectment, this Cuſtom was found, and that a Surrender was made; but the Party to whoſe Uſe it was made, *died before the next Court*; it was inſiſted, that he dying before Admittance, he cannot be ſaid to be a Copyholder within the Cuſtom, and by Conſequence cannot be poſſeſſed of the Copyhold Eſtate; and if ſo, then the Heir of the Surrenderor is in by Deſcent, and ſhall hold by the Copy of his Anceſtor: But on the other Side it was ſaid, that the Surrender was good, and warranted by the Cuſtom, and if the Lord had accepted any Rent of the Surrendree, that is a ſufficient Admittance to entitle him to the Copyhold. *Style* 145. *Barker* verſus *Denham.* See 1 *Mod.* 102.

19. A Copyholder in Fee made a Leaſe for Years, rendring Rent, and afterwards ſurrendered the Reverſion to *W. R.* who diſtrained for the Rent, and the Plaintiff brought a Replevin, and the Defendant avowed the Taking, and ſet forth the Leaſe and Surrender, but did not ſhew any Attornment or Notice of the Surrender; and upon a Demurrer to this Avowry, it was held good without any Attornment or Notice, for the Diſtreſs is ſufficient Notice, and the Eſtate paſſes by the Surrender and Admittance, which are Publick Acts; and Attornment is not neceſſary, becauſe there is no Means to compel it. 1 *Lev.* 40. *Bluck* verſus *Mole.* See *Antea pl.* 5. Raym. 181

20. Tenant for Life, Remainder for Life of a Copyhold, who entered on the Tenant for Life, and made a Surrender; adjudged, that nothing paſſed by it; becauſe by his Entry he was a Diſſeiſor, and had no Manner of cuſtomary Eſtate in him, which he might Surrender. 1 *Mod.* 199. *Bird* verſus *Kirke.*

(i)

Of Surrenders to the Uſe of the Will, and of Surrenders to other Uſes, not good, and where not neceſſary.

1. A Copyholder of Inheritance ſurrendered his Copyhold to the Uſe of an Infant in his Mother's Womb, after its Birth; adjudged a void Surrender. *Paſch.* 23 *Eliz. Clamp's* Caſe. 4 *Leon.* 8.

2. The Husband deviſed his Copyhold Land to his Wife, and that if ſhe had any Iſſue by him, then to ſuch Iſſue at the Age of twenty-one Years, and if he had no Iſſue by her, than *ſhe to chooſe two Attornies*, and they to *ſell* the Lands to her beſt Advantage; adjudged, this was an *Authority* deviſed to her to Name two Attornies, who ſhould ſell, and that they might ſell the Lands accordingly, and when ſold, the Purchaſer ſhall be in by Will, without any new Surrender. 2 *Cro.* 199. *Brent* verſus *Sheppard.*

3. Copyholder ſurrendered to the Uſe of his Will, and afterwards deviſed the Lands *to his Wife for Life*, and that *after his Death* ſhe, or her Executors, might *ſell* the ſame, *ſecundum formam ultimæ voluntatis*; the Teſtator died, the Wife was admitted for Life; adjudged, that ſhe had not only an expreſs Eſtate for Life, but Power to ſell the Inheritance: for otherwiſe thoſe Words, (viz.) *That after his Death ſhe might ſell ſecundum forman ultimæ voluntatis*, had been void and inſignificant, therefore ſuch Conſtruction ſhall be made of this Will, that all the Words of it may be effectual, if poſſible. *Mich.* 29 *Eliz.* 1 *Leon.*

4. Where a Copyholder ſurrenders to the Uſe of his Wife, and he afterwards makes a Will, the Lands do not paſs by the Will, but by the Surrender; for that is only Declaratory of the Uſes of the Surrender. 1 *Bulſt.* 200. *Semaine's* Caſe.

(k)

Of the Surrendzee.

1. LOrd and Copyholder for Life, the Lord granted a Rent-Charge out of the Manor, the Copyholder ſurrendered to the Uſe of another, who was admitted; in ſuch Caſe the Surrendree ſhall not be charged with this Rent; but if the Eſtate of the Copyholder had been determined by his Death, and then the Lord had granted it to another, he ſhall be charged with the Rent. 1 *Leon.* 408.

2. A Copyholder in Fee, made a Leaſe for Years, with Licenſe, *&c.* rendring Rent to him, and to his Heirs and *Aſſigns*, on certain Days, with a *Clauſe of Re-entry, &c.* The Rent was not paid at the Day, and the Copyholder ſurrendered to another, who was admitted, and he entered on the Leſſee; adjudged, that he ſhould not take Advantage of this Condition as an *Aſſignee* within the Equity of the Statute, 32 *H.* 8. for he is in by the Cuſtom, which doth not extend to collateral Things, and he is not Privy to the Leaſe. *Beal* verſus *Brafier. Yel.* 222. 2 *Cro.* 205. *S. C.* See *placito* 3. *contra.*

3. Adjudged, that the Surrendree of a Reverſion of a Copyhold may bring an Action of Debt or Covenant againſt the Leſſee within the Equity of the Statute 32 *H.* 8. *cap.* 34, becauſe 'tis a Remedial Law; the Surrendree is an Aſſignee, and the Lord can have no Prejudice; and that *Yelv.* 222, was a haſty Reſolution, for the Caſe was never argued; and *Hol.* 179, was an Extrajudicial Opinion. 1 *Salk.* 185. *Glover* verſus *Cope.* 4 Mod. 80. 3 Lev. 326. Antea pl. 1.

4 Adjudged, that the Admittance of a Copyholder relates to the Surrender, and that the Title of the Surrendree commences from thence. 1 *Salk.* 158. *In the Caſe of Benſon and Scott.*

(l) Con-

(I)

Concerning Trees growing on Copyhold Lands. See *antea* (Q) 2. *Eſtovers.* (A) 8.

1. FEoffment in Fee of a Manor to the Uſe of himſelf and his Wife, and to his Heirs, in which Manor there were Underwoods, which were uſually cut at twenty-one Years Growth, but the Husband ſuffered them to grow twenty-five Years during the Coverture; adjudged, that the Wife could not fell theſe Woods without committing Waſte; becauſe the Time of Felling being limited by the Cuſtom, and that being paſt, and more, ſhe cannot fell till another twenty-one Years. *Hill.* 23 *Eliz. Godb.* 6.

2. Adjudged, that Tenant by Copy of Court-Roll, cannot by the Common Law take *Trees* growing on his Copyhold Lands, either for *Houſe-Bote*, *Hedge-Bote* or *Cart-Bote*; but if he take any for either of thoſe Purpoſes, there muſt be a * Special Cuſtom for ſo doing. *Cro. Eliz.* 5. *Lord Mountague* verſus *Sheppard.*

* 13 Rep. 68. *he may take theſe Things of Common Right, and without any Cuſtom to warrant it, tho' his Power may be reſtrained by Cuſtom, that he ſhall not take unleſs by the Aſſignment of the Lord.* Godb. 172. 2 Brownl. 329.

Moor 315. 355. 3. In Treſpaſs the Caſe was, that *W. R.* was ſeiſed of a Manor, and that the *Underwood* growing on the Place where the Treſpaſs was ſuppoſed to be done, had been demiſed by Copy of Court-Roll Time out of Mind, and that the Lord of the ſaid Manor had granted the *Underwood* there growing, from Time to Time, to the Plaintiff *and his Heirs*, by Copy of Court-Roll, to be cut down by him and them, four or five Acres yearly, and every Year: The Queſtion was, whether *Underwood* could be granted by Copy, where the Soil it ſelf, upon which it did grow, was not granted? and adjudged, that it might, becauſe 'tis a Thing of Inheritance and Perpetuity; for after every Cutting the Wood will grow again, and ſo may be well granted *in Fee*. *Cro. Eliz.* 413. *Hoe* verſus *Taylor.*

4. The Cuſtom alledged was, to take Wood for Houſe-bote, Hedge-bote, and *pro ligno cumbuſtibili in Tenemento*, and that ſufficient Wood was not left on the Tenement for Houſe-bote, whereupon the Copyholder cut down an Oak, and the Lord carried it away; adjudged, that of Common Right, without a Cuſtom, Trees growing on the Copyhold do belong to the Copyholder for Repairs, *&c.* and that he may fell them for that Purpoſe, without alledging a Cuſtom, and that the Lord muſt leave ſufficient, if there is not a Special Cuſtom to fell all; and that, if the Copyholder hath cuſtomarily taken Trees for Repairs, and cutteth any for that Uſe, and the Lord carries them away, he may bring Treſpaſs againſt him; and that a Preſcription to take Wood *pro ligno cumbuſtibili* in the Tenement is good. *Godb.* 173. *Heydon* verſus *Smith.* 2 *Brownl.* 329. *S. C. Lewis* verſus *Smith.* 14 *Jac. S. P. Sanford* verſus *Stephens.* 2 *Bulſt.* 281. *S. P.*

1 Brownl. 231. S. C. 5. Cuſtom, that a Copyholder for Life might take Timber-Trees growing on his Copyhold, for Repairs, *&c.* The King being ſeiſed of a Manor, made a Leaſe thereof * *for Years, excepting the Trees*, the Leſſee granted Copyholds for Life, and the Tenant cut down Trees to repair, *&c.* and adjudged lawful, becauſe the Eſtate of the Copyholder is not derived out of the Eſtate of the Lord, for he is in by Cuſtom, which is paramount this Leaſe, and the Lord is but an Inſtrument to make the Grant. 8 *Rep.* 63. *Swain's* Caſe. *Moor* 811. *S. C.*

* *'Tis not ſo, if it had been for Life.*

6. The Cuſtom of a Manner was, that every Copyholder might lopp the Pollards upon his Copyhold *pro ligno cumbuſtibili*, and that the Lord of the Manor had cut them down, being on the Copyhold of the Plaintiff, for which he brought his Action upon the Caſe; and upon Demurrer adjudged a reaſonable Cuſtom, and the Action well brought. *Cro. Eliz.* 629. *Stebbing* verſus *Groſvenor. Moor.* 546. *S. C.*

7. In Trover, *&c.* the Queſtion was, whether a Copyholder *for Life* might preſcribe to cut down Timber-Trees growing on his Copyhold; and it was adjudged, that ſuch a Preſcription is void, becauſe it was againſt Reaſon; but by Way of *Uſage* for repairing his Copyhold Buildings, he may cut down Timber-Trees. 1 *Bulſt.* 153. *Northumberland Earl* verſus *Wheeler.* * 2 *Cro.* 29. *Powell* verſus *Peacock. S. P. Cro. Car.* 220. *Rocky* verſus *Higgins. S P.*

* *See* Noy 2. S. P.

8. Cuſtom of a Manor, that the *Copyhold Tenants* for Life might fell Timber-Trees; adjudged no good Cuſtom, unleſs it appeared, that they were Tenants of *Copyhold of Inheritance. Hob.* 6, 11. *Brook* verſus *Spencer. and* 1 *Bulſt.* 50. *S. P. Cro. Car.* 160, 220. * *Rockey* verſus *Higgins. S. P. Cro. Car.* 220. *S. C.*

*W. Jon. 245.

Cro. Eliz. 292, 498. 9. Upon a Special Verdict in Ejectment the Caſe upon the Pleading was, that *Sir Henry Lee* being Lord of the Manor of *Quarrenden in Com' Bucks*, made a Feoffment to one *Keine* of that Manor, that *Keine* had Iſſue a Daughter married to *Nich. Houſe*, and that a Copyhold Meſſuage and Lands deſcended to the Defendant *Harding*; that after the Death of *Keine*, the ſaid *Nicholas Houſe* and his Wife made a Leaſe of the ſaid Manor to *Eaſt* the Plaintiff for ten Years; that *Harding* the Copyholder * *cut down two Elmes*, there being no Cuſtom found either one way or other, whether the Cutting them down was a Forfeiture, or not; but that there was a Cuſtom to cut Timber for Repairs, and that the Copyholder's Houſe was out of Repair, when he cut down thoſe *Elms*, and after the Action brought, he had employed one of thoſe to * Repair the Houſe, *&c.* and that the other was *ready there for the ſame Purpoſe*; adjudged,

* Roll. Abr. Copyhold, (E) 18. *no Forfeiture.*

* *Which was five Years after the Cutting down.*

judged, this was a Forfeiture, and that the Leſſee for ten Years of the Manor, ſhall take Advantage of it. *Moor* 392. *Eaſt* verſus *Harding*. *See* Repairs. (A) 13. *S. P.*

And yet a Cuſtom, that all the Tenants within ſuch a Manor in *Eſſex*, had uſed to cut down Trees to repair their Freehold and Copyhold Tenements within the ſaid Manor, and alſo to ſell Trees at their Pleaſure, was held good. 4 *Leon.* 238. *Glaſtock*'s Caſe. See *Winch* 1. 2 *Brownl.* 85. *Hob.* 11. 1 *Bulſt.* 50. *Godb.* 234.

But where a Copyholder commits Waſte againſt the *Cuſtom of the Manor*, this is a Forfeiture. 4 *Rep.* 27. *Clifton*'s Caſe; this muſt be underſtood of * negligent Waſte, and not of voluntary Waſte, for the one is not a Forfeiture without a Cuſtom, but the other is a Forfeiture at Common Law. *Noy* 51.

* *But permiſſive Waſte is a Forfeiture, without any Cuſtom to make it ſo.* Owen 18. *See* Antea (Q) 2. S. P.

10. A Copyhold was granted to *Two* for their Lives *ſucceſſive*, where the Cuſtom of the Manor was, that they could not fell Trees; in ſuch Caſe, if the firſt Copyholder for Life cut down Trees, *&c.* 'tis not only a Forfeiture of his own Eſtate for Life, but of him in Remainder; ſo if a Stranger cut down Trees, or a Tenant at Sufferance of the Copyholder, 'tis a Forfeiture. *Moor* 49.

11. If a Lord of a Manor grant to a Copyholder the Trees growing on his Land, or which hereafter ſhall grow, *&c.* he may fell and carry away the Trees then growing, but not thoſe which grow afterwards, for as to thoſe the Grant is void. *Moor* 94.

12. Copyholder for Life made a Leaſe, and the Leſſee brought an Action of Treſpaſs for Breaking his Cloſe and cutting down his Trees; the Defendant juſtified as Servant, *&c.* to the Lord of the Manor; the Plaintiff replied, that the Copyholder was Tenant for Life, that his Houſe was in Decay, and that the Trees growing on the Land were not ſufficient for Repairing; and upon Demurrer to the Replication it was adjudged, that the Copyholder was Tenant of the Trees as well as of the Land, that the Fruit and Acorns belonged to him, and that this Action might be maintained by the poſſeſſory Right which the Plaintiff had; and upon a Writ of Error brought in the Exchequer-Chamber, this Judgment was affirmed, but it was reverſed in the Houſe of Lords, becauſe the Tenant cannot cut the Trees; and if the Lord of the Manor cannot, then they muſt rot. 2 *Salk.* 368. *Aſhmead* verſus *Ranger*, in this Caſe *Holt* Ch. Juſt. denied 3 *Cro.* 5. to be Law.

(m)

Of Pleading By-Laws, &c.

1. IN *ſecond Deliverance*; the Defendant made Conuſance as Bailiff of *Sam. Marrow*, for that he was ſeiſed in Fee of the Manor of *S.* and ſets forth a Cuſtom there to make *By-Laws*, and to impoſe Penalties, *&c.* and to diſtrain for the ſame, and that at ſuch a Court-Baron *before the Suitors*, held by the Homage *ex aſſenſu aliorum tenentium* of the ſaid Manor, it was ordered, *&c.* and afterwards at another Court *coram ſectatoribus* (without naming them) *præſentatum fuit per homagium*, that the Plaintiff kept Cattle, *&c.* contrary to the ſaid Order, but that the Forfeiture (which was 20 *s.*) *ex gratia Curiæ*, was aſſeered to 6 *s.* 8 *d.* *&c.* and upon a Demurrer to this Cogniſance it was held ill, becauſe the Defendant did not alledge the By-Law to be made *ex aſſenſu omnium tenentium* or *majoris partis tenentium*, but *ex aſſenſu aliorum tenentium*; beſides, he did not alledge in Fact, that the Plaintiff had broke the By-Law, but only that *præſentat' fuit per homagium*, that he had kept Cattle contrary to the Order, and that the Preſentment by the Homage was *coram ſectatoribus*, without naming them, which he ought to have done; and laſtly, that this Penalty could not be aſſeered, as he had pleaded. *Moor* 75. *Scarlet* verſus *Criett.* 3 Leon. 7. S. C. Bendl. 159. S. C.

2. In Replevin for four Cows, the Defendant made Conuſance as Bailiff to *T. S.* Lord of the Manor of *H.* ſetting forth a Cuſtom for the Steward, *with the Conſent of the Homage*, to make By-Laws, and to impoſe Penalties for the good Government of the Manor, *&c.* and a Cuſtom to diſtrain for ſuch Penalties, and that the Inhabitants of *Orington*, within the Manor, uſed to repair a *Bridge*, *&c.* for the Conveniency of the Commoners, who have a Right of Common in ſuch a Waſte within the Manor; and that at a Court held ſuch a Day, *&c.* the Steward, *with the Conſent of the Homage*, made a By-Law, that *the Inhabitants of Orington* ſhould repair the Bridge before ſuch a Day, *under a Penalty*; which not being done, and preſented at the next Court, this Diſtreſs was taken upon the Plaintiff, *one of the Inhabitants*, *&c.* and upon Demurrer it was adjudged, that this Conuſance was ill, becauſe it was for the Steward to make By-Laws, and the *Homage to conſent*, whereas the By-Laws *are to be made by the Homage*; beſides, it impoſed a Penalty upon the whole Townſhip of *Orington*, to be levied on a particular Perſon, who hath no Remedy by Contribution. 3 *Lev.* 48. *Wells* verſus *Cotterel.*

3. The Queſtion was, whether, if the King grant a Stewardſhip of a Manor, it may be exerciſed by a Deputy, without ſuch Authority given to the Steward by the *Patent*; it was objected, that he could not; and in the Argument a Difference was taken between an Office of Truſt, wherein the Officer hath an Inheritance, and where he hath it *for Life*; in the firſt Caſe he may make a Deputy, becauſe the Grantor of ſuch Office put no Confidence in the Perſon of the Grantee, therefore he may make a Deputy without any Power given to him in the Grant for that Purpoſe; but where an Office of Truſt is for Life, he cannot make a Deputy without ſuch an Authority

thority in the Grant, for he is choſen for his Skill, and in ſuch Caſe the Grantor repoſes a great Confidence in his Perſon, and a Steward is an Officer of Truſt, for he enters Plaints and takes Surrenders, and tho' he hath not a Judicial, yet he hath a miniſterial Place, for both Lord and Tenants repoſe a Truſt in him. 4 *Leon.* 243. *Earl of Rutland* verſus *Spencer.*

Coroner.

Of a Coroner in general, where the Writ ſhall be. (A)

Awarded to the Coroner, and not to the Sheriff. (B)

(A)

See *Indictment.* (K) per totum. *Tales.* (A) 9. *Venire facias.* (A) 3.

1. THIS is an antient Officer, for he is mentioned in the Charter granted by King *Athelſtan* to *Beverley*, *Anno* 925, the Number of them in every County is incertain, but 'tis uſually four, tho' in ſome Counties but one; he is choſen by the Freeholders by Vertue of the * King's Writ, and as to his Qualifications, he ought to be a diſcreet Perſon; and formerly it was a ſufficient Cauſe to remove him, if he was not a *Knight*, and had not 5 *l. per Annum* Freehold Eſtate, and for this Purpoſe there is a Writ in the Regiſter, *fo.* 177. *b.* his Office concerns the Pleas of the Crown, and for that Reaſon he is called *Coroner*; there are alſo certain Coroners within particular Liberties, as the Coroner of the *Verge*, which is a certain Precinct about the King's Court, of his Authority. See 4 *Rep.* 46.

* De Coronatore eligendo. F. N. B. 163. 2 Inſt. 271.

2. A Suggeſtion was made to the Court, that a *Coroner* had not ſufficient Lands in the County to qualify him for that Office; whereupon a Writ iſſued forth to chuſe another, and he was accordingly choſen; the Queſtion, upon a Motion, was, whether, upon the chooſing of another, the firſt was diſcharged without a Writ for that Purpoſe; and the Court was of Opinion that he was, for otherwiſe there would be two Officers where there ſhould be but one, this appears by the Words of the Writ which is directed to the Sheriff, commanding him, that *loco W. R. elegi faciat unum Coronatorem*, and a Coroner thus choſen cannot be *in the Place* of the other, if he doth not ceaſe to be a Coroner as ſoon as the ſecond is choſen. *Mich.* 29. *Godb.* 105.

3. A Coroner *ſuper viſum Corporis*, cannot make an Inquiſition of an *Acceſſary* after the Murder. *Moor* 29.

4. The Coroner of the County cannot intermeddle with the Death of a Man within the *Verge*, and ſo it was adjudged, *Paſch.* 24 *Eliz. in B. R. Swift's* Caſe, where he was indicted before the Coroner of the County of *Middleſex*, for a Murder done in *Tuthill* in the ſaid County, and the Indictment being removed into *B. R.* he pleaded, that at the Time of the Murder, *Tuthill* was, and yet is within the *Verge*, and this was held a good Plea, and he was diſcharged of that Indictment. See 4 *Rep.* 45. * *Holcroft's* Caſe, recited in *Wrote* and *Wigg's* Caſe.

* 2 Leon. 160. S. C.

5. Inquiſition taken before the *Coroner* in *Oxfordſhire*, upon the Death of the Earl of *Berkſhire*, being removed into *B. R.* it was moved to quaſh it, for that it was *præſentatum extitit per juramentum A. B. C.* naming the reſt of the Jury, but did not ſay *proborum & legalium hominum*, ſo Perſons outlawed and Criminals might be returned; beſides, 'tis that the *Earl ſuper ſe inſultum fecit & cum quadam Baliſta in ſeipſum arctata ſagittavit dans ſibi ipſi mortalem plagam*, but did not ſay, that *ſeipſum percuſſit*, which is an incurable Fault, for he might diſcharge the Bow and not ſtrike himſelf, and for theſe Reaſons this Inquiſition, which found him *Non compos*, was quaſhed, and the ſubſequent Words *Dans ſibi mortalem plagam* is not an expreſs Allegation *Quod percuſſit ſeipſum*, but only an Explanation of what went before. *Palm.* 282. *The Earl of Berkſhire's* Caſe.

2 Cro. 635. S. C. By the Name of Oily's Caſe.

6. Inquiſition before the Coroner found, that *S. H.* paſſing over a Bridge between *H.* and *W.* in the County of *Hertford*, by Reaſon of a Breach in the Bridge, fell into the River, where he was drowned, and that the Bridge is in the Vill of, *&c. & in magno decaſu*, by Default of the Inhabitants there; adjudged, that the Coroner may find any Nuſance by which the Death of a Man happens, and that the Townſhip ſhall be amerced upon ſuch finding, but that this was ill, becauſe it was not found that the Town was bound to repair this Bridge, ſo it was quaſhed. *Allen* 51. *Samuel Hall's* Caſe.

7. There being an Inquiſition taken *ſuper viſum Corporis*, it was found, that *Stanlake* died of a *Megrim* in *Greenwich*; and now upon *Affidavits*, that he was thrown from his Horſe by a Coach with ſix Horſes driving furiouſly by him, a *Melius Inquirendum* was prayed, but there appearing no Miſdemeanor in the Coroner, the Inquiſition was not ſet aſide; and by *Hale*, there

can be no *Melius inquirend'* after an Enquiry *ſuper viſum corporis.* 1 *Vent.* 181. *Stanlake's* Caſe. *T. Jones* 198. *S. P.* 3 *Mod.* 80, 100, 238. *S. P.* 2 *Lev.* 141. *S. P.*

8. *Michael Berkley* of *Gray's-Inn* being drowned in a ducking Pond, the Coroner's Inqueſt found him *Felo de ſe*; but upon ſeveral *Affidavits* produced, that he was diſtempered in his Head, the Court was moved, that the Inquiſition might not be filed, eſpecially ſince the Coroner would not ſuffer any Witneſſes to be examined in the Behalf of the Adminiſtrator of *Berkley*, to prove that he was diſtemper'd in Mind, and for that Reaſon they granted a new Trial; but becauſe the Inqueſt could not be *ſuper viſum Corporis*, it was ordered, that the Inqueſt ſhould be made by Six of the former Jury, of which there *were eighteen*; that *fourteen of them* had found him *Felo de ſe*, but *four diſſented*; ſo three of thoſe four, and three more of thoſe who had found him guilty, and ſix new Jurors were appointed, and that they ſhould have Counſel and Witneſſes on both Sides, which ought to be done by all Coroners, ſince the Law has ſo great Regard to Inquiſitions taken before them, that they are not traverſable; and it was inſiſted for the Adminiſtrator, that this new Inquiſition might be taken before the Chief Juſtice, who admitted, that he could do it in any Place, he being chief Coroner of *England*, but would not grant that Part of the Motion, becauſe it was the Ignorance of the Coroner not to hear any Witneſſes againſt the King, and not any Misbehaviour of him in his Office, which was the Occaſion of this Complaint; thereupon the Jury proceeded before the Coroner, and upon this ſecond Inqueſt he was found *Felo de ſe*, and now *Maynard Serjeant* objected againſt it upon 4 *Ed.* 1. *de officio Coronatoris*, by which 'tis enacted, that the Inqueſt ſhall be taken by Men *Villarum proxime adjacentium*, which this was not, but by Men *Villarum adjacentium*, and this Statute being made to prevent a Miſchief, which was before at Common Law, ought to be ſtrictly purſued, or elſe 'tis made to no Purpoſe; to which it was anſwered, and ſo adjudged, that 'tis not requiſite to ſhew, that the Jury were Men of the Vills *proxime adjacentium*, for it ſhall be ſo *intended* till the contrary is ſhewn, that an Inquiſition *ſuper viſum Corporis* might be taken at Common Law before the *Coroner*, and then 'tis *Villarum adjacentium*, which ſhall be intended *proxime adjacentium*, ſo the Inquiſition was filed. 2 *Sid.* 90, 101, 144, *Berkley's* Caſe.

9. Upon a Motion to amend an Inquiſition taken by the Coroner in *York*, *ſuper viſum Corporis*, the Rule was, that the Coroner ſhould attend and amend any Matters of Form, but not the Verdict. *Sid.* 225. *The King* verſus *Harriſon.* *Sid.* 259. *The King* verſus *Glover.* *S. P.*

10. The Coroner's Inqueſt *ſuper viſum Corporis* found, that *Parker* feloniouſly threw himſelf into a River, and therein *ſeipſum emergit, & ſic ſeipſum occidit & murdravit*; after the Man had been buried two Years this Inquiſition was quaſhed, for that *emergo* is not to drown, but to riſe out of the Water, and tho' 'tis ſaid, that he *Felonice* threw himſelf into a River, yet 'tis not that, but the Drowing which makes it Felony, *& ſic ſeipſum occidit* is a Concluſion without any Premiſſes, but becauſe the Man had been buried ſo long that there could be no *View*, it was ruled, that his Death ſhould be preſented at the next Aſſiſes, *&c.* and the Inquiſition traverſed and tried at the ſame Aſſiſes. 2 *Lev.* 140. *The King* verſus *Parker.*

11. The Coroner's Inqueſt found *T. S. Felo de ſe*, and now his Executor moved, that he might *Traverſe* it, which was granted, for *Felo de ſe* is traverſable, tho' *fugam fecit* is not, afterwards the Inqueſt was quaſhed for Want of the Word *Murdravit*, and a new Inquiſition was taken before Juſtices of Peace. 2 *Lev.* 152. *The King* verſus *Aldenham.*

(B)

Where the Writ ſhall be awarded to the Coroner, and not to the Sheriff, and econtra, and of his Fees. See *Venire facias.* (C) per totum.

1. THE Sheriff was *challenged*, and the Cauſe of *Challenge* was not denied, but confeſſed on the other Side; the Sheriff was out of his Office, and a new Sheriff made, yet the Proceſs ſhall go to the Coroner. *Moor* 422. *Hinſon* verſus *Burridge.*

2. In an Action of Debt the Plaintiff moved for a *Venire facias to the Coroners*, becauſe the Defendant was a *Servant to the Sheriff*, and this being confeſſed by the Defendant himſelf, thereupon a *Venire facias* iſſued accordingly, and the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that Proceſs ought not to go to the *Coroners* upon the Suggeſtion of the Party, but only upon a principal *Challenge* to the Favour, but the Plaintiff had his Judgment. *Moor* 470. *Cane's* Caſe.

3. A Writ of Error was brought, and the Error aſſigned was, that the *Venire facias* being awarded to the Sheriff, it was quaſhed for Favour in the Under-Sheriff, who returned the Panel, and a new *Venire facias* was awarded to the ſame Sheriff, *ita quod* the Under-Sheriff *ſe non intromittat*; it was objected, that this was Error, for that the Writ ought to be directed to the Coroner: *Sed per Curiam*, 'tis not Error. 1 *Roll. Rep.* 272. *Walter* verſus *Walter.*

By the Statute 3 *H.* 7. *cap.* 1. Upon an Inquiſition taken upon View of the Body, the Coroner ſhall have 13 *s.* 4 *d.* of the Goods of the Perſon who killed the other, and if he hath nothing, the Town ſhall be amerced for the Eſcape.

But by the Statute 1 *H.* 7. *cap.* 8, the Coroner ſhall have nothing where an Inquiſition is taken *ſuper viſum Corporis* of one killed by Miſadventure. See 4 *Inſt.* 271.

4. Where the Sheriff is either Plaintiff or Defendant, the Writ muſt be directed to the Coroner, and ſo it is where he is one of the Cogniſees; in a Fine, the Writ of Covenant was directed to the Coroner. *Cro. Car.* 300. *Done* verſus *Smithier.*

Mod. Caſes 37. 5. *Debt* againſt *two Coroners* of the County of *Norfolk*, in which the Plaintiff declared, that he had got Judgment againſt *Nightingale*, Sheriff of the ſaid County, for 600 *l.* and upon a *Ca. Sa.* directed to the Defendants, they arreſted him, and afterwards ſuffered him to eſcape: The Defendants plead ſeverally *Nil debet*; and upon the Trial of this Iſſue, it appeared on the Evidence, that the Writ was delivered to one of them alone, and that the Arreſt was made by him, and that the other had no Manner of Notice, either of the Writ or the Arreſt; nor did it appear, that there was any Return made of the Writ; yet *Holt* Ch. Juſt. directed the Jury to find for the Plaintiff, but afterwards, for the Hardſhip of the Caſe, ſigned a *Bill of Exceptions at London*, upon which it was argued for the Defendant, that he ought not to be charged for this Act of his Companion, done without his Knowledge; for tho' in Truth they both make but one Officer, and ought to join in all miniſterial Acts, yet in this *perſonal Tort*, the Charge ſhall lie on him who did the Wrong, as in 3 *Cro.* 175, the Under-Sheriff who imbeziled the Writ is only chargeable, tho' the High Sheriff alone is the Officer of the Court; but the better Opinion was, that both being but one Officer, the Act of one is the Act of both, and ſo is 1 *Mod.* 98. *Nayler* verſus *Sharpley*, to which the Court inclined. 3 *Lev.* 399. *Tailour* verſus *Clerke* and *Denny.*

Dyer 278. *b.* Style 297.

4 Mod. 65. 6. Information for a Riot done in *Cheſter*, it was ſuggeſted on the Roll, that one of the Sheriffs was a Defendant, and a *Venire facias* being prayed, and directed to the other Sheriff, the Cauſe went on, and the Jury found the Defendants guilty; it was inſiſted in Arreſt of Judgment, that the *Venire facias* ought to have been directed to the *Coroner*, becauſe both Perſons make but one Sheriff; but adjudged, that if one is challenged, the other may execute the Writ in the Name of both, that the Coroner is not the Officer of *B. R.* but where the Sheriff is improper, and not where there is no Sheriffs at all, for if he die, the Coroner cannot execute the Writ; in the Caſe of two Coroners, if one is challenged, the other may execute Writs, yet both make but one Officer; ſo where there are two Sheriffs, if one is challenged, the other muſt Act. 1 *Salk.* 144. *The King* verſus *Warrington.*

3 Mod. 23. 7. Adjudged, that where a Coroner's Inqueſt is quaſhed, he muſt make a new one *ſuper viſum Corporis*, but if he misbehaves himſelf in the Inqueſt, and a *Melius Inquirendum* is granted upon it, that Inquiſition muſt be taken by the *Sheriffs or Commiſſioners, upon Affidavits*, and not *ſuper viſum Corporis*, becauſe none but a *Coroner* can take Inquiſition *ſuper viſum, &c.* and he is not to be truſted again. 1 *Salk.* 190. *The King* verſus *Bunney.* *See* Felo de ſe.

8. An Inquiſition was taken before the Coroner *ſuper viſum Corporis*, which found, that *Clerke* having not the Fear of God before his Eyes, but being alone in his Houſe *Voluntarie, felonice, & ut felo de ſe cum cultro pretii, &c. quem in manu ſua dextra tenuit, jugulum ſuum ſecuit, & ſeipſum occidit*; it was objected, that it ought to be *murdravit*, but adjudged, that Word is not neceſſary in an *Inquiſition*, tho' 'tis in an Indictment for Killing another Perſon, becauſe there are Degrees in the Offence of Killing another, as *Murder*, *Manſlaughter*; but there are no Degrees in Killing one ſelf, and the Word is neceſſary in Murder, becauſe Clergy is excluded; but this Inquiſition was quaſhed, becauſe the Wound was not ſet forth, and it was not alledged, that it was mortal, and 'tis not ſaid that he died of the Wound, for to what Purpoſe is the Body viewed, but only to ſhew the Jury that the Wound was mortal: The Inquiſition being thus quaſhed, the Coroner took up the Body again after it had been buried ſeven Months, and this was held to be a Miſdemeanor; 'tis true, the Coroner may Cauſe the Body to be digged up again ſoon after the Burial, but not at ſuch a Diſtance of Time, for 'tis a Nuſance, and may infect the People. 1 *Salk.* 377. *The Queen* verſus *Clerke.* *Far.* 16. *S. C.*

Corporation.

What Acts a Corporation may do, and what not, and of Actions againſt them. (A)

Of diſſolving a Corporation. (B)
Of miſnaming a Corporation. (C)

(A)

What Acts they can do, and what not, and of Actions brought by them, and of Deviſes to them.

1. A *Corporation* is ſo called, becauſe 'tis made into a *Body* Politick, and hath Capacity to take and grant, as a ſingle Perſon hath, and ſuch a Body may be eſtabliſhed *by Preſcription, by Grant of the King, or by Act of Parliament*; and 'tis either *Civil* or *Eccleſiaſtical*; as Mayor of a City or Town, Commonalty, Bailiff or Burgeſſes; or *Eccleſiaſtical*, which is again divided into *Regular*, as Abbots, Priors, *&c.* who are now diſſolved, or Secular, as *Biſhops, Deans, Archdeacons, Parſons, Vicars*; and 'tis either Elective, *Preſentative, Collative* or *Donative*; 'tis alſo either *Sole*, or *Aggregate* of many Perſons, which laſt is by the Civilians called *Collegium.* *Co. Litt.* 250. 3 *Inſt.* 202.

2. The Qeen granted a Leaſe to the Men of *Cheſterfield*, by the Name of the *Aldermen of Cheſterfield*, rendring Rent, and they granted all their Intereſt in the Lands to *W. R.* adjudged, that their Grant was void; becauſe by the Queen's grant to them, they had only a Capacity to take, but not to grant. *Cro. Eliz.* 35, *Aldermen of Cheſterfield*'s Caſe.

3. Leaſe for Years made to the Churchwardens of St. *Saviour*'s *Southwarke*; adjudged, that they cannot *Surrender* ſuch Leaſe without Deed under their Seal; yet it may be ſurrendered by act in Law, without Writing, as if they accept a new Leaſe from the Leſſor. 10 *Rep.* 66. *The Churchwardens of St. Saviour*'s Caſe. Lane 21. S. C. Hob. 211, 285.

4. A *Writ of Right* was brought by the Warden of *All Souls College in Oxford*, by the Name of *Cuſtos & Collegium omnium Animarum*, and the Writ was for Lands which the Demandants claimed * *eſſe jus & hæreditatem ſuam*; but did not ſay *in jure Collegii*; yet adjudged good; for when the Writ was brought by the *Cuſtos & Collegium*, it cannot be otherwiſe intended; but that they claimed *jure collegii*, as they are a Body Corporate, for they had no other Capacity to claim. *Cro. Eliz.* 232. *All Souls College* verſus *Tamworth.* 1 Inſt. 272. 1 Leon. 153. S. C. * *But did not ſay*, ipſius Cuſtodis & Collegii. 1 And. 272.

5. Where a Corporation hath an Eſtate *for the Life of another Perſon*, if they attorn to the Reverſioner, it muſt be by Deed in Writing; for tho' an Attornment is no more than to ſhew the Conſent of him who hath the Poſſeſſion, yet in ſuch Caſe a Deed is requiſite, *ex inſtitutione legis.* 6 *Rep.* 38. *In Bellamy*'s Caſe.

6. There are *five Things* requiſite to the very Being of a Corporation, (*viz.*) *Lawful Authority to incorporate*, which may be either by *Grant, Preſcription*, or *Act of Parliament*, and that the Perſons incorporated are either Natural or Political; that they be incorporated by a Name; that there be a Place certain where they are incorporated; and laſtly, that there be apt and ſufficient Words of Incorporation; all this was adjudged in the Caſe of *Sutton*'s *Hoſpital*; againſt which it was objected, that *Sutton* died before it was founded, and that the Place of Incorporation was incertain, becauſe it was not deſcribed by Metes and Bounds; beſides, the Licenſe which the King gave to *Sutton*, was to make a Corporation *preſently*, and it was neither founded, or a Maſter named, in his Life-time, but long afterwards; but adjudged, that the Corporation was well made, for the Licenſe was to *Sutton*, his Heirs and Succeſſors; and as to the Incertainty of the Place, it being to erect an Hoſpital *where the Charter-Houſe* was, a *Manor* may be an Hoſpital which is more incertain than the *Charter-Houſe*; and if it was only an Hoſpital *in Poteſtate*, 'tis ſufficient, tho' no Houſe was built; for the *Temple* was a Corporation in the Reign of *H.* 1. and yet it was not built till the Reign of *Ed* 2. 10 *Rep.* 25. *The Caſe of Sutton*'s *Hoſpital.*

7. *King Ed.* 6. granted to the *Mayor, Citizens*, and *Commonalty of London*, his Manſion-Houſe, called *Bridewell*, and that *it ſhould be founded and erected into an Hoſpital* for the Poor; and that when founded and erected, it ſhould be called the *Hoſpital of King Ed. 6. of Chriſt*, and *St. Thomas of Bridewell*, and that they ſhould be incorporated *by the Name of the Governors* of the Poſſeſſions of the Revenues of the *Hoſpital of King Ed. 6. &c.* Adjudged, that this Hoſpital *in Intention* only, was ſufficient to ſupport the Name of a *Corporation*, and that the

Words, (*viz.*) That the Governors from henceforth ſhould be incorporated *by the Name, &c.* made them preſently a Corporation by Law, and that they ſhould not ſtay till Materials were brought to erect an Houſe or Hoſpital. *Mich.* 34 *Eliz. The Caſe of Bridewell Hoſpital vouched in* 10 *Rep.* 31. *in the Caſe of* Sutton's *Hoſpital.*

8. Deviſe of an Houſe to his Wife for Life, Remainder to the Heirs of the Body of *W. R.* and in Default of ſuch Iſſue, Remainder to the Maſter and Wardens of the *Queen's Free School of St. Ollave's Southwark*; it was objected, in an Action of Treſpaſs brought by the ſaid *Maſter and Wardens*, that the Corporation could not take by this Deviſe; becauſe there is an Exception in the Statute 32 *H.* 8, *of Wills of all Bodies Politick or Corporate*; but adjudged, that the Diviſe to them was good, according to *Porter's* Caſe in the firſt Report. 2 *Bulſt.* 33. *Caſe of the Maſter, &c. of St. Ollave's, &c.*

9. *Treſpaſs, &c.* for taking away twelve Locks; the Defendant pleaded, that the Lock-Smiths of *Durham* have made *By-Laws* and Orders, for the better regulating their Trade, which were confirmed by *Cuthbert Biſhop of Durham*, who had *Jura Regalia* within the *County Palatine of Durham*; one of which was, that the Warden of the ſaid Company might ſeiſe all Locks, *&c.* which were not good, *&c.* by Vertue whereof the Defendant, as Warden, *&c.* did take the ſaid Locks, not being good, *&c.* and ſo juſtified: Upon Demurrer to this Plea, it was objected, that it did not appear, that the *Lock-Smiths were a Corporation*; and if ſo, then what the Defendant had done in this Caſe, was without Warrant: Now, tho' their Orders for regulating their Trade were confirmed by the Biſhop, yet that did not make them a Corporation, and ſo it was adjudged. *Style's* 298. *Goodye* verſus *Shaw.*

(B)

Of Diſſolutions of Corporations.

1. WHere Lands are given to a Corporation, and their Succeſſors, if the Corporation is diſſolved, the *Donor*, or his Heirs, ſhall have the Lands again, and they ſhall not eſcheat to the Lord; becauſe the Fee-ſimple being veſted in the Corporation, in their Politick Capacity, the Law in ſuch Caſe doth annex a Condition to it, that if the Body Politick be diſſolved the Donor or his Heirs, ſhall re-enter. *Godb.* 211. *Dean and Chapter of Windſor's Caſe.*

2. The College of *Greyſtock* was founded by *Pope Urban*, at the Requeſt of *Ralph Baron of Greyſtock*, Anceſtor of the *Lord Dacres*, and was always afterwards called or known by the Name of the *College of Greyſtock*; and it conſiſted of a Maſter and ſix Prieſts, who came in by Admiſſion and Inſtitution of the Biſhop, and had yearly Stipends, but they had no Common Seal; and therefore it was adjudged, that this was not a College well incorporated, and therefore not given to King *Edw.* 6. by the Statute. 1 *Ed.* 6. *of Diſſolutions. Hill.* 6 *Ed.* 6. *Dyer* 81.

3. If the King ſhould grant Lands *probis hominibus de Iſlington, habendum* to them and their *Succeſſors, rendring Rent*; this is a good *Corporation* as to that Intent only, but not to take or grant by that Name; for they are but Tenants at Will, and if the King releaſeth the Rent, the Corporation is diſſolved. *Trin.* 1 *Mar. Dyer* 100.

4. The *Biſhop of St. David's*, by Vertue of a Licenſe from the King, did of an Appropriation make a Collegiate Church, and conſtituted Prebends thereof, and appropriated a Corps to every Prebendary, all which was afterwards confirmed by the King; adjudged, this is a good Foundation of a College, and an Incorporation of the Prebendaries; and therefore it was given to the King by the Statute 1 *Ed.* 6. *Mich.* 7 *Eliz. Dyer* 267. 4 *Rep.* 107. *S. P.*

(C)

Miſnoſmer of Corporations, good and not good. See *Miſnoſmer.* (E) per Totum.

1. ADjudged, *Dean and Chapter*, and all other Corporations muſt be named truly in their Names of Incorporation according to the Form thereof, in all Leaſes, Grants or Actions where they are either Plaintiffs or Defendants, without omitting any Part of their Names, which is material, otherwiſe their Leaſes, *&c.* are void; becauſe the Name of a Corporation is as the Name of Baptiſm, which cannot be varied or changed. *Paſch.* 4 *&* 5 *Mar. Bendl.* 2.

2. The *Dean and Chapter of Carliſle* were incorporated by the Name of *Decanus & Capitulum Eccleſiæ cathredalis Sanctæ & individuæ Trinitatis Carlien'*, and they made a Leaſe by the Name of the *Dean* of the *Cathedral Church* of the *Holy Trinity in Carliſle, & totum Capitulum Eccleſiæ præd':* Now here, tho' the Word *Capitulum* was left out after *Dean*, and the Word *individuæ* was wholly omitted, yet it was adjudged a good Leaſe; for that Word was not of the Subſtance of the Name. *Dyer* 278.

3. The *Cooks in London* were incorporated by the Name of *Maſter, Wardens*, and *Commonalty* of the *Miſtery of Cooks*, and they made a Leaſe by the Name of *Maſter, Wardens* and Commonalty of the *Craft and Myſtery of Cooks, &c.* adjudged, that the Addition of the

Word *Craft* was only Matter of Surpluſage, and that *Craft and Myſtery* ſignified the ſame Thing, ſo that was not a material Variance to make the Leaſe void. *Plowd. Com.* 537. *Croft* verſus *Howell.*

4. The Pleading a Leaſe made by the *Abbot and Convent* for the Life of *T. P.* was held good, without ſhewing any Warrant of Attorney under their Common Seal, to make Livery and Seiſin. *Plow. Com.* 149. *Throgmorton* verſus *Tracy.* Habendum. (C) 3.

5. The Plaintiff entituled himſelf by a *Feoffment* made by the *Bailiffs and Commonalty of Ipſwich*, and did not ſet forth a Letter of Attorney under their Common Seal, to make Livery, *&c.* and without it the Feoffment is void; yet adjudged, that the Pleading it in ſuch Manner was good, becauſe 'tis implied in the Pleading the Feoffment. 2 *Cro.* 411.

6. The Defendant pleaded an Entry by the *Dean and Chapter of Norwick*, for a Forfeiture; and it was objected againſt the Plea, for that the Defendant did not ſet forth, that he had a Warrant to enter under their Common Seal; but the Pleading was adjudged good, and it ſhall be intended, that the Entry was lawful, becauſe all neceſſary Circumſtances to make it ſo, ſhall be implied. *Cro. Car.* 169. *Edgar* verſus *Sorrell.*

7. Debt on Bond, upon *Non eſt factum* pleaded, the Caſe was, The Money was borrowed by the Company of *Woodmongers*, who were incorporated, and the Bond was ſealed with their Common Seal, and ſubſcribed by the Defendants, who were two of the Company, and now the Company being diſſolved, the Action was brought againſt thoſe who ſubſcribed the Bond; but ruled, that it could not lie; ſo the Plaintiff was Nonſuit. 1 *Lev.* 237. *Edmonds* verſus *Brown, & al'.*

8. *Mandamus* to the Mayor and Commonalty of *Thetford*; the Return was made in the Name of the Corporation, but without the *Common Seal*, or the *Hand of the Mayor*; and upon a Motion, that he might either ſign it, or put the Common Seal to it, it was adjudged, that at Common Law no Officer was bound to ſign a Return; the Statute of *York* obliges the *Sheriff*, but doth not extend to a *Coroner*, *Mayor*, or other Officer; that tho' the Corporation can do no Act *in pais*, without their Common Seal, yet they may do any Act on Record without it; and the Reaſon is, becauſe they are eſtopped by the Record to ſay, that 'tis not their Act. 1 *Salk.* 192. *The Mayor of Thetford's* Caſe.

9. In an Action for a Falſe Return of a *Mandamus*, the Caſe was, That *Ed.* 3, granted to the Burgeſſes of *Dartmouth* a Charter to chooſe a Mayor every Year *de ſeipſis*, and that by ſeveral By-Laws made afterwards, and long Uſage in Purſuance thereof, the Method had been for the Common Council to propoſe two Perſons to the Freemen, out of which they choſe one to be Mayor; and thus it continued till 1641, and then a By-Law was made to repeal all former, and that for the future all Elections ſhould be made by the Freemen at large, which was done accordingly; that in the Year 1684, the old Charter was ſurrendered, and a new one granted; but that this Surrender was never enrolled; that under this new Charter a By-Law was made to Repeal that made in 1641. Adjudged, that tho' by the Grant of *Ed.* 3. the Election was to be made by the Freemen at large, yet that might be regulated by Uſage and ſubſequent By-Laws; that the By-Law made in 1641, had well reſtored the antient Conſtitution; that the Surrender of the old Charter was void for want of Enrollment; that where Members under a good old Charter join in any Act with thoſe under a bad new one, the Act is void. 1 *Salk.* 190. *Butler* verſus *Palmer.*

Coroner. See **Prohibition.** (E) 19.

Coſts.

Costs.

Of Costs on seveval *Statutes*. (A)
Who shall not pay Costs. (B)
Where *Actions* will lie for Costs, and where *Trials* shall be staid for not paying Costs, and where not. (C)
Where Costs shall be *double and treble*, and where not, and where there shall be no more *Costs than Damages*. (D)
Costs on *Scire facias*, and *Writs of Error*, and *double Costs* on a Judgment affirmed upon a *Demurrer*. (E)

(A)

Upon the Statutes 7 H. 8. cap. 4. 23 H. 8. cap. 15. **where the Defendant shall have Costs.** 4 Jac. 1. cap. 3. **who shall pay Costs, and in what Cases.** See *Error*. (F) 19. *Statutes*. (B) 3. *Warrantia Chartæ*. (A) 1.

At Common Law, before the Statute 7 *H.* 8. the *Avowant* was to defend his Right at his own Expence; for tho' he distrained for a very just Cause, he was to have no Costs or Damages if he recovered, and this made many Persons *Replevy* their Goods, merely for the Vexation of the Avowant.

To Remedy which Inconveniency that Statute was made, by which 'tis enacted, That where *Common Recoveries* are suffered of Manors, the *Recoverors* may distrain for *Rents*, *Services*, *or Customs*, and avow or make Cognisance for the Taking, *&c.* and if 'tis found for them, or the Plaintiff is barred, they shall have *Damages and Costs*.

But because that Statute extended only to *Avowries for Rents*, *Customs*, *and Services* of those who held Lands of particular *Manors*; therefore the Statute 21 *H.* 8. *cap.* 19, was made, by which 'tis enacted, That Avowants shall have *Costs and Damages* for the taking away Cattle *Damage feasant*, *or for other Rent or Rents*: Now this last Statute extending only to such Cases where the Defendants *avowed or made Cognisance*, and there being many Actions and Cases within the same Mischief; therefore the Statute 4 *Jac. cap.* 3, in which the Statute 21 *H.* 8. is recited, gives Costs to the *Defendant* in Actions of *Debt*, *Detinue*, *Accompt and Trespass on the Case*; and because *Ejectments and Trespass vi & armis* were omitted, that Statute gives Costs to the *Defendants in those Actions*, *or in any other Actions whatsoever*, wherein the Plaintiff or Defendant might have Costs.

And therefore, in *Replevin*, where the Defendant made *Cognisance*, and justified the taking for an *Amerciament in a Court-Leet*, it was adjudged, that he should have *Costs*, tho' a Justification for *an Amerciament*, *&c.* is neither for a *Rent*, or for *Services*, or for *Customs*, or any other particular Action, in which Costs are given by either of the Statutes of *H.* 8. before-mentioned; but such an Avowry or Cognisance falls under the general Words in the Statute 4 *Jac.* which takes in all Actions whatsoever, wherein the Plaintiff or Defendant might have Costs. *See postea pl.* 8. *S. P.*

43 Eliz. cap. 6. In all Personal Actions, *&c.* not being for any Title or Interest of Lands, not concerning the Freehold, nor for any Battery, if it shall appear to the Court, and be so signified by the Judge, that the Debt or Damages doth not amount to 40 *s.* the Judge shall award the Plaintiff no more Costs.

21 Jac. cap. 16. In Actions on the Case for Slander, if the Damage is found to be under 40 *s.* the Plaintiff shall have no more Costs.

But slandering a Title is not within this Statute; for the Slander intended by this Statute must be personal. *Cro. Car.* 141. * *Law* versus *Horewood.*

* Palm. 530. W. Jones 196. Ley. 82. S. C.

So if the Action is brought for calling the Plaintiff Thief, and causing him *to be arrested*, and the Plaintiff hath a Verdict, 'tis not within this Statute. *Cro. Car.* 163, 307.

22, 23 Car. 2. cap. 9. * By *this Statute* 8 & 9 Will. *if the Judge shall certify on the* In the 136th Paragraph of the Statute 22 *Car.* 2. for preventing trivial Suits contrary to the Statute 43 *Eliz.* 'tis enacted, That in all Actions of * Trespass, Assault and Battery, and other Personal Actions, if the Judge shall not certify on the back of the Record, that the Assault and Battery was sufficiently proved, or that the Freehold or Title of the Land in the Declaration, was chiefly in Question; and if the Jury find under 40 *s.* the Plaintiff shall have no more Costs; and if more are given, the Judgment shall be void, and the Defendant may have an Action for an unjust Vexation.

Postea, *That the Trespass was Wilful and Malicious, the Plaintiff shall have full Costs.*

But

But there being a Doubt, whether this Act extended to Actions brought in inferior Courts and removed by *Habeas Corpus*, it was enacted by the Statute 11 *Will.* 3. that it ſhall extend to the Courts in *Wales*, *&c.* and to the Counties Palatine. 2 Lev. 124. 11 & 12 W. 3. c. 9.

In all Actions of Waſte, and Actions of Debt, upon the Statute for not ſetting out Tithes, wherein the ſingle Value, or Damage found by the Jury ſhall not exceed twenty Nobles; and in all Writs of *Scire facias* and Suits on Prohibitions, if the Plaintiff have Judgment after a Plea pleaded, or upon a Demurrer joined, he ſhall have Coſts. 8 & 9 W. 3. c. 10.

The Caſes upon theſe Statutes are as follow:

1. DEBT *againſt an Executor* upon a Bond ſealed by his Teſtator, in which Action the Plaintiff was *Nonſuit*, and thereupon the Defendant had Coſts, but if the *Executor had been Plaintiff* and nonſuited, he ſhould not pay Coſts, becauſe the Suit was in Right of another. *Cro. Eliz.* 503. *Fetherſtone* verſus *Allibone.*

2. Upon a *Special Verdict* in *Aſſumpſit* the Defendant had Judgment; and it was moved, upon the Statute 21 *H.* 8. *cap.* 19, whether the Plaintiff ſhould pay Coſts, and adjudged, that he ſhould, for a *Special Verdict* is a Verdict as well as a *General Verdict*, and when Judgment is given thereon, there is no Difference between the one and the other, as to the Coſts. *Cro. Eliz.* 465. *Alſop* verſus *Cleyton.* *Poſtea* Verdict. (D) 21. *S. C.* Moor 406.

3. *In Replevin*, the Defendant, who was an *Executor*, avowed, upon the Statute * 32 *H.* 8. for *Arrears of Rent*; the Queſtion was, if there was a Verdict againſt the Plaintiff, or he ſhould be *Nonſuit*, whether he ſhould pay Coſts; and adjudged, that he ſhould, becauſe by that Statute the *Avowant* is to have Coſts where the Plaintiff was to have any at Common Law, and the Statute is, that he might avow as his Teſtator might have done if he had been living. *Bendl.* 149. *Fannel* verſus *Kightley.* 2 Roll. Rep. 457.

* *If the Defendant* demur *on a Matter which goes to the very Action, and Judgment is given for him, tho' the Word* Demurrer *is not within this Statute, yet he ſhall have Coſts.* 1 And. 117.

4. In Ejectment there was a Verdict for the Defendant; it was moved, that he ſhould not have Coſts, becauſe there was a Miſtake in the *Venire facias*, but a Precedent was cited, *Mich.* 18 *Jac.* between * *Done* and *Knott*, where the Defendant had Judgment for Coſts, having obtained a Verdict in Ejectment, notwithſtanding the Plaintiff had made a Miſtake in the *Venire facias*. *Godb.* 329. *Pritchard* verſus *Williams.* * Palm. 147. Poſtea 15.

5. In all Caſes where the Plaintiff might have Coſts againſt the Defendant, there, if the Plaintiff be Nonſuit, the Defendant ſhall have Coſts. 1 *Brownl.* 46.

6. *In Replevin*, the Defendant avowed for 36 *l.* Rent arrear, for a Year and an Half; the Plaintiff replied, and as to 12 *l.* Part of the Rent, he pleaded Payment, and as to the Reſidue, being 24 *l.* he tendered another Iſſue, (*viz.*) an Agreement and Satisfaction, upon which they went to a Trial, and the firſt Iſſue was found for the Plaintiff, and *Damages and Coſts* aſſeſſed by the Jury, and the other Iſſue was found for the *Avowant*, upon which he moved the Court, that the aſſeſſing *Damages and Coſts for the Plaintiff*, upon the firſt Iſſue, was void, becauſe where any Part is found for the *Avowant*, he ſhall have a Return of the Diſtreſs, and Damages and Coſts, but both cannot have them, therefore the Plaintiff ſhall not, and ſo it was adjudged. 2 *Cro.* 473. *Denton* verſus *Parſons.* *Poſtea* (B) *pl.* 27. *S. P.* 2 Roll. Rep. 37. 1 Brownl. 173.

7. *In Replevin*, the Defendant made Conuſance, and juſtified the Taking, *&c.* for a Penalty forfeited, upon a Breach of a *By-Law* made at a *Court-Baron*; and upon a Demurrer to the Cogniſance, the Defendant had Judgment, and thereupon a Writ of Error was brought; and one Queſtion was, whether a *By-Law* made according to Cuſtom, for the better Ordering a Common was good, and being proclaimed in Court, whether the Commoners were bound to take Notice of it; but the great Queſtion was, whether Damages and Coſts ought to be given to him who made this Conuſance, and who had Judgment upon this Demurrer; and adjudged, that it ought, for it was within the Statute 7 *H.* 8. *cap.* 4, under the Word *Cuſtom*, becauſe in this Caſe he diſtrained for a Duty grounded on a Cuſtom; and the Statute 21 *H.* 8. *cap.* 19, adds, that the *Avowant* ſhall have Coſts for *Damage-feaſant.* *Cro. Car.* 357, and 383. *James* verſus *Tutney.* March 28.

8. *In Replevin* againſt two Perſons, one of them pleaded *Not guilty*, and the other *avowed* and juſtified the Taking the Diſtreſs for an *Amerciament in a Court-Leet*; and upon a Demurrer the Avowant had Judgment, and upon the Trial of the Iſſue it was found for the other Defendant, and *Damages and Coſts* aſſeſſed for both; it was objected, that the *Avowant* ought not to have Coſts, becauſe he was not within the Statutes 7 *H.* 8. *cap.* 4, or 21 *H.* 8. *cap.* 19, but adjudged, that he ſhould have Coſts, for the Statute 4 *Jac.* 1. *cap.* 3, gives Coſts *to the Defendant* in each Action, where the Plaintiff ſhould have Coſts if he had recovered; and tho' an Avowant is the firſt Actor, and in Nature of a Plaintiff, yet in this reſpect he ſhall be taken as a *Defendant*, but he was adviſed to releaſe the Damages. 2 *Cro.* 520. *Samuel* verſus *Loder.* *Paſch.* 38 *Eliz.* *Chapley* verſus *Horſley.* *S. P.* and *Mich.* 44 *Eliz.* *Mackworth* verſus *Sheppard.* *S. P.* 2 Roll. Rep. 74. Moor 893. *The Stat.* 5 Eliz. *gives treble Damages for Hunting in a Park, but yet the Plaintiff ſhall have Coſts.* 4 Leon. 36. Onyon's *Caſe.*

9. In Treſpaſs, *&c.* the Plaintiff declared to his Damage *of* 40 *l.* the Jury gave him 49 *l.* for Damages, which was 9 *l.* more than for what he had declared, and 20 *s.* for Coſts; the Plaintiff *waved the* 9 *l.* and prayed Judgment only for 40 *l.* *Damages*, for which he had declared, with Increaſe of Coſts, and the Court increaſed the *Coſts to* 10 *l.* and ſo he had Judgment for 50 *l.* *Damages and Coſts*; and a Writ of Error being brought on this Judgment, the Error aſſigned

was, that the Damages and Coſts being put together, amounted to more than for what the Plaintiff had declared, for the Damages doth include Coſts; but adjudged, when an Act of Parliament gives a Recompence for a Thing where none was before, or *gives Damages* where none were allowed at Common Law, there the Defendant ſhall have his Damages *and Coſts*, for the Encreaſing of Damages doth not take away Coſts; beſides, Coſts are not always included in the Word Damages, for if Treſpaſs is brought againſt * two Defendants, and each of them is found guilty by himſelf, and Damages are ſeverally aſſeſſed, yet Coſts ſhall be taxed jointly; and 'tis regularly true, that the Plaintiff ſhall not recover more in Damages than for what he had declared, but that muſt be intended Damages for the Wrong done before the Suit began, and the Coſts of that Suit may be added afterwards. 10 *Rep.* 116. *Robert Pilford's* Caſe. 1 *Bulſt.* 157. *Sampſon* verſus *Cranfeild.* *See Poſtea* Treſpaſs. (B) 4. *S. C.*

* Sampſon v. Cranfeild. Treſpaſs. (B) 4.

10. In Replevin, the Defendant avowed for *Damage-feaſant*, and after Iſſue joined, the Plaintiff was Nonſuit at the Trial; it was a Queſtion, whether the Avowant ſhould have Damages and Coſts upon the Statute 7 *H.* 8. *cap.* 4, becauſe that Statute mentions only where the *Plaintiff* is barred upon an Avowry for *Rent*, *Cuſtoms and Services*, and *Damage-feaſant* is neither; but adjudged, this Caſe is within the Statute 21 *H.* 8. which extends to Nonſuits in all Caſes where the Plaintiff is barred. *Paſch.* 4 *Mar. Dyer* 141. *Plow. Com.* 82. In *Partridge* and *Strange's* Caſe. *S. P. Moor* 693. *S. P.*

11. Debt upon Bond for Performance of an Award, the Breach aſſigned was, for a Thing out of the Submiſſion, and Iſſue being upon it, the Plaintiff at the Trial was Nonſuit; and it was moved, that he ought not to pay Coſts upon the Statute 21 *H.* 8. becauſe the Judgment was upon a *Nonſuit*, and not upon any inſufficient Pleading; but adjudged, that Coſts ſhould be paid for the unjuſt Vexation. *Moor* 625. *Ladd* verſus *Wright.* 29 *H.* 8. *Dyer S. P.*

Hob. 219. 12. *Caſe, &c. far Words*, upon Not guilty pleaded, the Plaintiff was *Nonſuit* at the Trial, for that *the Words were not actionable*; then the Queſtion was, whether the Plaintiff ſhould pay Coſts upon the Statute 4 *Jac.* which provides, that *the Defendant ſhall have Coſts in all Caſes where the Plaintiff might have Coſts if he had recovered*; now, in this Action he could never recover, becauſe the Words were not actionable; but adjudged, that he ſhall pay Coſts for his Vexation, which is the greater, if he have no Cauſe of Action; beſides, the Nature of the Action is ſuch, that the Plaintiff would have Coſts, if he had recovered. *Hutton* 16. *Drury* verſus *Fitch.*

13. Upon an *Information* on a *Penal Statute*, the Informer had a Verdict; but becauſe it appeared to the Court that the Statute was *diſcontinued*, the Judgment was entered, that the Defendant *eat fine die*; then the Queſtion was, whether the *Informer* ſhould pay Coſts, upon the Statute * 18 *Eliz. cap.* 5, it was objected, that he ſhould not, for if there is no ſuch Statute, then there is no Informer; but adjudged, that he ſhould pay * Coſts, for the Statute was made to prevent vexatious Informations; and if an Informer might proſecute upon a Statute not being in Force, and without paying Coſts, that would be a very great Vexation to the People. *Hutt.* 36. *Pie's* Caſe.

* Poſtea 27.

* *See* Information. (A) 2.

14. Husband and Wife join in an Action of Treſpaſs for a Battery done to both of them, and conclude *ad damnum ipſorum*; upon Not guilty pleaded, the Defendant had a Verdict, it being found, that what he did was as a Conſtable in the Execution of his Office; and now the Plaintiff moved, that Judgment ought not to be given againſt him upon the Verdict, but upon the Inſufficiency of the Declaration, by which it appeared, that Husband and Wife joined in an Action of Aſſault and Battery done to both, and concluded *ad damnum ipſorum*, which he ought not to do; but adjudged, that he ſhall take * Advantage of this Defect in his own Declaration, to excuſe himſelf of Coſts. *Cro. Car.* 125. *Heliar's* Caſe. *Style* 149. *Franks* verſus *Butts. S. P.* and 153. *Franks* verſus *Davis. S. P.*

* Poſtea 15.

2 Roll. Rep. 213.

15. In *Ejectment* the Plaintiff was *Nonſuit*, which was recorded, and thereupon the Defendant moved for Coſts, upon the Statute 4 *Jac. cap.* 3, which enacts, that in Ejectment and every other Action *where the Plaintiff might recover Coſts, &c.* that in *ſuch* Action, upon a *Nonſuit*, the Defendant ſhall have Coſts; and now the Plaintiff, to avoid Coſts, objected, that he could *never recover Coſts in this Ejectment*, becauſe there was a Fault * in the Declaration; but adjudged, that the Plaintiff ſhall not take † Advantage of any Defect in his own Declaration, for if he ſhould, then Defendants could never have the Benefit of this Statute. *Palm.* 147. *Dove* verſus *Knap* 365. *Pritchard* verſus *Reynell. S. P.*

* Palm. 365.

† Antea 4.

16. A Copyholder exhibited a Bill in the Exchequer againſt the Lord, to be admitted, upon Payment of ſuch Fine; the Queſtion between them being, whether it ſhould be a Fine certain, or not, and the Lord was in Contempt, for not putting in his Anſwer, it appearing, that the *Subpœna was ſerved on his Servant*, but he never gave his Maſter any Notice of it, for which Reaſon the Court ordered, that he ſhould be diſcharged of the Contempt, but that he ſhould pay Coſts. *Hardres* 405. *Duncomb* verſus *Hide.*

17. The Plaintiff being admitted in *Forma pauperis*, was afterwards *nonſuited* at the *Niſi prius*; and it was moved upon the Statute * 23 *H.* 8. *cap.* 15, that Coſts might be ſpared, for by that Statute 'tis left to the Judge, for at Common Law there were no Coſts; but the uſual Practiſe is, to tax the Coſts, and if that is not paid, that the Plaintiff ſhall be whipped, but the Court in their Diſcretion may ſpare both; however, in this Caſe it was ruled, that it ſhould be in the Election of the Plaintiff, either to pay the Coſts, or be whipped. *Sid.* 261. *Munford* verſus *Pait.*

* Poſtea (B) 15.

18. Treſpaſs *quare Vi & Armis*, he did throw down his (the Plaintiff's) Stalls in the Market-Place in *Highworth*; upon Not guilty pleaded, the Plaintiff had a Verdict, but Damages *under* 40 *s.* the ſecondary refuſed to tax Coſts, apprehending this Caſe to be within the Statute 22 & 23 *Car.* 2. *cap.* 5. and thereupon it was moved for the Plaintiff, that Coſts might be taxed, and a Rule was made accordingly, that the Plaintiff ſhould have his Coſts, for this Statute extends only to ſuch Caſes where the * Freehold ſhall be in Queſtion, or may come in Queſtion; but in this Caſe the Action was not *Quare clauſum fregit*, ſo that † the Freehold could never come in Queſtion. *Raym.* 487. *Smith* verſus *Batterton*. T. Jones 232. * Pl. 29. † 3 Mod. 39. Barns v. Edgar. S. P.

19. By a private Act of Parliament, it was enacted, that where a Trial is had between two Inhabitants of *Newcaſtle upon Tyne*, and the *Damages do not exceed* 40 *s.* that in ſuch Caſe *the Plaintiff ſhall have no Judgment, but the Defendant ſhall have Coſts*; the Plaintiff had Judgment upon an *Indebitatus Aſſumpſit*, and 30 *s. Damages*; it was now moved, that this might be ſuggeſted on the Roll, that the Defendant might have his Coſts, but it was denied, for the Judge of the inferior Court ought to have directed the Jury to find for the Defendant. 5 *Mod.* 367.

20. In Treſpaſs for Breaking his Cloſe and treading his Graſs; upon Not guilty pleaded, it appeared on Evidence, that the Plaintiff's Cloſe adjoined to the Defendant's Dwelling, who kept a Publick Houſe, and would frequently ſet a Table in the Cloſe for his Gueſts to ſit there and drink, that he often walked in the Cloſe with others, who ſhot with Bows and Arrows there: *Per Holt* Ch. Juſt. if in this Caſe the Jury ſhould give under 40 *s.* Damages, yet there ſhall be a Certificate for Coſts, tho' the Title of the Land doth not come in Queſtion, becauſe this is not an accidental, but a * voluntary and malitious Treſpaſs, and the Statute is to be underſtood of ſmall and involuntary Treſpaſſes. *Mod. Caſes* 153. *Dove* verſus *Smith*. * Poſtea (B) 28.

21. In an Action upon the Statute 8 *H.* 6. for a forcible Entry, after a Verdict for the Plaintiff he had treble Coſts, upon the Authorities cited in *Pilford*'s Caſe. 1 *Vent.* 22. *Skier* verſus *Atkinſon*.

22. In *Trover* by an *Adminiſtrator*, for that the Inteſtate was poſſeſſed of Goods, &c. and that *after his Death*, and before Adminiſtration granted, they came to the Defendant's Hands, who *converted* them; the Defendant had a Verdict and Coſts againſt the Adminiſtrator, becauſe the *Converſion was ſince the Death of the Inteſtate*. 1 *Vent.* 109. 3 Lev. 60.

23. *In Ejectment*, upon the Demiſe of the *Duke of Richmond*, there was a Verdict for the Defendant, and Coſts taxed, the caſual Ejector being not to be found, and the *Duke* being *Ambaſſador* abroad, it was ruled, that the *Duke's Agents*, who gave the Name of the Caſual Ejector to his Attorney, ſhould pay the Coſts, or produce a Plaintiff able to do it, and be committed till 'tis done. 2 *Lev.* 96. *Henloe* verſus *Peters*.

24. *Aſſumpſit* againſt an Adminiſtratrix, upon a Promiſe of her Inteſtate; ſhe pleaded, that *ipſa non Aſſumpſit*, inſtead of the Inteſtate; after a Verdict, a Repleader was awarded, but no Coſts of either Side upon a Repleader. 2 *Vent.* 196.

25. Judgment in Ejectment againſt the Inteſtate, who died, and his Adminiſtrator brought a Writ of Error, and the Judgment was affirmed; now, tho' it appeared, that it was brought *in dilatione executionis*, yet it was held, that the Adminiſtrator ſhould not pay Coſts. 1 *Vent.* 166. *Legg* verſus *Richards*. See *Poſtea* (B) 24. 1 Mod. 77.

26. Caſe, &c. for Eating his Graſs with Sheep, ſo that he could not enjoy his Common *in tam amplo modo*, &c. after a Verdict for the Plaintiff it was moved, that he ſhould have no more Coſts than Damages, becauſe this was a Treſpaſs in its Nature, and the Judge had not certified that the Title of any Lands was in Queſtion: *Sed per Curiam*, this is not a frivolous Action, becauſe a little Damage done to one Commoner, and ſo to twenty more, may be a great Wrong, and if it had been frivolous, the Judge would have marked it ſo to be, which he may do by the Statute 43 *Eliz. cap.* 6. ſo the Plaintiff had * full Coſts. 2 *Mod.* 141. *Stileman* verſus *Patrick*. * 4 Mod. 378. Roop v. Scritch. S. P.

27. Where a Statute gives a *Penalty to a Stranger*, and he ſues, he is in ſuch Caſe taken to be a * *Common Informer*; and if it goes againſt him, then he ſhall pay Coſts upon the Statute † 18 *Eliz.* but where the Penalty is given to the *Party grieved*, he is not a common Informer, nor liable to Coſts within that Statute. 1 *Salk.* 30. See 1 *And.* 116. 3 *Cro.* 177. * Informer. (A) 2. † Antea 13.

28. *Indictment for a Treſpaſs* and Riot, after Not guilty pleaded, the Defendant brought a *Certiorari*, and the Indictment being removed into *B. R.* the Defendant confeſſed it, and ſubmitted to a Fine, and went before the Maſter, who taxed Coſts only ſince the *Certiorari*, without conſidering the Charges of the Proſecutor below, whereupon it was moved, that he might go before the Maſter again, but it was denied by the Court, for the Maſter is only to tax Coſts ſince the *Certiorari*; then it was moved to aggravate the Fine, but that was alſo denied, ſince the Proſecutor had accepted the Coſts. 1 *Salk.* 55. *The Queen* verſus *Somers*.

29. *In Treſpaſs* for Entring his Cloſe, &c. the Defendant juſtified *for a Way*, &c. the Plaintiff replied, that the Defendant was guilty *extra viam*, upon which they were at Iſſue, and the Plaintiff had a Verdict; the Queſtion was, whether he ſhould have no more Coſts than Damages; adjudged, he ſhall have *full Coſts*, becauſe the * Title to the Way appears on Record, (*viz.*) of what Extent it is in Breadth. 2 *Lev.* 234. *Aſſer* verſus *Finch*. * Pl. 18.

30. In Treſpaſs *Quare clauſum fregit*, and for cutting and carrying away his Corn; and upon a Motion for full Coſts, upon the Statute 22 & 23 *Car.* 2. it was adjudged, that where the Title may come in Queſtion, as it may upon a *Clauſum fregit*, there ſhall be full Coſts. 1 *Salk.* 193. *Blackly* verſus *Fry*. See 2 *Vent.* 215. 5 Mod. 315.

31. Adjudged, that the King shall pay Costs for an Amendment, but not for not going to a Trial, but the * Prosecutor shall pay Costs, as well in the one Case as in the other, but then there must be an Affidavit of his Name, and if the Defendant doth not know who 'tis, he must apply himself to the Attorney General. 1 *Salk.* 193. *The King* versus *Edwards.*

* Postea (B) 31.

4 Mod. 7. 32. In *Replevin* against three Defendants, one of them was an *Infant*, and all of them *avowed by Attorney*, and had Judgment, and now the Plaintiff brought a Writ of Error in *B. R.* and assigned the Infancy of one of them for Error; but because he might have pleaded this Matter in Abatement, the Judgment was affirmed; but adjudged, that the *Avowants* should have no Costs, because all Statutes which give Costs are to be taken strictly, now the Statute 3 *H.* 7. *cap.* 10, mentions Costs only on Writs of Error brought by any Defendant or Tenant; but in Replevin, the Avowant is in Nature of a Plaintiff, and by Consequence neither Tenant or Defendant. 1 *Salk.* 205. *Cone* versus *Bowles.*

See Stat. 8 & 9 W. 3. c. 3.

33. Case, *&c.* for Words spoken of his Wife, (*viz.*) That she was a Whore, *by Reason whereof he lost such Customers*; upon Not guilty pleaded, the Plaintiff had a Verdict, but Damages under 40 *s.* adjudged, he shall have full Costs notwithstanding the Statute 21 *Jac. cap.* 16. because 'tis not the slanderous Words, but the *special Damage*, which is the Foundation of this Action; so where Trespass is brought for Beating his Servant *per quod servitium amisit*, this is not an Action of *Assault and Battery* within the Statute 22 & 23 *Car.* 2. *cap.* 9. but an Action founded on the Special Damage. 1 *Salk.* 206. *Brown* versus *Gibbons.* See 1 *Cro.* 140. *S. P.*

34. Trespass, *&c.* for chasing, driving, and wounding his Sheep, *per quod some died, and others were damnified*; upon Not guilty pleaded, the Plaintiff had a Verdict, and 2 *d.* Damages; adjudged, that he shall have full Costs, because this is not within the Statute 22 & 23 *Car.* 2. the Words are, *That in all Actions of Trespass, Assault and Battery*, and other personal *Actions*, wherein the Judge shall *not certify an Assault and Battery sufficiently proved, or that the Title of the Land came in Question, there shall be no more Costs than Damages, where the Damages found are under* 40 *s.* now, by this Clause *Actions* are restrained to such wherein the Judge may certify, therefore an Action, where he cannot certify the Battery, or that the Title came in Question, is out of the Statute, as *Debt*, *Assumpsit*, *Trover*, *Trespass for taking or spoiling his Goods*, or for Beating his Servant, *per quod servitium amisit*: But Trespass *Quare clausum fregit*, or for riding over his Ground, are within the Statute, yet if it go on for *cutting and carrying away his Corn*, 'tis out of the Statute, unless the Defendant is acquitted thereof. 1 *Salk.* 208. *Venn* versus *Phillips.* See *Raym.* 487. 2 *Jones* 232.

Mod Cases 91, 181. 35. *Indebitatus Assumpsit* by Husband and Wife *Executrix*, for that the Defendant being indebted to them in 20 *l.* as *Executors*, *&c.* for Money had and received *to their Use*, *&c.* he promised to pay, *&c.* upon *Non Assumpsit* pleaded, the Plaintiffs were nonsuit; adjudged, they shall pay * Costs, upon the Statute 23 *H.* 8. for the Cause of Action did arise entirely since the Death of the Testator, (*viz.*) By the Receipt of the Money to the Use of the Plaintiff. 1 *Salk.* 207 *Jenkins & Ux'* versus *Hill.*

* Latch. 220. Hutt. 78. *He need not Name himself Executor.*

5 Mod. 355. 36. Debt in *C. B.* upon the Statute 5 *Eliz. cap.* 9. for not appearing at the Trial, being served with a *Subpœna*, the Plaintiff had a Verdict and Judgment, and *Costs of Suit*; and upon a Writ of Error in *B. R.* it was adjudged, that where a Statute gives a *certain Sum* to the * Party grieved, as in this Case it doth, he shall have Costs, because he had a Right of Action before it was brought; but where a Sum certain is given to a Stranger, as where 'tis given to him who shall prosecute, he shall have no Costs, because he had no Right of Action in him till it was actually commenced. 1 *Salk.* 206. *Shore* versus *Maddison.* See 1 *Leon.* 128. *Cro. Eliz.* 130. *S. C.*

* Postea (B) 26, 32.

37. Case for a *Rescous* upon the Statute 2 *Will.* 3. *cap.* 5. which gives treble Damages and Costs against a Person who rescues a Distress for Rent; adjudged, that the Plaintiff shall have treble Costs as well as treble Damages, because an Action on the Case did lie for a Rescous at Common Law, and the Statute doth not give the Damages, but encreases them. 1 *Salk.* 205. *Lawson* versus *Storie.*

(B)

Who shall not pay Costs. See *Statutes.* (D) 12.

1. ACtion upon the Statute 1 & 2 *Ph. & Mar.* for impounding Cattle distrained out of the Hundred, *&c.* it was moved, whether the Defendant should have Costs upon the Statute 23 *H.* 8. *cap.* 16. and adjudged, that he should not, because the Action is grounded upon the Statute which gives *treble Damages*, and in such Case the Plaintiff shall have no Costs. 2 *Leon.* 52. *Wrenn* versus *Bulman.*

2. If an *Infant* brings an Action of Trespass by his *Guardian*, and is *Nonsuit*, he shall not pay Costs. *Cro. Eliz.* 33. *Graves* versus *Graves.*

3. *Account*, *&c.* by an Administrator against the Defendant, alledging him to be *Receiver to the Intestate*, the Plaintiff was nonsuit; adjudged, that the Defendant should not have * Costs, upon the Statute 23 *H.* 8. because the Plaintiff did not alledge, that the Defendant was *his Receiver*, but the Receiver of the Intestate. *Pasch.* 29 *H.* 8. *Bendl.* 11. *Allen's* Case.

* Antea (A) 34.

4. Error of a Judgment in Replevin, in which Action the Defendant avowed for an *Eſtray*, and had a Return thereof awarded, with *Coſts and Damages*, for which Reaſon the Error was aſſigned; for that no Coſts and Damages are given in this Caſe, either by the Statutes 7 *H.* 8. *or* 21 *H.* 8, for in thoſe Statutes Coſts and Damages are given only in *Avowries for Rents*, or for *Cuſtoms or Services*, or for *Damage feaſant*; the Court inclined, that it was Error. *Cro. Eliz.* 257. *Haſlip* verſus *Chaplin.*

5. Libel in the Spiritual Court for Tithes; the Defendant in a Prohibition *ſuggeſted a Modus* for Part, and a Contract executed between the Parſon and him, for the Reſidue; and becauſe he did not prove his Suggeſtion within ſix Months, the Parſon had a *Conſultation*, and *Coſts aſſeſſed* by the Court to 5 *s.* and Damages to 5 *s.* which, by the Statute 2 *Ed.* 6, are to be doubled; but there was no Judgment given for the ſingle Coſts, for in the Entry the Words, *Ideo conſideratum eſt quod recuperet*, were omitted, yet the Parſon brought an Action of Debt for theſe Coſts, and had Judgment by Default; and upon a Writ of Error brought, the Judgment was reverſed, becauſe thoſe Words were left out in entering the Judgment; ſo that the Coſts were only *aſſeſſed* by the Court, which is only Matter of Office, but no Judgment; beſides, Coſts in this Caſe ought not to be aſſeſſed, becauſe the Prohibition is grounded upon the *Modus*, which needs Proof, as well as upon the Contract, which needs no Proof in the Spiritual Court, and the Suggeſtion being Entire, and Part of it needing no Proof, they ought not to have given Coſts at all. *Yelv.* 119. *Cob* verſus *Hunt.* *Poſtea* Tithes. (G) 21. *S. C.* 1 Brownl. 100.

6. The Teſtator being ſeiſed of Lands in *Southwarke*, made a Leaſe thereof in *London*, reſerving Rent, and afterwards deviſed the Reverſion to *W. R.* and his Heirs; but declared his Intention to be, that his Executors ſhould have it during the Term for which he had leaſed it, upon Condition, that they give *Bond*, *&c.* to pay 34 *l. per Ann.* at the uſual Feaſts; the Executors gave no Bond, tho' they were required by the Deviſee of the Reverſion ſo to do, and to pay the Rent, whereupon he brought an Action of Debt againſt the Leſſee *in London*, and not in *Southwarke*, where the Lands were; it was agreed, that the Plaintiff had a good Title to the Rent; but being miſtaken, in laying the Action in a wrong County, he could not have Judgment: Then the Queſtion was, whether he ſhould pay Coſts upon the Statute 32 *H.* 8. or 4 *Jac. cap.* 3. where the Words are, that *if the Plaintiff be Nonſuit, or a Verdict be againſt him upon a lawful Trial, he ſhall pay Coſts*; and adjudged, that this Caſe is not within thoſe Statutes, for the Plaintiff was not Nonſuit; neither was a Verdict found againſt him, but rather for him; 'tis true, the Judgment was againſt him, not upon the Merits of the Cauſe, but becauſe he had miſtaken the Place where he ought to bring his Action. *Winch.* 69. *Treherne* verſus *Cleybrooke.* *Poſtea* Trial. (F) 6. *S. C.* *Godb.* 345. *contra.*

7. Debt upon the Statute 5 *Eliz.* of Perjury, in which the Plaintiff was nonſuited; the Queſtion was, whether the Defendant ſhould have Coſts upon the Statute * 23 *H.* 8. which gives Coſts in Caſes mentioned in that Statute, *or upon any Statute, for any Offence or perſonal Wrong done to the Plaintiff, and in which he is Nonſuit*; but adjudged, that in this Caſe the Defendant ſhall not have Coſts, neither upon the Statute 23 *H.* 8. nor upon the Statute *of King James*; becauſe the one was made long before the Statute 5 *Eliz.* upon which this Action was grounded, and *the other gives Coſts to the Defendant only in ſuch Caſes where the Plaintiff ſhould have Coſts, if he had recovered*; but in this Caſe the Plaintiff could have no Coſts, if the Judgment had been for him. 1 *Brownl.* 66. *King* verſus *Laws.* Hutt. 22. * *In an Action for an Eſcape, the Plaintiff was nonſuit; it was held, that the Defendant ſhould not have Coſts upon this Statute; for 'tis not a Perſonal Wrong immediately done to the Plaintiff.* 4 Leon. 182.

8. In *Aſſumpſit*, the Plaintiff had a Verdict for Damages and Coſts, and the Judgment was, *quod recuperet damna*, and Coſts to 53 *s.* 4 *d. de incremento per Curiam adjudicat'*; but omitted the Words, *ex aſſenſu partium*, or *ad requiſitionem* of the Plaintiff, and for that Reaſon the Judgment was reverſed in a Writ of Error; for Coſts *de incremento* ought not to be aſſeſſed *for the Plaintiff*, but upon *his Requeſt.* 2 *Cro.* 587. *Sache* verſus *Yeoman.* *Mich.* 18 *Jac.* *Cowſlaw* verſus *Eyre.* *S. P.* *Poph.* 211. *Good's* Caſe. *S. P.*

9. Caſe by an Adminiſtrator, and he declared in the *Detinet* and was nonſuited; yet he paid no Coſts, tho' he did not ſet forth, that the Debt was due to the Inteſtate; for having declared in the *Detinet*, it ſhall be ſo intended, and that the Action was brought in Right of the Inteſtate. 2 *Cro.* 361. *Barrett* verſus *Winchcombe.* 2 *Brownl.* 261. *Laick* verſus *Emms.* *S. P.*

10. Debt by an Exucutor, the Defendant pleaded *Non eſt factum*, and ſo it was found; adjudged, that the Executor ſhall not pay Coſts; for tho' 'tis enacted by the Statute 4 *Jac.* That *where a Verdict* paſſeth for the Defendant, in ſuch Caſe the Plaintiff ſhall pay Coſts; that muſt be intended where the Plaintiff ſueth in his own Right, and not in the Right of another. 2 *Cro.* 229, 367. *Hayworth* verſus *David.* *Cro. Car.* 29. *Peacock* verſus *Peacock.* *S. P.* *Hutt.* 78. *S. C.* Yel. 168.

11. Where a Suit is in the Spiritual Court between two Perſons, concerning the Right of Adminiſtration, and Sentence and Coſts are given againſt him, who is the rightful Adminiſtrator, thoſe Coſts ſhall be paid out of the Goods of the Inteſtate, and not out of his Goods. *Paſch.* 19 *Jac.* *Winch* 11.

12. Where there is a Fault in the Original Writ, if the Plaintiff be afterwards Nonſuit, he ſhall pay no Coſts; becauſe where the * Original is abated, it is as if no Suit had been between the * 1 And. 117. S. P

the Parties. *Mich.* 12 *Jac. Godb.* 220. *Laiſton's* Caſe. *Mich.* 30 *Eliz. Bear* verſus *Underwood. S. P.* 1 *Leon.* 105.

13. Information in the Spiritual Court againſt one, for laying violent Hands on a *Parſon* in the Church, and *Coſts of Suit* were given in that Court, and the Defendant was excommunicated for Non-payment; but a Prohibition was granted, becauſe this was a Proſecution upon an Information, in which no Coſts ought to be given, and not at the Suit of the Party. *Moor* 540. *Waſton* verſus *Ridge.*

* Antea (A) 17. 14. The Plaintiff was admitted * *in forma pauperis*, and before Iſſue joined he was diſpaupered, and afterwards at the Trial he was nonſuited; the Queſtion was, whether he ſhould pay Coſts upon the Statute 23 *H.* 8. *cap.* 15. and adjudged, he ſhould not; nor upon the Statute 4 *Jac.* for that refers to the Statute 23 *H.* 8. 1 *Roll. Rep.* 88.

15. Adjudged, that where an Adminiſtrator is Plaintiff, and nonſuited, the Defendant ſhall not have Coſts, notwithſtanding the general Words of the Statute 4 *Jac. cap.* 3. 2 *Roll. Rep.* 87. *Valdan* verſus *Hunt.*

16. *T. S.* obtained a Sentence in the Spiritual Court, and had Coſts given, and afterwards the Defendant had a Prohibition; but a Conſultation was awarded, and then the Spiritual Court gave more Coſts *de novo*, for the Delay and Charges which the Plaintiff had ſuſtained by the Prohibition; and this Matter being ſuggeſted by the Defendant, he had another Prohibition; for otherwiſe the People would be terrified to move for Prohibitions, tho' the Matter was of Temporal Cogniſance; and *Mr. Noy* ſaid, that *Anno* 1 *Jac.* a Bill was brought into Parliament, to have this Uſage confirmed to the Spiritual Courts; but it did not paſs. 2 *Roll. Rep.* 119. *Read* verſus *Stonehouſe.*

17. In Replevin againſt two Defendants, one pleaded *non cepit*, upon which they were at Iſſue, and it was found *quod cepit*; the other Defendant avowed the taking, *&c.* for a good Cauſe, upon which they were likewiſe at Iſſue, and it was found for the Avowant; it was inſiſted, that Coſts ought not to be paid by that Defendant, againſt whom the firſt Iſſue was found, becauſe the other Iſſue was found for his Companion; and therefore it appears, that the Plaintiff had no Cauſe to complain of the Taking, *&c.* and ſo it was adjudged. 2 *Roll. Rep.* 140.

Cro. Car. 219. 18. There is one Caſe where a contrary Judgment was given, (*viz.*) Trover *by an Adminiſtrator*, for the Goods of the Inteſtate, and the *Converſion* was laid *in the Time of the Adminiſtrator himſelf*; there was a Verdict for the Defendant, and he had Coſts, becauſe the *Converſion*, which was the Ground of the Action, was laid in the Time of the Plaintiff himſelf. *Jones* 241. *S. C. Atkey* verſus *Heard. Latch.* 220. *Worfeild* verſus *Worfeild. S. P. Hutt.* 78. *S. P.* See (E) *pl.* 6.

1 Lev. 165. 19. An Executor brought an Action, and declared, that the Defendant was indebted to his Teſtator, and that upon an *Account between him the ſaid Executor, and the Defendant*, he was found in arrear, *&c.* Upon *Non Aſſumpſit* pleaded, the Defendant had a Verdict, but could not get

* 1 Roll. Rep. 63. Long *v.* Winchcombe. S. P. * Coſts, tho' it was inſiſted for him, that the Action was founded on an Account between the Executor and himſelf; which was very true, but it was for a Duty to the Teſtator, and the Plaintiff had made a Title as Executor; ſo that if he had recovered, the Money would have been Aſſets. *Jones* 47. *Bull* verſus *Palmer.* See *antea pl.* 9. *&* *pl.* 18.

20. In all Actions brought by *Executors* or *Adminiſtrators* upon Bonds, Contracts, or other Things, made or done to the Teſtator or Inteſtate, or upon any Wrong ſuppoſed to be done not immediately to the Plaintiff himſelf, there ſhall be no Coſts, if he is Nonſuit, or a Verdict againſt him; but if the Action is brought upon an immediate Wrong done to themſelves, they ſhall pay Coſts. *Hutt.* 79. *Townley* verſus *Steel.*

21. A Bill was exhibited againſt an Executor, to be relieved againſt a Bond which the Plaintiff gave to the Teſtator, *&c.* There was a Decree for the Plaintiff, and 140 *l.* Coſts taxed, and the Defendant moved, that they might be diſcharged, becauſe an Executor pays no Coſts; it was inſiſted, that an Executor in all Caſes where he is Defendant, pays Coſts, if the Judgment is againſt him; 'tis true, they are *de Bonis Teſtatoris ſi, &c.* But it was ruled, that an Executor being Defendant in Equity, ſhall not pay Coſts. *Hardr.* 165. *Twiſleton* verſus *Thelwell.*

22. In a Prohibition to the Eccleſiaſtical Court of *Lincoln*, for that the Plaintiff was proſecuted *ex Officio*, upon Articles exhibited againſt him, for not going to Church, and for ſitting irreverently there when he did come, and for that they *taxed Coſts there againſt him*: The Court doubted, whether Coſts ought to be taxed; becauſe it was not a Cauſe between Party and Party, but promoted *ex officio Judicis*, and *per inſtantiam Curiæ*, by a Perſon aſſigned to proſecute. *Hardr.* 501. *Brown* verſus *Sir Edw. Lake.*

23. Debt was due on a Bond to a Perſon, who afterwards became *felo de ſe*, and the Mayor of *Southampton*, who pretended a Title under a Grant from the King *de bonis & catallis felonum de ſe*, brought an Action of Debt on the Bond; the Defendant *demurred* to the Declaration, and the Plaintiff had Leave to Diſcontinue; but the Defendant had no Coſts, becauſe this was not within the Statute. *Sid.* 142. *Southampton Mayor* verſus *Richards.* 1 *And.* 117. *contra.*

Hob. 38. 24. An Executor or Adminiſtrator, whether Plaintiff or Defendant, pays no Coſts; but where he is Defendant he ſhall have Coſts, if the Plaintiff be Nonſuit, or a Verdict againſt him; and the Reaſon why he pays no Coſts is, becauſe where he is Plaintiff, he ſues in the Right of another, of which he is preſumed to have no certain Knowledge; and in ſome Caſes, tho' he had

a certain Knowledge of the Fact, and it was found againſt him, yet he paid no Coſts; as for Inſtance, an Adminiſtratior brought an Action of Debt upon a Bond due to the Inteſtate; the Defendant pleaded, that he paid the Money to the * *Adminiſtrator himſelf*, upon which they were at Iſſue, and the Jury found for the Defendant; but he could never get Coſts, tho' the Plaintiff knew very well, that he had no Cauſe of Action. 1 *Vent.* 92. *Jewſter* verſus *Sanders*. *See Cro. Eliz.* 503. *Fetherſton* verſus *Allibon*. *Antea* (A) 1. *S. C.* 3 *Lev.* 60. *S. P.* Antea (A) 25, 39.

25. But the later Authorities are otherwiſe, (*viz.*) Trover by an Adminiſtrator, who declared, that *he was poſſeſſed of the Goods*, and loſt them; now here the Action was grounded *upon his own Poſſeſſion*, yet tho' the Verdict was againſt him, the Defendant could not get Coſts. 3 *Lev.* 70. *Maſon* verſus *Jackſon*.

26. Action upon the Statute 17 *Car.* 2. for reſiding in a Place where he formerly kept a Conventicle; the Penalty is 40 *l.* to the King and Informer: After a Verdict for the Plaintiff, it was moved, that he might have Coſts; for where a Statute gives a * certain Penalty, there, if 'tis not paid on Demand, he that ſues for it ſhall recover Coſts; which is very true, but that muſt be where a Statute gives the certain Penalty to *the Party grieved*, but it ought not to be given in Actions Popular, whether the Penalty is certain or not. 1 *Vent.* 133. *Eaton* verſus *Barker*. * Antea (A) 36.

27. In Replevin, *&c.* for taking *a Cow and a Stack of Hay*; the Defendants made Cogniſance, for that one *Nath. Day* was poſſeſſed of the ſaid Goods, and that a Plaint was levied againſt him in the County-Court, and he not appearing upon a Summons, there was an Attachment iſſued againſt his Goods, by Vertue whereof he took the Goods; the Plaintiff replied, that he was poſſeſſed of the Goods, and traverſed the Poſſeſſion of *Nathaniel Day*; upon which they were at Iſſue, and the Jury found for the *Defendant, as to the Cow*, and they found for *the Plaintiff, as to the Hay*, and aſſeſſed Damages and Coſts to 40 *s.* both *to to the Plaintiff* and Defendant; it was moved, that the aſſeſſing *Coſts and Damages to the Plaintiff* was wrong, becauſe in Avowries, where Part of the Iſſue is found for the Avowant, it plainly ſhews, that he had a Right to ſome of the Goods, tho' not all; therefore the Defendant ſhall have Coſts, but the Plaintiff ſhall have none; adjudged, that both ſhall have Coſts. *See* (A) *pl.* 6. *S. P. contra*. 2 *Lutw.* 1190. *Winnard* verſus *Foſter & al'*.

28. In Treſpaſs for breaking his Cloſe and Soil, the Plaintiff had a Verdict, and 1 *s.* Damages; and upon a Motion for Coſts upon the Statute 22 *&* 23 *Car.* 2. it was inſiſted, that the Statute did not extend to a * Voluntary Treſpaſs as this was, but to involuntary Treſpaſſes, as walking over another Man's Ground, or the like; but adjudged, that the Plaintiff ſhall have no more Coſts than Damage; 'tis true, if the Defendant take away any Thing, he ſhall pay Coſts; but here the Soil was broke by Digging, and nothing carried away; ſo likewiſe for ploughing a Man's Soil, he ſhall have Coſts, becauſe 'tis a Damage done to the Freehold; ſo for aſſaulting and beating his Servant *per quod Servitium amiſit*, the Coſts are given for the Loſs of the Service. 5 *Mod.* 74. *Reynolds* verſus *Osborne*. * Antea, (A) 20.

29. *Ejectment* in the Common Pleas, and the Plaintiff had a Verdict, and afterwards the Defendant in that Action was Plaintiff in *B. R.* in another Ejectment brought by him againſt the Plaintiff in the former Ejectment, and it was moved, that he might have his Coſts in the firſt Ejectment, before he ſhould be compelled to plead to the ſecond Ejectment: *Sed per Curiam*, he ſhall not, becauſe the Verdict was for him; but if it had been againſt him, or if he had been nonſuited, then he (*viz.* the Plaintiff) ſhould not bring a new Ejectment againſt the ſame Defendant, until he paid the Coſts of the firſt; becauſe it would have been vexatious to begin a new Action. 4 *Mod.* 374. *Roberts* verſus *Cook*.

30. In *Aſſumpſit*, the Defendant pleaded in *Abatement*, and the Plaintiff *demurred*, and Judgment was given againſt him upon this Demurrer; and upon a Motion, that the Defendant might have Coſts upon the Statute 8 *&* 9 *Will. cap.* 11. it was adjudged, that he ſhould not, becauſe the Statute extends to *Demurrers in Bar*, and not in *Abatement*; for it mentions *vexatious Suits*: Now it cannot appear, whether the Suit is Vexatious or not, upon a Demurrur to a *Plea in Abatement*, but it may upon a *Demurrer to a Plea in Bar*, for there the Merits of the Cauſe will appear to the Court; beſides, upon this Demurrer, if it had been good, the Plaintiff could have no Coſts; therefore the Statute ought to be expounded in the ſame Manner as to the Defendant. 1 *Salk.* 194. *Thomas* verſus *Loyd, and* * *Garland* verſus *Exton*. *Ibidem. S. P.* Mod. Ca. 88. * Mod. Ca. 88.

31. Information againſt three Defendants, and at the Aſſiſes, one was acquitted, and the other two found guilty; and tho' the Judge did not certify a probable Cauſe, yet adjudged, that the * Proſecutor ſhould not pay Coſts to that Defendant who was acquitted; becauſe, before the Statute 8 *&* 9 *Will.* 3. the Plaintiff never paid Coſts in any Action, if one Defendant was found guilty, and the Act 4 *&* 5 *Will.* 3. *cap.* 18. cannot be intended to make *Proſecutors* otherways liable than as *Plaintiffs* were before. 1 *Salk.* 194. *The Queen* verſus *Danvers*. * Antea (A) 31.

32. Where a Sum certain is given to a Stranger, as where 'tis given by a Statute to the Proſecutor, he ſhall have no Coſts, becauſe he had no Right of Action till he commenced it; ſo in Popular Actions, whether the Penalty is certain or not, there ſhall be no Coſts. 1 *Salk.* 206. *In Shore and Maddiſon's* Caſe. *See Hutt.* 22. 1 *Brownl.* 66. 1 *Lutw.* 201.

33. *Aſſumpſit* by an *Executor*, for the Teſtator's Money received by the Defendant to the Uſe of the Plaintiff, he was nonſuit; adjudged upon a Motion for a Rule to the Maſter of the Office to tax Coſts, that he ſhall not pay any Coſts, becauſe he could not bring the Action

but

but as Executor; for ſuppoſe it was received by the Defendant ſince the Death of the Teſtator, 'tis not Aſſets in the Hands of the Executor, till recovered; but in Trover by an Executor upon a Trover and Converſion in the Time of the Executor, if he is nonſuit he ſhall pay Coſts; becauſe he need not name himſelf Executor, and the Goods are Aſſets in his Hands, tho' he never recover them; ſo if an Executor will not go on to Trial, according to Notice given by himſelf, he ſhall pay Coſts. 1 *Salk.* 314. *Evans* verſus *Mocato.*

(C)

Where Actions will lie for Coſts, and where Trials ſhall be ſtaid for Non-payment, where not.

1. CASE, *&c.* the Plaintiff was nonſuit, and the Defendant had Judgment to recover Coſts upon the Statute 23 *H.* 8. afterwards a Writ of Error was brought on this Judgment, and it was affirmed; then the Defendant brought an Action of Debt for the Coſts upon the *Nonſuit*, and adjudged, that the Action was well brought. *Paſch.* 32 *H.* 8. *Dyer* 32.

2 Roll. Rep. 212. 2. Adjudged, that where the Plaintiff is *nonſuit*, the Defendant may have a *Capias ad ſatisfaciendum* againſt him for the Coſts. 2 *Cro.* 595. *Dyer* verſus *Fincham.*

March 24. 3. The Plaintiff had Judgment in Treſpaſs in *C. B.* and thereupon the Defendant brought an Attaint againſt the Jury, and it was found againſt him; adjudged, that the Defendant in the Attaint ſhall not have his Coſts by the Statute 23 *H.* 8. which gives an Attaint to the Party grieved, nor by any other Statute which gives Coſts to a Defendant. *W. Jones* 432. *Davis* verſus *Bellamy.* *See Stat.* 3 *H.* 7.

4. Adjudged, that after a Verdict *in Ejectment*, and Coſts taxed, and an Attachment againſt the Perſon who ought to pay them, tho' the Attachment cannot be executed, and the Perſon not found, yet he may ſue the ſame Perſon for the ſame Cauſe, but *in another Court*; ſo where Coſts are given *for not going on to Trial*, he may proceed *in the ſame Court*, tho' not paid; but he cannot proceed in *the ſame Court* where Coſts are given after a Verdict, till they are paid, for the Court will ſtop him upon a Motion. *Sid.* 279. *Auſtin* verſus *Hood.*

(D)

Where they ſhall pay double and treble, and where not, and where no more Coſts than Damages. Antea (A) 37.

1. ERror of a Judgment in *C. B.* upon the Statute 8 *H.* 6. of Forcible Entry; the Error aſſigned was, for that the Jury had found 20 *l.* Damages, and 20 *s.* Coſts, and the *Coſts were encreaſed by the Court* to 20 *s.* more, and the Damages and Coſts being trebled, he had Judgment to recover 66 *l.* whereas the *Coſts encreaſed by the Court* ought not to be trebled, but only the Coſts which were aſſeſſed by the Jury; and this was adjudged erroneous, and the Judgment was reverſed. *Cro. Eliz.* 582. *Thorogood* verſus *Scroogs.* 1 *Leon.* 282. *Rolſtone* verſus *Chambers, contra.* Where it was held, that all ſhould be trebled. *Paſch.* 28 *Eliz. Goldſ.* 12. *S. P.*

2. *Prohibition* upon a Libel in the Spiritual Court for *Tithes of Pidgeons*, if the Suggeſtion is not proved *within ſix Months*, the Defendant ſhall have a Conſultation and double Coſts; in this Caſe the Plaintiff in the Prohibition did not prove his Suggeſtion within the ſix Months; but the Defendant took Iſſue upon the Prohibition, and it was found againſt him, and yet he would now have *double Coſts*, becauſe the Plaintiff had not proved his Suggeſtion within the Time limited by the Statute 2 *Ed.* 6. but adjudged he ſhould not have ſuch Coſts, becauſe he had lapſed the Time to have a Conſultation, and now he could never have it, becauſe the Iſſue was found againſt him. *Latch* 140. *Wilkinſon* verſus *Sir Geo. Pacy.*

3. In Aſſault and Battery, upon Not guilty pleaded, the Jury found the Defendant guilty of the Aſſault, and Not guilty of the Battery, and ſmall Coſts; the Queſtion was, whether he ſhould have full Coſts or not? adjudged, that he ſhall have no more Coſts than Damages; for the Judge did not certify, that the *Battery* was proved, but only the *Aſſault.* 2 *Lev.* 120. *Smith* verſus *Newſam.*

4. Treſpaſs in the Palace-Court to his Damage 5 *l.* 19 *s.* *The Defendant* removed the Cauſe into *B. R.* and at the Trial the Jury gave 15 *s.* *Damages*; the Queſtion was, whether the Plaintiff ſhould have no more Coſts? for he objected, that this was not within the Statute, becauſe it was not an Original Cauſe in *B. R.* but brought thither by *Habeas Corpus*; which was held reaſonable, it being removed *by the Defendant*; but otherwiſe where removed *by the Plaintiff.* 2 *Lev.* 124. *Gavell* verſus *Scudamore.*

5. Caſe, *&c.* wherein the Plaintiff declared, that he was a Freeman, and had a Right to Vote in the chooſing a Mayor, and that the Defendant, the preſent Mayor, refuſed to admit him to Vote; the Plaintiff was *Nonſuit*, and the Defendant moved for double Coſts, which was oppoſed, becauſe it did not appear that the Plaintiff was Nonſuit for want of Proof that the

Defendant was *Mayor*; beſides, the * Statute gives double Coſts where a Man is ſued for what he doth in Execution of his * Office, but this Suit is for a *Non-feaſance* in his Office; adjudged, that this is not within the Statute. 2 *Lev.* 250. *Herring* verſus *Finch.*

* 7 Jac. cap. 5. *extends to a Deputy Conſtable.* 3 Bulſt. 77. 1 Roll. Rep. 274. Moor 845. *The aforeſaid Statute made perpetual by the Statute* 21 Jac. cap. 12. *and farther enacted, that Church wardens and Overſeers of the Poor, and thoſe who do any Thing by their Command, to aſſiſt them, ſhall have the Benefit of the Statute* 7 Jac. *See tit.* Church-wardens. (A)

6. Judgment by Default, and Notice given to execute a Writ of Enquiry of Damages, which was not executed according to the Notice, the Court will not allow Coſts. 1 *Vent.* 305.

7. In *Treſpaſs*, the Plaintiff had a Verdict, and 10 *s.* *Damages* and 40 *s.* *Coſts*, and Judgment entered accordingly, afterwards he brought an Action of Debt on this Judgment, to which the Defendant pleaded the Statute 22 *&* 23 *Car.* 2. *cap.* 9, by which 'tis enacted, that *in Treſpaſs*, if the *Damages are under* 40 *s.* and more Coſts ſhall be *awarded than Damages*, *the Judgment ſhall be void*; and upon Demurrer to this Plea it was held ill, becauſe the Verdict was for the 40 *s.* *Coſts*, and they were not encreaſed to that Sum by the *Award* of the Court; beſides, if the Judgment had been erroneous, it would be hard to avoid it by a Plea, tho' the Statute ſays it ſhall be void, but by Writ of Error. 2 *Vent.* 36. *Page* verſus *Kirke.*

8. Action againſt a *Conſtable*, for what he did in Execution of his Office, and the Verdict was for him accordingly, but the Judge before whom the Cauſe was tried did not mark the *Poſtea* for *double Coſts*, according to the Statute 7 *Jac.* and now the Court was moved to ſupply that Omiſſion, but it was denied, becauſe by the Statute 'tis directed, that the Judge ſhall do it, therefore the Court cannot. 2 *Vent.* 45.

9. In Treſpaſs *Quare clauſum fregit*, *&c.* the Defendant pleaded Not guilty as to Part, and a *Special Juſtification* as to the reſt, and it was found for the Plaintiff, upon the General Iſſue, and for the Defendant as to the Special Juſtification; adjudged, that this was within the Statute, for no more Coſts than Damages, becauſe the Iſſue upon the Special Juſtification, was found for the Defendant, and ſo 'tis the ſame Thing as if the general Iſſue had been only pleaded and found for the Plaintiff, (*i. e*) the Damages being under 40 *s.* the Plaintiff ſhall have no more Coſts than Damages. 2 *Vent.* 180, 195. *S. P.*

10. In *Ejectment* againſt two Defendants, who entered into the common Rule to confeſs Leaſe, Entry, *&c.* at the Trial, one appeared and confeſſed the Leaſe and Entry, *&c.* and not the other, but at the Trial the Plaintiff was nonſuit, and Coſts taxed for the Defendants, the Court held that both of them were entituled to theſe Coſts, and that he who did not appear might releaſe them to the Plaintiff. 2 *Vent.* 195. *Fagg* verſus *Roberts & al'.*

(E)

Of Coſts on Scire facias, and * Writs of Error. See 8 & 9 Will. 3. cap. 10. Double Coſts on a Judgment affirmed on a Demurrer.

* *At Common Law no Coſts on a Writ of Error, but given by the Statute* 3 H. 7. cap. 10. *and by the Statute* 13 Car. 2. cap. 2. *Double Coſts where the Judgment is affirmed.*

1. IN an Action of *Aſſault and Battery W. R.* was Bail, and there was a Verdict and Judgment againſt the Defendant, and a Writ of Error being brought in the Exchequer-Chamber upon that Judgment, it was there affirmed, and Coſts were given by that Court, and the Record being remanded into *B. R.* a *Scire facias* was prayed againſt *W. R.* the Bail, as well for the Damages and Coſts upon the original Judgment, as for the Coſts upon the Affirmance of it on the Writ of Error; but adjudged, that the Bail was not chargeable with the Coſts upon the Writ of Error, becauſe he took upon him to pay only the Coſts in the original Action in *B. R.* and not in any other Court. *Cro. Eliz.* 588. *Penraddock* verſus *Errington*, and *Cro. Eliz.* 544. *Wolfe* verſus *Meggs. S. P.* 2 *Cro.* 636. *Smith* verſus *Faldoe. S. P.* Moor 704.

2. The Caſe was: *Iſſ.* The Statute 27 *Eliz.* which gives a Writ of Error in the Exchequer-Chamber, and that the Juſtices may examine Errors found in *Judgments* in *B. R.* and thereupon to *reverſe or affirm*, enacts, that after the Judgment ſhall be reverſed or affirmed, the Record ſhall be brought back into *B. R.* by which Statute it appears, that the Record is not to be brought back, unleſs the Judgment is affirmed or reverſed; but yet if the Plaintiff in the Writ of Error is nonſuit, or if the Suit be diſcontinued, the Record ſhall be ſent back by the Equity of this Statute, and the Exchequer may award Coſts and Damages to the Plaintiff in the original Action, for the Delay and Vexation, and this is by Vertue of the Statute 3 *H.* 7. *cap.* 10. unleſs the Plaintiff in the original Action be likewiſe Plaintiff in Error. 2 *And.* 122.

3. After a Judgment was obtained, and *an Execution ſerved*, a Writ of Error was brought, and the Judgment was affirmed, *with Coſts*; but adjudged, that Coſts ought not to be given in this Caſe, upon the Statute 3 *H.* 7. becauſe the Writ of Error was brought *after the Execution was ſerved*, and therefore it was not brought *in Delay of the Execution*, and that Statute gives Coſts where a Writ of Error is brought *in Delay of Execution*, and the Judgment affirmed; therefore a *Superſedeas* was awarded to ſtay Execution as to the Coſts. 2 *Cro.* 636. *Eardly* verſus *Turnock. Mich.* 10 *Car. Smith* verſus *Smith. S. P.*

4. Judg-

4. Judgment was given *for the Defendant* in the Court of Common Pleas, which was affirmed upon Error in *B. R.* and 10 *l.* Costs given in that Court by Vertue of the Statute 3 *H.* 7. it was objected, that this was not warranted by that Statute, because it enacts, that where Judgment is given *against the Defendant*, and he to delay Execution, brings a *Writ of Error*, and the Judgment is affirmed, in such Case he shall pay Costs, but here the Judgment was not given *against the Defendant, but for him*, and by Consequence no Execution could be awarded against him, and if so, then the Writ of Error was not brought to delay Execution; therefore, because *the Plaintiff* brought the Writ of Error, and *not the Defendant*; it was adjudged not to be within the Statute, and so the Execution was staid as to the Costs. *Cro. Car.* 291. *Bowler* versus *Nicholls.*

5. Judgment in Ejectment against the *Intestate* and his *Administrator* brought a *Writ of Error*, and the Judgment was affirmed, yet the Administrator paid no Costs, tho' the Writ of Error was certainly *in dilatione Executionis, &c.* 1 *Vent.* 166.

4 Mod. 244. 6. So where there was a Judgment against the *Administrator himself*, and he brought a Writ of Error in *B. R.* and the Judgment was affirmed; the Plaintiff could never get Costs, tho' the Bringing the Writ of Error was the Act of the Administrator himself, and was in Delay of the Execution of the Judgment. 3 *Lev.* 375. *Gale* versus *Till.* See (B) *pl.* 18.

Sid. 213. Raym. 16, 55, 70, 96. 7. Error of a Judgment in the Grand Sessions in *Wales*, in a *quod ei deforceat*, and the Judgment was affirmed; and it was moved on the Statute 3 *H.* 7. that the Demandant in the original Action might have Costs, because the Writ of Error was brought in Delay of Execution; but adjudged, he should have no Costs, because he was to have neither Costs or Damages in the original Action, according to 1 *Cro. Smith* versus *Smith*; and yet in *Cro. Eliz.* 616. *Graves* versus *Short*, Costs were given in a Writ of Error upon a Formedon, and *folio* 650, in the same Book, and 5 *Rep.* 101. *Penruddock*'s Case, in a Writ of Error upon a *Quod permittat*, in both which there were none in the original Action. 1 *Lev.* 146. *Wynn* versus *Lloyd.*

8. So where a *Scire facias* was brought against an Administratrix, who pleaded specially; and upon Demurrer to the Plea, Judgment was given against her, yet she paid no Costs. 3 *Annæ*, *Smith* versus *Harmer.*

9. Writ of Error in *B. R.* upon a Judgment in *C. B.* afterwards the Record in *C. B.* was amended, and the Clerk of the Treasury of *C. B.* attended the Court of *B. R.* with the Record, that the Transcript might be amended, which was opposed, till the Defendant in the Writ of Error had his Costs allowed; but adjudged, that he should have insisted for his Costs in the Court of *C. B.* before the other Party had Leave to amend, that 'tis the Course of this Court to amend here by the Record there, and this is to save the Charge of a *Certiorari*, therefore this Amendment cannot be opposed. 1 *Salk.* 49.

Covenant.

What a *Covenant* is, and how it differs from a *Condition*. (A)
Where, and in what Caſes an Action of Covenant will lie. (B)
Where, and in what Caſes an Action of Covenant will not lie. (C)
Covenants, Conditions, and Promiſes to *ſave harmleſs*. (D)
Covenants, that the Vendor hath a *lawful Eſtate*, and Power to convey, and will warrant and defend, *&c.* (E)
Covenants and Conditions for *quiet Enjoyment*. (F)
Covenants, that the Eſtate is *free from Incumbrances*, and of ſuch a *Value*. (G)
Covenants not to *alien* without *Licenſe*. (H)
Covenants for *farther Aſſurance*, and to convey as *Counſel ſhall deviſe*. (I)
Of mutual Covenants. (K)
What are not mutual Covenants. (L)
Pleadings in Actions of Covenant, good. (M)
Pleadings in Actions of Covenant, not good. (N)

(A)

What it is, and how it differs from a Condition. See *Condition*. (B) per totum. *Cottages*. See *Leet*. *Repairs* per totum.

1. IN *Ejectment, &c.* the Caſe was, Leaſe for Years, rendring Rent, in which there was a Covenant for the Leſſee to *Repair, &c.* the Leſſor *deviſed* the Houſe to the ſame Leſſee for a farther Term of Years, after the Expiration of the Term then in Being, reſerving the like Rent, and under *the ſame Covenants*, as in the firſt Leaſe, Remainder to another in Fee; the firſt Leaſe expired, and the Leſſee continued in Poſſeſſion by Vertue of the Will, but did not *repair*, whereupon he in Remainder brought an *Ejectment*; adjudged, that the Will did not make it a *Condition, ſo as the Remainder-man might enter and avoid the Eſtate*, becauſe the Will referred to the Leaſe, by which the Deviſee was to have it *under the ſame Covenants*, as in the Leaſe, and by the Leaſe it was only a *Covenant to repair*, ſo that now it ſhall not be a *Condition* to make him forfeit the Eſtate, but continue ſtill a Covenant, and he may recover Damages for not Repairing. *Owen* 54. *Mitchell* verſus *Dunton*. Conditions. (D) 4. *S. C.*

1 And. 179, 197, S. C. *by the Name of* Manchel *v.* Dunton. 2 Leon. 33. S. C. Gouldsb. 74. S. C. Godb. 99. S. C. Poph. 8. S. C. Cro. Eliz. 288. S. C. 1 And. 230. S. C.

2. The Father covenanted, in Conſideration of the Marriage of his Son with the Daughter of *W. R. &c.* that he would ſtand ſeiſed of ſuch Lands to the Uſe of the Wife for Life, and afterwards to the Uſe of his Son in Tail; and farther covenanted, that he was ſeiſed of a lawful Eſtate in Fee, *notwithſtanding any Act by him done*, and that the ſaid Lands were of the yearly Value of 200 *l.* and in an Action of Covenant brought againſt the Father, the Breach aſſigned was, that the Lands *were not of the yearly Value of* 200 *l.* the Defendant pleaded, that *notwithſtanding any Act done by him*, they were of the yearly Value of 200 *l.* and upon Demurrer to this Plea it was adjudged, that thoſe Words *notwithſtanding any Act done by him*, do not refer to the yearly Value of the Lands, but only to the Lawfulneſs of his Eſtate, for it plainly appears, that he intended the Jointure ſhould be of that yearly Value, and that is properly in the Knowledge of the Covenantor. *Trin.* 13 *Car. Cro. Car.* 356.

3. The Defendant covenanted to convey Lands to the Plaintiff in Fee; and in an Action of Covenant brought, he pleaded, that the Plaintiff had not ſet forth in his Declaration, what Manner of Conveyance he would have; and upon Demurrer to this Plea the Defendant had Judgment for that very Reaſon. *Latch* 126. *Lucas* verſus *Warren*.

(B)

Where, and in what Caſes an Action of Covenant will lie.

1. BY the Statute 13 *Eliz.* 'tis enacted, that if a Parſon is *Non-reſident* on his Living for the Space of *eighty Days*, that in ſuch Caſe all Leaſes made by him, and all Obligations and Covenants for enjoying the Parſonage Lands, ſhall be void; a Parſon made a Leaſe, *&c.* and was afterwards *Non-reſident for eighty Days*; adjudged, that tho' the Leaſe was void, yet if any

Covenant was broken by the Leſſee, before the Leaſe was made void, an Action of Covenant would lie. *Cro. Eliz.* 245. *Hill* verſus *Pilkington*, and *Cro. Eliz.* 77. *Walls* verſus *Cox*, vouched in Dr.* *Nunns* and *Gee*'s Caſe. *Cro. Eliz.* 244.

*2 Bro'nl. 167.

3 Leon. 69. Hob. 168.

2. Tenant in Tail, Reverſion to the Queen in Fee, Tenant in Tail made a Leaſe for twenty-one Years, and covenanted that the Leſſee ſhould quietly enjoy, *&c.* againſt all Perſons, except the Queen, her Heirs and Succeſſors; the Queen granted the Reverſion to *W. R.* the Tenant in Tail died without Iſſue, *W. R.* entered, and put the Leſſee out of Poſſeſſion, who brought an Action of Covenant; and adjudged, it would lie, becauſe the Exception extended only to the Queen, her Heirs and Succeſſors, but not to her Patentee. *Cro. Eliz.* 517. *Woodroffe* verſus *Greenwood.*

1 And. 30, 53. 4 Leon. 190. Cro. Eliz. 9. *See* Manſer's *Caſe.* S. P.

3. There were three joint Purchaſers of Lands in Fee, and every one of them covenanted with the other, and each of them, his Heirs and Aſſigns, to make ſuch Aſſurance to the Heirs of the other, who ſhould die firſt, as ſuch Heirs ſhould deviſe; two of them died, and the *Heirs of him who died laſt*, deviſed an Indenture of Bargain and Sale, which he tendered to the Survivor to ſeal, but he requiring Time to adviſe the Heir, brought an Action of Covenant; and adjudged, that it was well brought. *Cro. Eliz.* 337. *Wootton* verſus *Cooks.* See *Poſtea* (C) 6.

Conditions: (E) 1. S. P.

2 Roll. Rep. 25. S. C. Hob. 3. S. C. Noy 131. S. C. * Poſtea 6. † *Grant of a Rent to* T. S. *payable at* Michaelmas *next, and the Grantor covenanted to pay the Rent; adjudged, that an Action of Covenant lies for Non-payment tho' he might have Debt.* 1 Brownl. 19. Mordant *v.* Watts. ** Poſtea (F) 21.

4. Leaſe for twenty-one Years, and afterwards the Leſſor made a Leaſe to the Plaintiff *for Life*, by theſe Words * *Dedi & demiſi*; the Tenant for Life entered, and being put out of Poſſeſſion by the Leſſee for Years, he brought an Action of † Covenant againſt the Leſſor, and aſſigned for Breach, that he was expelled by the Leſſee for Years; adjudged, that the Words in the Leaſe for Life did enure to a double Warranty, (*viz.*) the Word *Dedi* to warrant the *Freehold*, and the Word ** *Demiſi* to warrant againſt the Eviction of a *Term of Years*; now this being only a Warranty in Law, a Tenant for Life cannot have an Action of Covenant upon ſuch a Warranty, unleſs he had been evicted of his whole Eſtate for Life, which he was not in this Caſe, but only for a Term of Years, for he ſtill continued ſeiſed of the Freehold for Life, and therefore might have an Action of Covenant upon a Warranty in Law, tho' there was no expreſs Covenant in the Leaſe for Life, that he ſhould quietly enjoy. *Yel.* 139. *Pincomb* verſus *Rudge. Antea* Baron and Feme. (L) 7. *Bragg* verſus *Wiſeman. S. P.*

5. The Defendant covenanted, that whereas a Deputation of the Office of *Aulneger* was granted to *W. R.* for two Years, that he at the End of the ſaid two Years, would procure for the Plaintiff a Deputation of the ſaid Office for ſeven Years, in the ſame Manner as *W. R.* had it; Proviſo, that the Covenantee, upon the Making the ſaid Deputation *ſhould give Security* for the Payment of 100 *l. per Annum* Rent, *&c.* in an Action of Covenant brought by the Plaintiff, the Breach aſſigned was, that the Defendant had not procured ſuch a Deputation; and upon a Demurrer to the Declaration (the ſame being adjudged to be good) a Writ of Error was brought, and the Error aſſigned was, that the Plaintiff had not alledged, that he had performed the Covenant on his Part, which was *to give Security for the Payment of* 100 *l. per Annum Rent*, he only alledged, that he was *ready to give Security*; but adjudged, that he need not give any Security till the Deputation was made; then it was objected, that he did not alledge in Fact, that any Deputation was made to *W. R.* but adjudged, that ſince 'tis mentioned in the Covenant, that there was ſuch a Deputation, the Defendant ſhall not ſay any Thing to the contrary, but that he is bound to procure a Deputation. 2 *Cro.* 297. *Barwick* verſus *Gibſon.*

Moor 419. S. C. Cro. Eliz. 675. *Antea 4. Poſtea (C) 3. † 1 And. 12. Serles *v.* Swaine. S. P.

6. The Leſſor made a Leaſe for Years by the Words * *Demiſe and Grant*, and covenanted with the Leſſee, that he ſhould *quietly enjoy, during the Term, without the Eviction of the Leſſor, or any claiming under him*, and entered into a Bond to perform *all Covenants, &c.* the Leſſee aſſigned the Leaſe, and a *Stranger* entered upon the Aſſignee, and recovered in Ejectment, afterwards the firſt Leſſee brought an Action of Debt upon this Bond; adjudged, that the Words † *Demiſe and Grant made a Covenant in Law*, and that this Bond did extend to *all Covenants*, which includes Covenants in Law as well as *expreſs Covenants*, and that by Breaking a *Covenant in Law*, the Bond was forfeited; adjudged likewiſe, that an *Aſſignee* may have an Action of Covenant, upon a Breach of a *Covenant in Law*, but that in the principal Caſe the *expreſs Covenant for quiet Enjoyment, without Eviction of the Leſſor, &c.* did qualify the *Covenant in Law*, and therefore the Bond did extend no farther than to that *expreſs Covenant.* 4 *Rep.* 8. *Noke*'s Caſe. *Poſtea* Expoſition of Words. (B) 9. *S. C.* 5 *Rep.* 17. *S. P.* in *Spencer*'s Caſe.

7. The Plaintiff covenanted to raiſe 800 Soldiers, and to bring them to ſuch a Port, and the Defendant covenanted to *find Shipping and Victuals* for them, to tranſport them to *Calais*, and the Action was brought againſt him for not providing Shipping and Victuals at the Time appointed; the Defendant pleaded, that the Plaintiff had not raiſed the Soldiers at that Time; and

and upon Demurrer to this Plea, the Plaintiff had Judgment; for tho' the Soldiers were not raiſed, *&c.* the Defendant ought to have provided Ships and Victuals, and then he might have an Action of Covenant againſt the now Plaintiff, for not raiſing Soldiers; for theſe are actual and diſtinct Covenants; and therefore the Non-performance of the Covenant on the Part of the Plaintiff cannot be pleaded in Diſcharge of the Breach of the Covenant on the Part of the Defendant, tho' it might have been alledged in Mitigation of Damages. *Style* 187. *Ware* verſus *Chapple.*

8. Leaſe for Years, *yielding and paying* Rent, *&c.* the Leſſee died, and an Action of Covenant was brought againſt his *Executor* upon the general Words, *Yielding and Paying*, for Non-payment of Rent, there being no * expreſs Covenant to pay it; the Objection againſt the Action was, that this being a *Covenant in Law*, the Teſtator was only bound by it, and not his *Executor*; but adjudged, that the Action would lie againſt the Executor, tho' not named upon a Covenant in Law. *Style* 387. *Newton* verſus *Osborne.* * Pl. 10.

9. The Wife of the Defendant *dum ſola*, covenanted, by Indenture, with the Wife of the Plaintiff, *dum ſola*, reciting, that ſhe was ſeiſed in Fee of certain Lands, and that in Conſideration of a Marriage to be had between her and her Son, did grant to her a *Rent-Charge* out of thoſe Lands, to have after the Death of her Son, and covenanted to pay it; the Marriage took effect, the Son died, and the Widow married the Plaintiff, and now he and his Wife brought an Action of Covenant againſt the Defendant and his Wife, who pleaded, that ſhe had nothing in the Lands at the Time of the Grant, but that *W. R.* was ſeiſed thereof in Fee; and upon Demurrer, it was adjudged, that the Defendants were eſtopped by the Deed, and that the Covenant extends to it as an Annuity. *Allen* 79. *Newton & Ux'*, verſus *Weeks & Ux'.*

10. *Covenant* was brought upon theſe Words, ſſ. *I oblige my ſelf to pay ſo much at ſuch a Day, and ſo much at another Day*; and adjudged, that this Action lies, eſpecially if both the Days of Payment are not paſt; but *Hale* was of Opinion, that if it had been *Teneri & firmiter Obligari*, in ſuch Caſe it muſt have been an Action of Debt, and not Covenant. *Hardr.* 178. *Norris*'s Caſe.

11. Covenant, *&c.* in which the Plaintiff declared on a Deed, by which the Defendant did *aſſign and transfer* to the Plaintiff all ſuch Money, *&c.* it was objected, that Covenant would not lie upon this Clauſe, becauſe 'tis neither an expreſs or implied Covenant; but adjudged a good Covenant againſt the Party himſelf; as where a Man doth *Demiſe*, 'tis neither an expreſs or implied Covenant, but 'tis good againſt the Party demiſing. 1 *Mod.* 113. *Deering* v. *Farrington.*

12. In Covenant, the Plaintiff declared, that the Defendant demiſed to him a Meſſuage, *&c.* (excepting a Piece of Ground where a Pump ſtood) with *free Uſe of the Pump* during the Term, and covenanted, that he ſhould enjoy *the Premiſſes*; then he aſſigns a Breach, for that he ſuffered the aforeſaid Pump to be broke and quite ſpoiled; and upon Demurrer to the Declaration, it was inſiſted for the Defendant, that an Action of Covenant would not lie, becauſe there was no *expreſs Covenant to Repair*; 'tis true, the Plaintiff might have an Action on the Caſe, and recover Damages for not repairing, but he cannot have Covenant; but adjudged, that the Defendant having demiſed to the Plaintiff *the free Uſe of the Pump*, he is bound to do all Things neceſſary to make his Grant effectual, otherwiſe he breaks his Covenant for quiet Enjoyment. *Sid.* 429. *Pomfret* verſus *Ricroft.* 1 *Saund.* 321. *S. C.* 1 *Vent.* 26, 44. *S. C.* * Poſtea 13. S. C.

13. The ſame Caſe is reported more at Large, thus: In Covenant the Plaintiff declared, that the Defendant (who was the Leſſor) *demiſed* to him (the Plaintiff) by Deed, *&c.* one Meſſuage and Lands, and *the Uſe of a Pump*, excepting the Lands on which the Pump ſtood, and aſſigned for Breach, that the Leſſor had not cleanſed the Pump; and upon Demurrer to this Declaration, the Queſtion was, whether Covenant would lie? it was admitted, that regularly it doth not lie by the Leſſee againſt the Leſſor, but where the Leſſee is evicted; and therefore three Judges held, that becauſe the Land was excepted, on which the Pump ſtood, and the Leſſee could not come to mend it, without being a Treſpaſſer, that amounted to an Eviction; but upon a Writ of Error in the Exchequer-Chamber, the Judgment was reverſed, becauſe Covenant will not lie upon the Word *Demiſit*, without an Expulſion by the Leſſor or a Stranger; beſides, where Covenant is brought upon the Word *Demiſit* or *Conceſſit* by the Leſſee, the Judgment is not only, that he ſhall recover Damages, but the Term it ſelf, which is yet to come, which cannot in this Caſe be executed, becauſe the Leſſor never meddled with the Pump. *Sid.* 427. *Pomfrett* verſus *Ricroft.* Vent. 26, 45. Antea. 12.

14. Upon a Bill in Equity, the Caſe was, upon Articles of Marriage it was recited, that *whereas a Fine is intended to be levied to ſuch Uſes, &c.* and now a Bill was exhibited to enforce the Levying of this Fine, the Queſtions were, whether this was a *Covenant to levy* it? and if it was, whether the Court could decree the Defendant to levy it? and as to both Points, the Lord *Chancellor Finch* was of Opinion in the Affirmative; it was agreed, that there was no need of the Word *Covenant* to make a Covenant, for any Thing under the Hand and Seal of the Parties, which imports an Agreement, amounts to a *Covenant*, and 'tis the Intent which makes the Agreement; and where there is ſuch an Agreement an Action of Covenant lies, if 'tis under Hand and Seal. 2 *Mod.* 86. *Hollis* verſus *Carr.*

15. In Covenant, *&c.* the Caſe was, a Jointure was made to the Wife for Life; the Huſband died, and the Lands deſcended to his Son, who granted a Rent-Charge of 200 *l. per Ann.* to Truſtees in Truſt for the Widow for her Life, and this was to be in Diſcharge of her

Jointure, with a Clauſe of Diſtreſs, if the Rent was not paid, and a Covenant to pay the Money to the Truſtees *to the Uſe of the Widow*; and in an Action of Covenant brought, the Breach aſſigned was, that he had not paid the Money to them *for the Uſe of the Widow*; and upon a Demurrer to this Declaration, it was objected, that an Action of Covenant would not lie, becauſe this Grant being executed by the *Statute of Uſes*, a *Diſtreſs* is the proper Remedy; which is very true; but here is a double Remedy, either by Diſtreſs, or by an Action of Covenant upon the *expreſs Covenant to pay, &c.* Then it was objected, that admitting Covenant would lie, the Breach was not well aſſigned; for it was, that the Defendant had not paid the Rent to the Truſtees, *to the Uſe of the Widow*, which is a Negative pregnant. *Sed per Curiam*, 'tis well aſſigned, being according to the very * Words of the Covenant it ſelf. 2 *Mod.* 139. *Cook* verſus *Herle*.

* Poſtea (E) 1.

16. Debt upon Bond, the Condition was, that the Obligor did acknowledge himſelf to be indebted to the Obligee in 40 *l. which he did thereby Covenant to pay*, when ſuch a Bill of Coſts ſhould be ſtated by two Attornies, to be choſen by them, *&c.* and the Plaintiff declares, that he did Name an Attorney, but the Defendant being deſired to name one, he refuſed; upon a Demurrer it was objected againſt this Declaration, that this ſhall not be taken for a *Covenant*, but an *Agreement ſolvendum* the Money when the Bill of Coſts ſhould be ſtated; and by the Plaintiff's own ſhewing the Bill was not ſtated, therefore nothing is due: *Sed per Curiam*, this is an *expreſs Covenant to pay*; for if it ſhould be expounded as the Defendant would have it (*viz.*) *ſolvendum* the Money when the Bill is ſtated, then it will be in his Power to defeat the Bond, for if he would never chuſe an Attorney, then the Bill could never be ſtated; therefore the Plaintiff having named an Attorney ought to recover 2 *Mod.* 266. *Otway* verſus *Holdip*.

17. Covenant by an Aſſignee of a Reverſion *againſt the Leſſees*, upon a Leaſe for Years, rendring 70 *l. per Annum* Rent, which they for themſelves, and for their Executors, Adminiſtrators and Aſſigns, covenanted to pay to the Leſſor, or his Aſſigns, according to the Reſervation, and this Action of covenant was brought for Rent arrear, and incurred after the Aſſignment; one of the Defendants ſuffered Judgment to go by *Nil dicit*, the other pleaded in Bar, that before the Aſſignment, he, by the Conſent of the Leſſor, releaſed the other Leſſee, and that the Leſſor accepted him as his Tenant alone, and that he paid the Rent to him, which the Leſſor accepted as of his Tenant; and upon Demurrer it was objected, that the Covenant enſuing the Rent a Diſcharge of the one is a Diſcharge of the other: *Sed per Curiam, no Act of the Leſſee can diſcharge himſelf, or his Executors, of a ſpecial Covenant*, and that the Aſſignee of the Reverſion ſhall have the Benefit of it by Vertue of the * Statute. *T. Jones* 144. *Aſhurſt* verſus *Mingy*.

2 Bulſt. 282. Othoe v. Hemmings S. P. * 32 H. 8.

Hob. 12. S. C.

18. Leſſee for Years covenanted to Repair; Provided always, and *'tis agreed*, that the Leſſor ſhall find rough Timber, *&c.* adjudged, this is a Covenant on the Part of the Leſſor, and 'tis the Word *Agreed* which makes the Covenant, and it ſhall not * Qualify the Covenant of the Leſſee. 1 *Brownl.* 23. *Holder* verſus *Taylor*.

* *If the Word* Agreed *had been left out, it would be a Qualification of the Covenant of the Leſſee.*

19. Covenant upon a Charter-Party for Freight of a Ship; the Defendant pleaded, that the Ship was loaded with *French* Goods prohibited by Law, *&c.* and upon a Demurrer to this Plea the Plaintiff had Judgment; becauſe when the Defendant did covenant the Thing was lawful, and therefore the Covenant is binding, tho' it was afterwards prohibited by Act of Parliament. 3 *Mod.* 39. *Braſon* verſus *Deane*.

20. The Teſtator, by a Writing ſealed by himſelf, acknowledged, that he was accountable for all ſuch Money as ſhould be charged by him on *W. R.* to be paid to *L. R.* and in an Action of Covenant brought againſt the Executor, the Plaintiff declared, that the ſaid Teſtator charged ſo much Money on *W. R.* payable to *L. R. &c.* it was objected, that Covenant would not lie upon this Writing, even againſt the Teſtator himſelf, but an *Account*; and tho' an *Account* will not lie againſt an Executor, yet it ſhall not be turned into an Action of Covenant, which was not a Covenant againſt his Teſtator; but adjudged, that Covenant will lie on any Words in a Deed, purporting an Agreement for Payment of Money. 1 *Lev.* 47. *Brice* verſus *Carr*. *See* 1 *Cro. Gury* verſus *Reaſon. S. P.*

21. Debt on a Charter-Party, which was thus penn'd, (*viz.*) This Indenture Charter-Party Witneſſeth, that *B. with the Conſent of C.* hath let a Ship to *R.* and *W.* (the Defendants) for a Voyage, *&c.* and the ſaid *R.* and *W.* (the Defendants) did covenant to pay unto *B.* ſo much, *&c.* and they alſo *covenanted* with the ſaid *B. and likewiſe with the aforeſaid C. to pay unto him* 200 *l.* the Action was brought by *C.* for the Money, tho' he was *no Party to the Deed*; but adjudged, that this being in the Nature of a Deed-Poll, and not a Deed between the Parties, (*viz.*) Between *B.* of the one Part, and *R.* and *W.* of the other Part, they may covenant in ſuch a Deed with a Stranger, (*viz.*) with one who is no Party to that Deed. 2 *Lev.* 74. *Cooker* verſus *Child*. 1 *Lutw.* 302. *Lucke* verſus *Lucke*. *S. P. Antea* Breach of Covenant. (B) 25. *S. C.*

22. The

22. The Leſſor made a Leaſe of an Houſe for Years, *excepting* two Rooms, *and free Paſſage to them*, the Leſſee aſſigned the Term, and the Leſſor brought Covenant againſt the Aſſignee, for diſturbing him in the *Paſſage to thoſe Rooms*; adjudged, that the Action lies; 'tis true, if the Diſturbance had been *in the Chambers*, this Action would not lie, becauſe they were *excepted*, and ſo not leaſed at all; but where the Leſſee agrees to let the Leſſor have a Thing out of the demiſed Premiſſes as a *Way*, *&c.* in ſuch Caſe Covenant lies for the *Diſturbance*; which Covenant goes with the Tenement, and binds the Aſſignee. 1 *Salk.* 196. *Cole's* Caſe.

23. In Covenant the Plaintiff declared, that the Defendant by Deed did *grant, bargain and ſell*, *&c.* to the Plaintiff, *&c. Provided*, that if the Defendant paid for ſo much Money, *&c.* to the Plaintiff, *&c.* it ſhould be lawful for him (the Defendant) to re-enter; and *he covenanted to pay the Money*, and for Non-payment this Action was brought: After a Judgment by Default, and a Writ of Enquiry executed, it was objected, that nothing paſſed by this Deed, becauſe it was not *enrolled*; and if ſo, then the Covenants are void; which is very true, if the Covenants were Relative and Dependant to a void Deed, but not where they are Separate and Independant, as this is; and in ſuch Caſe 'tis not material whether any Eſtate paſſed by the Deed, and the Plaintiff need not declare *quod* (the Defendant) *conceſſit*; but the beſt Way is *quod cum Teſtatum exiſtit.* 1 *Salk.* 199. *Northcote* verſus *Underhill.*

24. In Covenant, the Plaintiff declared, that *T. S.* being indebted to him, and arreſted at his Suit; the Defendant in Conſideration, that the Plaintiff would order the Bailiff to let him the ſaid *T. S.* go at large, undertook and covenanted with the Plaintiff to bring in the Body, and to deliver the ſaid *T. S.* to the Cuſtody of the Bailiff by ſuch a Day, which he had not done; the Defendant craved *Oyer* of the Deed, which was thus: ſſ. *I*, R. W. *&c. do promiſe and engage my ſelf to bring in the Body of* T. S. *&c. to the Cuſtody of* B. B. *Bailiff*, &c. *by ſuch a Day*; and thereupon the Defendant demurred to this Declaration; adjudged, that all ſuch Matter of Fact which is contained in the Deed it ſelf, is immaterially ſet forth in the Declaration, and that the Plaintiff, the Covenantee, cannot bring this Action of Covenant, becauſe he is not ſo much as * named in the Deed, or any Party to it. 1 *Salk.* 197. *Green* verſus *Horne.* * Pl. 21.

(C)

Where, and in what Caſes, an Action of Covenant will not lie.

1. TEnant for Life, Remainder in Fee; the Tenant for Life made a Leaſe for fifteen Years, *rendring Rent*, and died; he in Remainder entered, and the Leſſee brought an Action of Covenant againſt the Executor of the Tenant for Life; adjudged, that the Action would not lie againſt the Executor, becauſe this was a Covenant in Law; for there was * no expreſs Covenant made by the Tenant for Life, that the Leſſee ſhould enjoy it during the Term of fifteen Years; therefore it muſt determine with his Eſtate and Intereſt, unleſs it had been broken in his Life-time; but if he had been ſeiſed of an *Eſtate in Fee*, inſtead of the Eſtate for Life, and had made ſuch a Leaſe for Years, and died, an Action of Covenant would lie againſt his Heir, tho there had been no expreſs Covenant; and that is by Reaſon of the Privity of Eſtate between the Anceſtor and Heir. *Hill.* 9 *Eliz. Dyer* 257. * Antea (B) 13.

2. Covenant, that ſuch Lands ſettled on a Woman for her Jointure, were of the Value of 100 *l. per Ann.* and ſo ſhould continue, *notwithſtanding any Act done by the Covenantor*, againſt whom an Action of Covenant was brought, for *that the Lands were not of that yearly Value*; adjudged, that the Action did not lie, except ſome Act done by him was the Cauſe which made them not of that Value. *Cro. Eliz.* 43. *Rich* verſus *Rich.* 1 And. 134. Antea *Breach of Covenant.* (A) 8.

3. *Tenant for Life* made a Leaſe for *Years*; the Leſſee *bargained and ſold* the Term to *W. R.* to hold in as large and ample Manner and Form as he himſelf ought to hold it; the *Tenant for Life died*, and then the *Bargainee* brought an Action of Covenant againſt the *Bargainor*; adjudged, that the Action doth not lie, unleſs there was a *Warranty* in the Bargain and Sale; for otherwiſe, notwithſtanding the Words, *Bargain and Sale*, 'tis only a bare *Aſſignment* of the Intereſt of the Bargainor, which was now determined by the Death of the Tenant for Life; for thoſe Words will not imply a Warranty. *Cro. Eliz.* 157. *Landydale* verſus *Cheyney. Trin.* 30 *Eliz.* 1 *Leon.* 179. *S. C.* reported by the Name of *Cheney* verſus *Langley.*

4. Leaſe for Years to the Defendant, who by Deed had granted his Intereſt to *W. R.* and covenanted, that he and *his Aſſignes* ſhould quietly enjoy; *W. R.* aſſigned his Intereſt to *M. R.* by Parol, and that Aſſignee being put out of Poſſeſſion by a Stranger, brought an Action of Covenant againſt the firſt Leſſee, who had covenanted with *W. R.* that he, *and his Aſſigns*, ſhould quietly enjoy: Now, if that Leaſe was only a Leaſe by Eſtoppel, then adjudged, that an Aſſignee of a Leaſe by Eſtoppel ſhall not take Advantage of that Covenant. *Cro. Eliz.* 675. *Nokes* verſus *James. Moor* 419. *S. C.* 4 *Rep.* 8. *Nokes's* Caſe. *S. C. Antea* (B) 6. *S. C.* Yelv 175. S. C.

5. The Father covenanted upon the Marriage of his Son, that during his Life, his Son and his Wife ſhould have Diet in the Father's Houſe, and if *they ſhould diſagree*, then the Father *covenanted to pay to the Son and his Wife* yearly, during their Lives 20 *l.* the Son died,

died, his Widow married again, and *diſagreed* to have her Diet in the Father's Houſe, and thereupon ſhe and her Husband brought an Action of Covenant againſt him for the 20 *l.* adjudged, that the Action would not lie, for the Diſagreement of one of them was not ſufficient, becauſe the Words were *joint*, (viz.) *If they ſhould diſagree*; ſo that the Father muſt diſagree as well as the Daughter. *Bendl.* 186. *Mich* 2 *Car. Crabb* verſus *Tucker. S. P.*

6. The Vendor covenanted with two joint Purchaſers, and *each of them*, that the Lands which he had ſold to them were diſcharged of all Incumbrances; one of them brought an Action of Covenant; but adjudged, that it would not lie by one alone, but that both muſt join. *Trin.* 30 *Eliz.* 2 *Leon.* 47. *See antea* (A) 3.

7. Three Licenſes to ſell Wine were ſold to the Vendee, who covenanted with the Vendor, to give 10 *l.* for them, and the Vendor covenanted with the other, that he ſhould enjoy the ſaid Licenſes; adjudged, that neither of them could have an Action of Covenant againſt each other; for where a Man doth covenant to pay Money at a Day, and doth not pay it, an *Action of Debt* lieth for the Money, and not an Action of Covenant. *Godb.* 217. *Chawner* verſus *Bowes.*

Godb. 212. Hob. 12. S. C.

8. In Debt brought by the Sheriff againſt the Under-Sheriff, upon a Bond for Performance of Covenants to ſave him harmleſs from Eſcapes; the Breach aſſigned in the Replication was, that a Priſoner was taken in Execution, *and ſuffered* to go at Large, and that the Plaintiff had paid the Debt, ſo the Defendant had not ſaved him harmleſs, *&c.* And upon Demurrer, it was adjudged, that the Breach was well aſſigned, tho' the Plaintiff had not ſet forth, *that the Defendant had ſuffered him to go at Large*; for in what Manner ſoever he goes at large, 'tis an Eſcape. *Moor.* 856. *Norton* verſus *Symms. Cro. Eliz.* 749. *S. C.*

9. A Merchant covenanted with a Maſter of a Ship, that if he would *bring the Goods Freighted, &c.* to ſuch a Port, then he would pay him ſuch a Sum; and in an Action of Covenant brought by the Maſter of the Ship, he ſet forth, that he was robbed of *Part of the Goods by Pirates*, and that he brought the Reſidue to the *Port* appointed, and there unladed them, but that the Merchant had not paid him; and adjudged, that he ought not, becauſe the Maſter of the Ship had not brought *all the Goods* to the Port; ſo, that having not performed his Agreement, he cannot bring an Action of Covenant againſt the Merchant. 1 *Brownl.* 21. *Bright* verſus *Cowper.*

10. *Aſſumpſit*, in Conſideration that the Plaintiff would forbear his Proceedings againſt the Defendant in the Court of Chancery, he promiſed to ſave the Plaintiff harmleſs from all Actions which might be brought againſt him, for or concerning a Leaſe which he (the Defendant) had aſſigned to the Plaintiff, and averred, that he did forbear to proceed, and that *W. R.* had brought *an Action on the Caſe againſt him in B. R. ratione demiſſionis pred'*, and that the Defendant had not ſaved him (the Plaintiff) harmleſs: Upon *Non aſſumpſit* pleaded, the Plaintiff had a Verdict; but upon a Writ of Error brought, the Error aſſigned was, that the Declaration was ill, becauſe the Plaintiff did not ſet forth in particular, what Action was brought againſt him, or that it was brought for a Matter *in Being*, at the Time of the Promiſe made; and for theſe Reaſons the Judgment was reverſed. *Moor* 705. *Morſe* verſus *Roſſe.*

11. Leaſe for Years, in which the Leſſee covenanted with the Leſſor to do for him all reaſonable Works *with his Carts and Carriages*, and otherwiſe, as he ſhould require; and in an Action of Covenant brought by the Leſſor, he aſſigned the Breach, that he had required the Leſſee *to carry three Loads of Coals* for him to ſuch a Place, which he refuſed to do, and did not do it; and upon a Demurrer to this Plea the Court inclined againſt the Plaintiff, becauſe the Leſſee is not bound to keep Carts to ſerve the Leſſor; he is only to do the Work *when he hath Carts*, and is required to do it. *Mich.* 2 *Car. Latch.* 202. *Mannors* verſus *Veſey.*

12. The Maſter of a Ship covenanted that he would make ſuch a Voyage, and bear all Loſſes and Damages which ſhould befall the Ship, or Goods in her, (*Perils of the Sea only excepted*); and in an Action of Covenant brought, for not performing this Voyage, the Defendant pleaded, that upon making this Voyage at Sea, *the Ship was taken by Pirates*; and upon Demurrer, this was held a good Plea; for *Pyrates are Perils at Sea*, and *Perils, &c.* being excepted in the Covenant, for that Reaſon it was not broken, and by Conſequence the Action would not lie. *Style* 132. *Pickering* verſus *Berkley.*

13. *Aſſumpſit, &c.* in which the Plaintiff declared, that he, at the Defendant's Requeſt, was bound with him in a Bond of 200 *l.* and that in Conſideration thereof the Defendant promiſed to ſave him (the Plaintiff) harmleſs, and obliged himſelf, and his Heirs, in 200 *l.* for the Performance of the Promiſe; that the Money was not paid by the Defendant, neither did he ſave the Plaintiff harmleſs, but that *per debitum legis proceſſum* he was compelled to pay the Money; the Defendant demurred to this Declaration, for that the Plaintiff did not alledge, that the Defendant did not pay him the 200 *l.* but adjudged, that a verbal Obligation cannot effect the Heir, therefore 'tis void, and that this Action is brought upon the Promiſe to ſave harmleſs. 1 *Vent.* 75. *Gibbons* verſus *North. Sid.* 447. *S. C.*

(D)

Of Covenants and Conditions, and Promiſes to ſave harmleſs.

See *Notice.* (B) 21.

1. IN an Action of Covenant it was adjudged, that where there is a Covenant to ſave harmleſs againſt a *certain Perſon*, there the Covenantor muſt ſave the Covenantee harmleſs againſt the *Entry* of that Perſon, be it by a * *wrong* or rightful Title, but if 'tis to ſave harmleſs againſt all Perſons, there the Entry and Eviction muſt be by a *lawful Title*. *Cro. Eliz.* 213. *Foſter* verſus *Mapes*. *Owen* 100. *S. C.* reported by the Name of *Foſter* verſus *Wilſon*. See 2 *Lev.* 37. Owen 100. S. C. 1 Leon. 324. S. C. Hob. 35. S. C. *cited to be ſo adjudged.*

2. Debt upon Bond, conditioned to ſave the Plaintiff harmleſs from a Bond made to *W. R.* the Defendant pleaded *Non damnificatus*, the Plaintiff replied, that he was ſued by *W. R.* to the *Exigent*, and then he appeared, and that *W. R.* had *obtained a Judgment* againſt him; adjudged, that immediately upon the *Judgment given*, tho' * Execution was not taken out, the Plaintiff was damnified, becauſe his Goods and Lands are liable to the Execution, and if he ſhould afterwards have Occaſion to ſell his Lands, he cannot warrant them to be free from Incumbrances, becauſe they are liable to this Judgment. *Trin.* 34 *Eliz. Cro. Eliz.* 261. *Baſh* verſus *Ridgley*. * Poſtea (F) 1, 3, 5. * Poſtea 16.

3. The Diſtinction which is made and allowed in the Books is thus, (*viz.*) where the Defendant pleads in the * *Affirmative*, as in the Caſe laſt mentioned, that *he ſaved the Plaintiff harmleſs*, there he muſt ſhew *How*, becauſe the Court may Judge thereof; but where he pleads in the *Negative Non damnificatus*, 'tis good, without ſhewing *How* or by what Means; yet if the Plea had been in the *Affirmative*, without ſhewing *How*; and tho' 'tis ill, for that Reaſon the Plaintiff ſhall not take Advantage of it, without demurring ſpecially, and ſhewing the Cauſe, * but after a Replication he comes too late. *Cro. Eliz.* 253. 2 *Cro.* 363. 1 *Leon.* 71. *contra.* 2 *Rep.* 4. 1 *Lutw.* 424. *Lovelace* verſus *Bickham*. *S. P.* * Poſtea 17, 18. * 1 Lev. 194.

4. In an Action of Debt on a Bond, the Caſe was, one *Dowman* borrowed Money upon an uſurious Contract, and he, together with the Plaintiff *Button*, entered into a Bond to pay the Money to *Wilmer* the Obligee, (but *Button* did not know the corrupt Agreement) and *Dowman* gave *Button* a Counterbond to ſave him harmleſs from *Wilmer*, upon which Bond this Action was brought; the Defendant pleads in Bar the Statutes made againſt Uſury, and that the Bond was void, therefore the Plaintiff was diſcharged of it; and upon a Demurrer to this Plea it was adjudged, that the Action lies, for tho' the firſt Bond was void, yet the Plaintiff might be damnified. 2 *And.* 121. *Button* verſus *Dowman*.

5. Debt upon Bond for Non-performance of an Award, in which, amongſt many other Things, it was awarded, that the Defendant ſhould *acquit*, *diſcharge*, and ſave harmleſs the Plaintiff, and the Plea was * *Non damnificatus* generally; and upon Demurrer it was adjudged ill, becauſe the Defendant ought to ſhew *how he had diſcharged* the Plaintiff, eſpecially, becauſe of the Word *Acquit*, which implies that it muſt be by Deed. *Owen* 71. *Brett* verſus *Andrews*. 1 Leon. 71. 4 Leon. 62.

6. Caſe, *&c.* for that in Conſideration the Plaintiff would *diſcharge* a third Perſon, then under an Arreſt, the Defendant promiſed to pay the Debt, and alledged, that he did *diſcharge him*; after a Judgment for the Plaintiff, and a Writ of Error brought in *B. R.* the Error aſſigned was, that * *exoneravit* generally was not good, without ſhewing how; 'tis true, if it had been to diſcharge him from a Debt, or from a Rent, he muſt ſhew how, but in this Caſe he need not. *Cro. Eliz.* 913. *King* verſus *Hobbs*. Traverſe. (D) 12. *S. C.* 3 Bulſt. 209. Yelv. 25. S. C. Poſtea 13.

7. The Leſſor made a Leaſe to another for Life, and covenanted for himſelf and his Heirs, that he would ſave the Leſſee harmleſs, from any *claiming by from or under him*; the Leſſor died, and his Wife recovered in Dower againſt the Leſſee, who thereupon brought an Action of Covenant againſt the Heir of the Leſſor, and recovered, becauſe the Wife could not have Dower, but as *claiming it under her Husband* the Covenantor; but if ſhe had been the *Mother* of the Covenantor, it had been otherwiſe. *Trin.* 21 *Jac. Godb.* 333.

8. *Covenant* againſt the Defendant, who had covenanted to diſcharge and ſave harmleſs the Plaintiff againſt a *ſingle Bill*, in which he was bound with the Defendant, and for his Debt, and aſſigned the Breach, in that the Defendant had not paid the Money due on that Bill, but that a Suit at Law was brought againſt the Plaintiff for it, and Judgment obtained againſt him, which was ſtill in Force; the Defendant pleaded, that he paid the Money at the Day, and that he gave the Plaintiff Notice thereof before he brought this Action; and upon Demurrer to the Plea, the Plaintiff had Judgment, becauſe the Plea was naught, it did not anſwer the Declaration. 1 *Brownl.* 24. *Rider* verſus *Took*. Poſtea (N) 9. S. C.

9. Debt upon Bond, conditioned, that whereas the Defendant by Indenture had bargained and ſold an Advowſon to the Plaintiff, and to his Heirs, if he acquitted, *diſcharged*, and ſufficiently ſaved harmleſs the Plaintiff from all Bargains, Incumbrances, Charges, *&c.* that then the Bond ſhould be void; the Defendant pleaded, that *he ſaved the Plaintiff harmleſs*, as in the Condition; and upon Demurrer this was adjudged an ill Plea, becauſe he did not ſhew how he had *diſcharged* him, for he ought to ſhew that in a particular Manner. *Trin.* 5 *Jac.* 2 *Cro.* 165. *Allington* verſus *Tearthner*. *Style* 353. *Bond* verſus *Martin*. *S. P.* * Antea 5, 6.

10. The Defendant ſold Lands, and covenanted with the Vendee to ſave him harmleſs, *upon Requeſt*; the Land was afterwards extended, before any Requeſt made; adjudged, that this was no Breach of the Covenant, becauſe it was by the Negligence of the Plaintiff himſelf. *Moor* 189.

11. *Lang-*

11. *Langhorn* had an Action depending in an inferior Court againſt one *Moon*, and another in the ſame Court againſt one *Auſtin*, and now *Eykins*, the Plaintiff, procured one *Linacre* to be Bail for *Auſtin*, and *Moon* deſired the ſaid *Linacre* to be Bail for him likewiſe, and in Conſideration thereof promiſed to ſave him harmleſs for being Bail for *Auſtin* and for himſelf; *Langhorn* proceeded, and recovered both againſt *Auſtin* and *Moon*, and all that was recovered againſt *Auſtin* was paid by *Eykins*, who had procured *Linacre to be Bail*, and this being not repaid by *Moon*, this Action was brought againſt him upon the ſaid Promiſe, in which all this Matter was ſet forth, and that he had not paid the Money, or ſaved the Plaintiff harmleſs, *licet ad hoc faciendum ſæpius requiſitus*; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict; it was inſiſted in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſet forth how much he was damnified, nor that he required Satisfaction for it; 'tis true, this he ought to have done, if he had been a Party to the Suit below, but he was not, 'tis ſufficient for him to declare, that he was damnified; beſides, he is not the Party who had the immediate Loſs, but the Bail, and until he had accounted with the Bail, he cannot tell how much he is damnified; but there is a Difference where the Promiſe is to ſave one harmleſs (as in the Principal Caſe) and where 'tis to make Satisfaction for the Loſs he ſhould ſuſtain, for in the laſt Caſe, he who made the Promiſe ought to have Notice how much the other was damnified, becauſe that other actually knows how much it is. 2 *Roll. Rep.* 462. *Eykins* verſus *Moon.*

1 Roll. Rep. 8. S. C. 2 Bulſt. 93. S. C.

12. In Debt upon Bond, for Non-performance of an Award, in which a Suit in Chancery was recited between the Parties, and the Award was, that the Suit ſhould ceaſe, and that the Plaintiff *ſtaret acquietatus* of all Matters in the Bill; the Defendant pleaded, *quod ſtetit acquietatus inde*, but did not ſhew *how*; this was held a good Plea, becauſe he was acquitted by the Award it ſelf; but where a Man is obliged to *acquit* another from a Debt or Suit, 'tis not ſufficient for him to plead * *Non damnificatus* generally, but he ought to ſhew how and in what Manner. 2 *Cro.* 339. *Freeman* verſus *Sheen.*

* Antea 8, 9, 11.

13. Debt upon Bond, conditioned, to indempnify Lands demiſed to the Plaintiff, from the yearly Rent of 20 *l.* during the Term; the Defendant pleaded, that from the Time of the Making the ſaid Bond, *hucuſque* * *exoneravit*, *&c.* and upon a Demurrer to this Plea it was adjudged ill, for he ought to ſhew how, *&c.* 2 *Cro.* 165. *Horſman* verſus *Obbins.*

* Antea 6. *See* Goffe v. Elkin.

14. Debt upon Bond, conditioned, that whereas the Plaintiff and one *Haws* were bound in one Bond to perform Covenants in an Indenture; now if the ſaid *Haws* ſhould perform the ſaid Covenant, and alſo if the Defendant ſhould ſave the Plaintiff harmleſs of the ſaid Bond in which he became bound with the ſaid *Haws*, then, *&c.* The Defendant, upon *Oyer* of the Condition pleaded, that *Haws had performed the Covenants*, and that he had ſaved the Plaintiff harmleſs, *&c.* and upon a general Demurrer this Plea was adjudged ill, becauſe the Defendant did not ſet forth the Covenants in the Indenture, and ſome of them might be in the Negative; beſides, he ought to have ſet forth * *how* he had ſaved the Plaintiff harmleſs. *Allen* 72. *Ellis* verſus *Box.*

* Antea 9, 11.

15. Leaſe for Years, rendring Rent, the Leſſee aſſigned the Term to the Defendant *Pollard*, who covenanted to ſave the Leſſee harmleſs from all Covenants, Agreements and Payments in the original Leaſe, and afterwards he leaſed Part, (*viz.*) a Barn, to the ſame Leſſee who had aſſigned the Term to him, who put Hay into the Barn, and the firſt Leſſor diſtrained it for Rent, whereupon he brought an Action of Covenant againſt *Pollard*, who had covenanted to ſave him harmleſs as aforeſaid; but adjudged, that the Action would not lie, becauſe Hay in a Barn is not diſtrainable for Rent, and if the Diſtreſs was illegal, then the Covenant is not broken, becauſe it extends only to lawful Incumbrances, and not to thoſe which are wrongful. *W. Jones* 197. *Cowper* verſus *Pollard.*

16. The Leſſor covenanted to ſave the Leſſee harmleſs againſt all *Suits*, *Evictions*, and *Expulſions*, *&c.* and in an Action of Covenant brought, the Defendant pleaded, that *W. R.* outed him by an *Habere facias poſſeſſionem*; and upon a Demurrer to this Plea it was adjudged ill, becauſe he had pleaded an Expulſion by an * Execution, without ſhewing a Judgment; he ſhould have ſet forth the Ejectment and the Proceedings to the Judgment; beſides, he ought to have pleaded, that *W. R.* had a good * Title before the Leaſe made. 1 *Lev.* 83. *Nicholas* verſus *Pullen.*

*Antea 2.

*Antea 1.

17. Upon a Bond, conditioned to ſave the Plaintiff harmleſs of, and from all Coſts and Damages which may ariſe by Reaſon of ſuch a Law-Suit; the Defendant pleaded *Non damnificatus* generally, and upon Demurrer it was objected, that if the Condition had been to ſave the Plaintiff harmleſs, and no more, this had been a good Plea; but to ſave harmleſs *from all Coſts and Damages*, *&c.* he ought to ſhew how; which is very true, if he had pleaded in the * *Affirmative*, that he had ſaved the Plaintiff harmleſs, but having pleaded in the *Negative*, *Non damnificatus*, the Plaintiff ought to reply and ſhew how he was damnified, eſpecially in this Caſe; becauſe the Condition was to ſave him harmleſs from ſomething that was incertain at that Time, (*viz.*) from the *Coſts and Damages* which might ariſe from a Law-Suit; but if it had been to ſave him harmleſs from a particular and certain Thing, there *Non damnificatus* had not been good, without ſhewing how. 5 *Mod.* 243. *Harris* verſus *Pett.* See 2 *Saund.* 84. *See* Conditions. (E) 1.

*Antea 3. Poſtea 18.

18. Debt upon Bond, conditioned to ſave harmleſs *T. S. and the mortgaged Lands*, and to pay all Intereſt for the principal Sum; the Defendant pleads, that *T. S. non fuit damnificatus*, for that he (the Defendant) paid the Principal and Intereſt due at ſuch a Day; and upon a Demurrer to this Plea it was adjudged ill, becauſe *Non damnificatus* goes to the Perſon of *T. S.* and not to the Lands. 2 *Mod.* 325. *Shaxton* verſus *Shaxton.*

19. Debt upon Bond, conditioned, to *acquit, diſcharge, and ſave harmleſs* the Pariſh, of and from a Baſtard-Child; the Defendant pleaded *Non damnificatus* generally, and upon a Demurrer it was objected, that the Defendant ought to ſhew how he *acquitted and diſcharged* the Pariſh; for *Non damnificatus* goes only to the laſt Part of the Condition, *viz.* to ſave harmleſs: *Sed per Curiam*, if the Defendant had pleaded, that he did ſave the Pariſh harmleſs, it had not been good, without ſhewing how, but here it was in the * Negative, (*viz.*) that the Pariſh was not damnified, and if it was, the other Side ſhould reply and aſſign a Breach. 3 *Mod.* 252. *Mather* verſus *Mill.* * Antea 3, 17.

20. Leaſe by the Dean and Chapter of *Norwich*, dated 8 *Eliz.* to *T. S.* for ninety nine Years, afterward they made another Leaſe, *Anno* 42 *Eliz.* to *W. R.* for three Lives, and covenanted to ſave him harmleſs againſt *T. S.* the firſt Leſſee; adjudged, that if he is diſturbed, he may bring an Action againſt the Dean and Chapter; for tho' their Leaſe for ninety-nine Years was void, yet their Covenant to *W. R.* was collateral, and broke immediately. *Dean and Chapter of Norwich* verſus *Waller.* *Owen* 136. 1 Brownl. 21. S. C. Moor 877. S. C.

21. Ruled, that where one pretends to a Title of Lands, and gives the Tenants Security to *ſave them harmleſs*, upon Payment of the Rents to him, and afterwards *W. R.* recovers in Ejectment againſt them, yet they have no Remedy upon their Securities till the meſne Profits are likewiſe recovered, which is from the Time of the Action brought for them, and without an actual Entry there can be no Recovery of the Profits. *Mod. Caſes* 222.

22. Debt upon Bond, conditioned, to ſave the Plaintiff harmleſs againſt all *Eſcapes* which he had already ſuffered as *Warden of the Fleet*; upon a Demurrer it was objected, that this Bond was void, becauſe it was to ſave him harmleſs for ſuffering Eſcapes, that being what he ought not to do by Law; but adjudged, that if it had been to ſave him harmleſs from all *Eſcapes hereafter*, *&c.* it had been void, becauſe it would be unlawful to ſuffer them; but a Bond conditioned to indempnify the Plaintiff from a Penalty *already incurred againſt Law*, is good. *Mod. Caſes* 225. *Fox* verſus *Tilly.*

(E)

That the Vendor hath a lawful Eſtate, and full Power to convey, and will warrant and defend, &c. See *Warrantia Chartæ.* (A) 1.

1. LEaſe for ſix Years, if *W. R.* ſo long lived, in which the Leſſor covenanted, that he had full and lawful Power to demiſe the Lands; the Leſſee brought an Action of Covenant, and aſſigned the Breach, that the Leſſor *had not full Power and Authority to demiſe, &c.* the Defendant pleaded a Concord between him and the Plaintiff, and that he had paid 20 *l.* to the Leſſee (now Plaintiff) in Satisfaction of that and all other Covenants, upon which they were at Iſſue, and it was found for the Plaintiff; and upon a Writ of Error brought, it was objected againſt the Declaration, that the Plaintiff did not allege what Perſon had a Right, Title, or Intereſt in the Land at the Time of the Making the Leaſe, by which it might appear to the Court, that the Defendant had not Power to demiſe; but adjudged, that the Breach was well aſſigned in the *Negative*, purſuant to the very * Words of the Covenant, and that it lies properly in the Knowledge of the Defendant, to ſhew what Power he had to make a Leaſe, and not in the Knowledge of the Leſſee, who is a Stranger to ſuch Power, and therefore he ought to ſhew what Power and Authority he had to make the Leaſe. *Trin.* 10 *Jac.* 2 *Rep.* 60, 61. *Bradſhaw's* Caſe. 2 *Cro.* 304. *S. C.* 2 Cro. 304. * Antea (B) 16. Poſtea (F) 23.

2. The Leſſor covenanted, that he had lawful Right and Eſtate to leaſe the Lands, *&c.* and in an Action of Covenant brought by the Leſſee, the Breach aſſigned was, that the Leſſor had not a lawful Right and Eſtate to make a Leaſe; and adjudged, that the Breach was well aſſigned, for the Covenant being general, the Breach may be aſſigned as general as the Covenant, without ſhewing who had the Eſtate, or that a Stranger had evicted him by Title. 2 *Cro.* 304. *Salmon* verſus *Bradſhaw.* *Antea pl.* 1. *See* Breach of Covenant. (B) 1. *Muſcott* verſus *Ballett. S. P.* Antea 1.

3. Debt upon Bond, conditioned, that the Obligor ſhall and will Warrant and *defend* ſuch Lands againſt *W. R.* and all others; the Defendant pleaded, that the Plaintiff was not *lawfully diſturbed*; and upon a Demurrer to this Plea it was objected, that the Word *Defend* imports a Defence from all Treſpaſſes as well as Titles; but adjudged, that the Defence ſhall be only againſt *Titles*, and therefore the Plea is good. *Moor* 175. *Grocook* verſus *White.*

4. Covenant, *&c.* to make an Aſſurance of Lands, and that notwithſtanding any Act *done by the Covenantor*, that he had a good Eſtate and Power to convey to the Uſe of the Wife for Life, for her Jointure, *and that the Lands were of the* * *yearly Value of* 200 *l.* adjudged, that this ſecond Part of the Covenant is abſolute, and not reſtrained to any Act done by the Covenantor. *W. Jones* 403. *Hughes* verſus *Bennett.* *Expoſition of Sentences in Deeds.* † Poſtea (G) 5. S. P.

5. Covenant, *&c.* in which the Plaintiff declared, that the Defendant ſold Lands to him which he had purchaſed of one *Woolaſtone*, a Truſtee for the Sale of *Delinquents Eſtates*, and covenanted, that he was ſeiſed of a good Eſtate in Fee, *according to the Indenture to him by Woollaſtone*, and aſſigned the Breach, that he was not ſeiſed of a good Eſtate in Fee; the Defendant pleaded, that he was ſeiſed of as good an Eſtate as *Woollaſtone* conveyed to him; and upon De-

murrer to this Plea the Plaintiff had Judgment, for the Covenant was abſolute, that he was ſeiſed of a good Eſtate in Fee, and what relates to *Woollaſtone* denotes the Quality of the Eſtate and not the *Title*. 1 *Lev.* 40. *Cook* verſus *Fowns*.

6. The Defendant granted a Fee-Farm Rent to the Plaintiff, and covenanted, that he was ſeiſed in Fee, and had good Right to ſell; and in an Action of Covenant the Plaintiff aſſigns the Breach, that the Defendant had no good Right to ſell; now he having purchaſed it of the late Truſtees for the Sale of the King's Lands, pleaded, that it was farther agreed in the Indenture, that all the Covenants therein ſhould not extend farther than to Acts done by the Vendor, or his Heirs; and upon a Demurrer to this Plea it was adjudged, that this had qualified the firſt Covenant and reſtrained it to acts done by the Covenantor, tho' it was placed at the End of the Indenture, diſtant from the other Covenants. 1 *Lev.* 57. *Brown* verſus *Brown*. See *Noke*'s Caſe. *S. P.*

7. Covenant, *&c.* in which the Plaintiff declared on a Feoffment of Lands, wherein the Defendant's Father covenanted, that he was *ſeiſed in Fee, notwithſtanding any Thing by him done*; and ſecondly, that he had full Power to ſell; and thirdly, that the Feoffee ſhould enjoy againſt all Perſons claiming under him, his Father or Grandfather, and aſſigns the Breach, that he had no Power to ſell; the Defendant pleaded, that his Father, *notwithſtanding any Thing by him done, had Power to ſell*; and upon Demurrer it was agreed, that theſe were diſtinct Covenants, and three Judges againſt *North* Ch. Juſt. held, that tho' the Covenants are diſtinct, yet the two Firſt are of the ſame Import, for if he is ſeiſed in Fee, he hath Power to ſell, and when by the firſt he Covenants only againſt * *his own Acts*, it can never be intended, that by the other, which immediately followed, (*viz.*) *That he had full Power to ſell*, he covenanted againſt the whole World, ſince that Covenant is of the ſame Effect with the firſt, which reſtrained it to his own Acts; now in *Crayford*'s Caſe, the Covenants were of different Natures, tho' concerning the ſame Lands; but in this Caſe the ſubſequent Covenant is particular and reſtrained, and therefore the middle Covenant ſhall not be indefinite. 3 *Lev.* 46. *Nervin* verſus *Munns*. See * *Crayford* verſus *Crayford*.

* Poſtea (F) 10.

* *Expoſition of Sentences in Deeds.*

(F)

Of Covenants and Conditions for quiet Enjoyment. See *Covenant* (A) 13. (B) 6.

1. LEaſe for Years, in which the Leſſor covenanted, that the Leſſee ſhould quietly enjoy, without the Interruption of any Perſon; *the Father of the Leſſor* entered and interrupted the Leſſee, upon which he brought an Action of Covenant; adjudged good, for this Covenant is not like a *Warranty*, where the Interruption muſt be by ſome lawful Title, but it extends to all * wrongful Interruptions and Entries. *Mich.* 16 *Eliz. Dyer* 328. *Mountford*'s Caſe.

* Antea (D) 1.

2. In Debt upon Bond, the Condition was, that whereas the Obligor had ſold certain Lands to the Obligee, that he would warrant the ſame againſt the King, Lord, and all others, and that he ſhould enjoy the ſame peaceably, to him and his Heirs, *&c.* The Defendant pleaded in Bar, that theſe Lands were Copyhold, Parcel of the Manor of *M.* the *Cuſtom whereof was, that if the Rent be in arrear*, &c. *the Lord might enter for a Forfeiture*, then he ſet forth, that the Plaintiff had peaceably enjoyed the Lands, and *died ſeiſed*, and that the ſame deſcended to his Son, who did not pay the Rent, and thereupon the Lord entered for a Forfeiture; and upon a Demurrer to this Plea it was adjudged, that the Warranty in the Condition of this Bond extended only to the Obligee, but not to his Heir, and the Obligor himſelf was not bound to warrant againſt new Titles of Actions, which may accrue after the Warranty made, but only againſt ſuch Titles as were then in Being; and therefore, becauſe the Title of the Lord to enter for Non-payment of Rent, began after the Warranty, the Defendant was not bound to warrant againſt it. *Mich.* 30 *H.* 8. *Dyer* 42. *Greenliff*'s Caſe.

Yelv. 30. S. C. Noy 50. S. C.

3. The Vendor ſold twenty Tun of Copperas to the Plaintiff, and covenanted with him, that if he did not pay ſuch a Sum on ſuch a Day, that then the Plaintiff might quietly *have and enjoy* the ſaid twenty Tun, *&c.* in an *Action of Covenant* brought, the Plaintiff ſet forth, that the Money was not paid on the Day, and that he could not *have and enjoy* the ſaid twenty Tun of Copperas; there was Judgment againſt the Defendant by Default; and it was moved in Arreſt of Judgment, that the Declaration was not good, becauſe the Breach was not well aſſigned, for it was, that the Plaintiff *could not have and enjoy* the Copperas, but did not ſhew how, and by whom he was unlawfully diſturbed or hindered, for which Reaſon the Judgment was arreſted. *Cro. Eliz.* 914. *Chantflower* verſus *Preiſtly*. *Poſtea pl.* 25. *S. P.*

4. *Tenant for Life* made a Leaſe for twenty-one Years, and covenanted, that *he had not done* any Act to prejudice the ſaid Leaſe, but that the Leſſee ſhould quietly enjoy it againſt *all Perſons*; the Tenant for Life died, he in Reverſion entered, and the Leſſee brought an Action of Covenant againſt the Executor of the Tenant for Life; adjudged, that the Action would not lie, becauſe the laſt Part of the Covenant relates to the firſt Words, by which the Tenant for Life covenanted, that *he had not done any Act* to prejudice the Leaſe, but that the Leſſee ſhould quietly enjoy it againſt all Perſons, notwithſtanding any * Act done by him. *Cro. Eliz.* 615. *Gervis* verſus *Pead.*

* Antea (E) 6.

5. The Vendor covenanted, that the Vendee, and his Heirs, ſhould quietly enjoy the Lands without any Interruption; afterwards ſome Controverſies ariſing between them, concerning the Title, they ſubmitted themſelves to the Award of *W. R.* who awarded, that the Vendee and his Heirs ſhould quietly enjoy the Lands *in tam amplo modo*, as the ſame were conveyed to him, and the Truth was, that at the Time of the executing the ſaid Conveyance, the Vendor ſtood bound to *M. M.* in a Recogniſance of 600 *l.* who after the Conveyance ſued out an *Elegit*, and took the Moiety of the Lands in Execution; and in an Action of Debt brought by the Plaintiff for Non-performance of this Award, it was adjudged, that the Lands paſſed with the Charge, and when the Vendor covenanted, that the Vendee ſhould quietly enjoy, that Covenant is a collateral Security, and the Award, that he ſhould enjoy *in tam amplo modo*, as the Lands were conveyed to him, give him no new Title, for they are not Words of Conveyance; thoſe always conſiſt in legal and apt Words to convey an Eſtate; beſides, it appears by the Pleading, that there was no Interruption of the Vendee, becauſe the Execution by *Elegit* was illegal; for there was firſt a Judgment upon a *Scire facias*, and four Years afterwards the Cogniſee ſued out this *Elegit*, which he ought not to have done; but he ought to bring a new *Scire facias*, and the Sheriff ſhould return, that the Cogniſor, after the Execution had, made a Feoffment to the Vendee, and upon that Return the Cogniſee ſhould have a new *Scire facias* againſt the Vendee. *Paſch.* 27 *Eliz.* 1 *Leon.* 20. *Allington* verſus *Bates.*

6. Debt upon Bond, conditioned to permit the Obligee *quietly to take, reap and carry away Corn*; the Defendant pleaded, that he did permit, *&c.* the Plaintiff replied, that the Defendant came on the Land, and forbid him (the Plaintiff) to reap; and this was adjudged a good Breach of the Condition. 1 *And.* 137. *Burr* verſus *Higgs.*

7. The Husband made a Leaſe for twenty-one Years, and covenanted, that the Leſſee ſhould enjoy it during the Term, without the Lett or Diſturbance of the Husband, his Heirs or Aſſignes, or of any other Perſon, by or thro' *his Means, Title, or Procurement*; and in an Action of Covenant, the Plaintiff ſet forth, that before the ſaid Leaſe was made to him, one *W. R.* conveyed the Lands to the Husband, and *to his Wife*, and to the Heirs of the Husband, and averred, that it was by a Fine which the ſaid *W. R.* levied by the *Means and Procurement of the Huſband*, who was the Purchaſer; then he ſet forth, that the Husband was dead, and that he was turned out of Poſſeſſion by the Wife; it was objected, that the Wife derived no Title from her Husband, the Covenantor, but from *W. R.* of whom the Lands were bought, and that this Covenant did not extend to Titles paramount the Title of the Husband; but adjudged, that tho' the Wife claimed by a Title derived from another, in Point of Conveyance, and not from her Husband, yet ſhe is a Perſon within this Covenant, becauſe it was by *his Means and Procurement*, that the *Fine* was levied; and if that had not been levied, ſhe might have no Eſtate. 2 *Cro.* 657. *Butler* verſus *Lady Swinnerton.* Palm. 339. 2 Roll. Rep. 286.

8. Debt upon Bond, conditioned, that whereas the Plaintiff had bought a *Ship* of the Defendant, if the Plaintiff ſhould enjoy the ſaid *Ship, with all the Furniture* belonging to it, without being diſturbed for the ſaid *Ship or Furniture*, that then, *&c.* and the Breach aſſigned was, that after the Sale of the Ship, one *W. R.* ſued the Plaintiff for *Ballaſt*, which the Defendant had bought for the ſaid Ship, in which Suit he obtained Judgment and Execution, and had ſeiſed the Ship: The Queſtion was, *whether Ballaſt was Furniture of a Ship*; thoſe who argued for the Plaintiff, ſaid it was as neceſſary as *Sails*; but adjudged, that Goods laden in the Ship by Merchants, may be ſufficient *Ballaſt* for the Ship to Sail; beſides, the Plaintiff did not alledge, that there was any *Ballaſt* in the Ship at the Time of the Sale. *Mich.* 29 *Eliz.* *Lynter's* Caſe. 1 *Leon.* 46.

9. Covenant for Quiet Enjoyment, upon which an Action was brought, and the Breach aſſigned was, that the Defendant had exhibited a * Bill in Chancery againſt him, pretending, that the Leaſe, in which this Covenant was made between the Parties, was only in Truſt, but it was decreed otherwiſe; adjudged, that there being no Diſturbance at * Common Law, nor any Entry, the Exhibiting this Bill was no Breach of this Covenant, for the Law could not take any Notice of it. *Trin.* 11 *Jac.* 1 *Brownl.* 23. *Selby* verſus *Chute.* *Nota*, this Caſe is cited in *Raym.* 371. where 'tis ſaid, that Judgment was given for the Plaintiff; and that ſo it appeared by the * Record in *Winch's Entries*, and he was then one of the Judges. Moor 859. S. C. * 2 Mod. 54. Calthrop *v.* Heyton. * Poſtea 21, *and* 24. contra. * Winch Entries 116.

10. Debt upon Bond conditioned, that whereas the Obligor had ſold to the Obligee one Leaſe for Years, which he (the Obligor) had of the Manor of *S.* that he had not, nor would do any Act to diſturb the Obligee in the Poſſeſſion thereof; *but* that he ſhould quietly and peaceably enjoy the ſame, without the Diſturbance of the Obligor, *or any other Perſon*; the Defendant pleaded Performance, *&c.* the Plaintiff replied, and ſet forth, that a Writ of Dower was brought, *&c.* of the ſaid Manor, in which there was Judgment and Execution had, and ſo he was diſturbed; the Defendant rejoined, that this Judgment in Dower was obtained before he ſold the Leaſe to the Plaintiff; and upon Demurrer, the Defendant had Judgment; becauſe by the firſt Part of this Condition, he was bound only againſt his * own Acts; and the Words which follow ſhall be expounded according to the Premiſſes. *Moor* 58. *Broughton* verſus *Conway.* * Antea (E) 7.

Cro. Eliz. 481.

11. Leſſee for Years of a Manor covenanted, that neither he or his Aſſigns, would trouble, vex, or put out of Poſſeſſion any of the Tenants, under the Penalty of forfeiting the Leaſe; the Leſſor ſuppoſing this to be a Condition, entered, and aſſigned the Breach, that the Leſſee entered upon the Poſſeſſion of one of the Tenants, and beat him, *& præd'* (the Tenant) *in tenemento ſuo moleſtavit*; and upon Demurrer adjudged no Breach, unleſs he had turned out of Poſſeſſion, or diſturbed in receiving the Profits, *&c. Moor* 402. *Penn* verſus *Glover.*

12. The Leſſor made a Leaſe for Years, and covenanted, that neither he, or his Executors or Heirs, ſhould interrupt the Leſſee, but that he ſhould quietly enjoy during the Term; the Leſſor died, his Executors entered, and in an Action of Covenant brought, it was held, that the Plaintiff need not ſhew, that the Executors entered by an elder and good Title; for as to the Plaintiff, 'tis all one, whether the Leſſor or his Executors entered; but if the Entry had been by a Stranger, then he muſt ſet forth an Entry by an elder Title. 2 *Roll. Rep.* 21. *Forte* verſus *Vines.*

13. The Defendant covenanted with the Plaintiff, that he (the Defendant) would ſuffer the Plaintiff, and his Aſſigns, to have free Ingreſs, *&c.* into his Houſe and Shop, and the ſame to have and uſe in Common *with the Defendant*, without the Let or Interruption of him, and gave Bond for Performance of Covenants, and in an Action of Debt brought on this Bond, the Breach aſſigned was, that the Plaintiff *appointed* one *T. S.* on ſuch a Day *ut ſervientem ſuum* to enter into the ſaid Houſe and Shop, for the Uſe of the Plaintiff, and to poſſeſs in Common *ſuper quo præd' T. S. intravit, &c.* and *prædict'* (the Defendant) *eum expulit:* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Breach was not well aſſigned, for that it was alledged, that the Defendant expelled the Servant, which was not an Expulſion of the Maſter, with whom the Covenant was made; 'tis like the Caſe of a Return of a Reſcous by the Sheriff, who muſt not return, that it was done to his Bailiff, but to himſelf; beſides, 'tis that the Plaintiff *appointed T. S.* to enter, but doth not ſay at *what Time*; for an Appointment is only a Licenſe and Authority to enter, and probably it may be determined; neither is it ſaid at *what Time T. S.* did enter, but only *ſuper quo intravit: Sed per Curiam*, this is not like the Caſe of a *Reſcous*, before-mentioned, becauſe the Bailiff is not the Officer to the Court, but the Sheriff, and the Proceſs is directed to him, and therefore the Return of the Reſcous muſt be done to him, and not to his Bailiff; the Judgment was affirmed. 2 *Roll. Rep.* 78. *Snelling* verſus *Low.*

14. Covenant to Surrender upon Requeſt, and to permit the Defendant to take and enjoy the Rents, Iſſues and Profits; and in an Action of Covenant brought, the Plaintiff declared, that the Defendant *non permiſit eum* to take the Profits, *&c.* and upon a Demurrer to the Declaration, it was objected, that he ought to have ſhewed ſome actual Hinderance or * Diſturbance: *Sed per Curiam*, the Plaintiff having declared, that the Defendant took the Profits, that is a ſpecial Diſturbance and Hinderance. *W. Jones* 218. *Symonds* verſus *Smith.*

* Antea 3. poſt. 26.

15. Debt upon Bond, for Performance of Covenants, one whereof was for *quiet Enjoyment*, and the Breach aſſigned was, that *W. R.* a *Stranger*, entered, but did not ſay, that he had a * *Title. Hale, Ch. Juſt.* where a Man Covenants, that he hath Power to grant, and that the Grantee ſhall quietly enjoy from any claiming under him, thoſe are diſtinct Covenants, for one goes to the *Title*, and the other to the Poſſeſſion; in the Principal Caſe a Quiet Poſſeſſion is the Foundation of the Agreement. 1 *Mod.* 101. *Norman* verſus *Foſter. See* Breach of Covenant. (A) 5. *Dyer* 328.

**See* Wotton *v.* Hele Caſe.

1 Mod. 34. *Judgment for the Plaintiff, that the Words Payingand Performing do not make a conditional Covenant.* Contra Vaughan *Ch. Juſt.*

16. In an Action of Covenant the Caſe was, the Defendant being poſſeſſed of Lands for a certain Term of Years, made a Leaſe thereof for ſix Years to the Plaintiff, rendring Rent, and covenanted, that the Plaintiff, *paying the Rent, and performing the Covenants* on his Part to be performed, *ſhould quietly enjoy* the Premiſſes, without the Let, Diſturbance or Eviction of the Defendant, his Executors, Adminiſtrators or *Aſſignes*, or any of them; that by Vertue of this Demiſe he entered, and that he the Defendant being poſſeſſed of a longer Term, granted the Reverſion to the *Duke of Lenox*, to whom the Plaintiff attorned; that afterwards the *Duke* and others, by his Command, entered upon the Plaintiff, and turned him out of Poſſeſſion, and ſtill keeps him out, *&c.* The Defendant pleaded, that the Plaintiff enjoyed the Premiſſes according to the Demiſe, and traverſed the Grant of the Reverſion to the *Duke modo & forma.* The Ch. Juſt. *Vaughan*, in arguing this Caſe, held, that all Covenants between a Leſſor and his Leſſee, are either *Covenants in Law, or expreſs Covenants*; that by a *Covenant in Law*, which is made by the Word * *Demiſe, &c.* the Leſſee is to enjoy his Leaſe againſt any *lawful Entries*, but not againſt *wrongful Interruptions*; and the Reaſon is, becauſe in this laſt Caſe the Leſſee hath a proper Remedy againſt the *Wrong-Doer*, and therefore ſhall never reſort to the Leſſor: The Reaſon is the ſame upon an *expreſs Covenant* (*viz.*) that the Leſſee ſhall not have an Action of Covenant againſt the Leſſor upon his *expreſs Covenant*, unleſs he is *lawfully evicted*, for if 'tis done *wrongfully* he hath a proper Remedy againſt the Perſon who did the Wrong; 'tis true, in an *Action on the Caſe on a Promiſe*, that the Plaintiff ſhould *quietly and peaceably enjoy* the Land demiſed during the Term. After a Verdict for the Plaintiff, it was objected, that the Breach of the Promiſe was not well aſſigned; for it was, that the Father of the Defendant entered, and that might be upon a *wrongful Title*, and therefore he might have a proper Remedy againſt the Father; but the Judgment was affirmed, becauſe it was upon an *expreſs Promiſe*, that the Plaintiff ſhould enjoy; and this was * *Mountford* and *Catesby*'s Caſe. But even in an Action of the Caſe, it was otherwiſe adjudged not many Years afterwards, (*viz.*) The Defendant promiſed,

* Antea (A) 4. 6.

*Ac. Caſe (N) 5.

miſed, that the Plaintiff ſhould enjoy the Lands according to his Leaſe, *without the Let or Incumbrance of any Perſon*; and after a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that no good Breach was aſſigned, for it was, that the Lands were extended for a Debt due to the King, and ſo incumbered, but did not ſay, that this was a *lawful Incumbrance*; and for that Reaſon the Judgment was arreſted, and this was **Brooking* and *Cham's* Caſe. But in *Actions of Covenant*, the Authorities are expreſs, that the Plaintiff muſt ſhew that the Entry or Eviction was *lawful*; becauſe the Law will never judge, that a Man will covenant againſt the wrongful Acts of a Stranger, unleſs the Words in the Covenant are full and expreſs to that Purpoſe; and as to this Matter there ſeems to be no Difference between an Action on the Caſe, and an Action of Covenant, but only in the Form of the Action; for 'tis equally binding, both in Reaſon and Juſtice, where a Man promiſes to do a Thing, and covenants to do it: Now in an Action of Covenant the Plaintiff declared, that the Defendant covenanted, promiſed and agreed, that the Plaintiff ſhould *enjoy the Lands* for ſeven Years, and the Breach aſſigned was, that one *Elſing* had ejected and kept him out; but the Defendant had Judgment, becauſe the Plaintiff did not alledge, that *Elſing* kept him out by a *Title*, for if no Title is laid in him, it ſhall be preſumed he did enter *wrongfully*, and then the Plaintiff may have his Remedy againſt the wrong Doer; and this was **Tiſdale and Eſſex's* Caſe: So where a Man was bound by a *Covenant in Law*, that the Leſſee ſhould enjoy his Term, and a Bond was given for the Performance of Covenants, and in an Action of Debt on that Bond, the Breach aſſigned was, that a Stranger had recovered the Lands in Ejectment; now, tho' this Recovery was by due Courſe of Law, yet, becauſe it was not alledged to be upon an elder and lawful Title, it was adjudged no Breach of Covenant; and this was *Nokes's Caſe*. Upon which Authorities the Ch. Juſtice concluded for the Defendant. *Vaugh.* 118. *Hayes* verſus *Bickerſtaffe*.

* Covenant. (G) S. C.

* *See* Chauntflower *v.* Preiſtley. S. P. *and* Hammond *v.* Dod. S. P. Breach of Covenant (A) 4. Poſtea 20.

17. Leaſe for *nine Years*, dated 1 *June* 16 *Car.* 2. in which there was a Covenant to ſave the Plaintiff harmleſs from all Evictions *during the Term*; and in an Action of Covenant the Breach aſſigned was, that the Plaintiff was evicted *26th of June following*; the Defendant pleaded, that this Leaſe *primo deliberatum fuit* on the *firſt of June* 17 *Car.* 2. which was a Year after it was dated, and ſo it was after the Breach aſſigned, and that the Plaintiff was not ejected *after the Delivery of the Leaſe*; and upon Demurrer to this Plea, the Plaintiff had Judgment; for the Words, *during the Term*, ſhall be conſtrued, during the Term in Computation of Time, and not from the Time it commenced in Intereſt. *Sid.* 374. *Lewis* verſus *Hilliard*. See 2 *Cro.* 263. *Offley* verſus *Hicks*. Deed (A) 12. *S. C.*

18. An Executor brought an Action of Covenant, for that the Defendant covenanted with his Teſtator, his *Heirs and Aſſigns*, to levy a Fine, and that they ſhould quietly enjoy againſt all Perſons claiming under Sir *P. V.* and aſſigns a Breach in the Teſtator's Life-time; for that Sir *R. C.* did enter and claim, *&c.* The Defendant pleaded, that the Teſtator, at the Time of the Covenant had a good Title by Vertue of ſuch Fine, and by an Act of Parliament the ſame were afterwards declared to be void; and that Sir *R. C.* entered by Vertue of the ſaid Act, which he pleaded *in hæc verba*; and upon Demurrer to this Plea it was inſiſted for the Defendant, that this Title was by Matter ſubſequent to the Covenant, and compared it to the * *Lady Greſham's* Caſe, (*viz.*) Sir *Thomas Greſham* conveyed Lands to certain Uſes, with Power of Revocation; he revoked, and died; but the Revocarion being not purſuant to his Power, it was afterwards made good by Act of Parliament: Now the Lands being held in *Capite*, *a Fine* was demanded of the *Lady Greſham*, for this Alienation of her Husband without Licenſe; but ſhe was diſcharged, becauſe the Alienation took effect by Matter ſubſequent, (*viz.*) by an Act of Parliament; but adjudged, this was not like the *Lady Greſham's* Caſe, becauſe ſhe conſented to the Alienation by giving her Aſſent to the Act of Parliament; but here the Act of Parliament was in Nature of a Judgment, and probably it was the Proſpect of the Act, that this Covenant was required of the Defendant; ſo the Plaintiff had Judgment. 1 *Vent.* 175. *Lucy* verſus *Levingſtone*. 2 *Lev.* 26. *S. C.* * 9 *Rep.* 106. *Lady Greſham's* Caſe. Revocation. (B) 3. *S. C.*

* 9 Rep. 106.

19. Debt upon Bond for Performance of Covenants, one whereof was, that the Plaintiff ſhould *peaceably enjoy*, *&c.* without the lawful Let, Hinderance or Diſturbance of the Defendant, or any claiming under him; and the Breach was aſſigned, that *T. S.* having *jus & titulum*, did enter, *&c.* And upon Demurrer it was objected, that the Replication was ill, becauſe the Plaintiff did not ſet forth, that *T. S.* had a * *lawful Title*; but *Hale* Ch. Juſt. held, that *habens jus & titulum* implies it was a *lawful Title* and Entry. 1 *Vent.* 184. *Procter* verſus *Newton*. 3 *Lev.* 325.* *Buckley* verſus *Williams*. *S. P.* See 3 *Mod.* 135. *Moſſe* verſus *Archer*, *contra*.

2 Lev. 37.

* Antea (D) 20.

* 2 Vent. 61. S. C.

20. Covenant, *&c.* upon Articles of Agreement, wherein the Defendant covenanted, in Behalf of another, that the Plaintiff ſhould *quietly enjoy* for a Year, except a Cloſe to one *Edward Knolls*, Parcel of the Premiſſes; the Breach aſſigned was, that *Knolls* brought Treſpaſs againſt him, and recovered Damages and Coſts, *&c.* The Defendant pleaded, that he did not break this Covenant; upon which they were at Iſſue, and a Verdict for the Plaintiff; it was inſiſted in Arreſt of Judgment, that it did not appear that *Knolls* ſued upon a * *juſt Title*, and thereupon the Judgment was ſtaid; for in *Dyer* 128. *a.* the Covenant was for quiet Enjoyment *abſque interruptione alicujus*; and yet held, that a Title ought to be ſet forth; ſo in *Tiſdale and Eſſex's* Caſe, and *in* 2 *Cro.* 425. So *in* 2 *Saund.* 177. *Wootton* verſus *Hele*, where the Plaintiff ſet forth, that *T. P.* entered *habens legalem titulum*; yet that was held ill even after a Verdict. 2 *Vent.* 61. *Raſhlegh* verſus *Williams* 2 *Vent.* 46. *S. P.*

* Antea 16.

21. In Covenant, *&c.* the Plaintiff declared, that the Defendant leaſed a Houſe and certain Lands to him (the Plaintiff) in which he (the Defendant) covenanted, that the Plaintiff ſhould *quietly enjoy, without any Manner of Interruption*; the Breach aſſigned was, that the Defendant
*Antea 7. had exhibited a Bill in * Chancery againſt the now Plaintiff, ſuggeſting that he had ploughed up Meadows, and committed other Waſtes, and obtained an Injunction againſt the Plaintiff, by Reaſon whereof he was diſturbed in his Ploughing, and that afterwards this Bill was diſmiſſed with Coſts, and ſo the Deſendant had broke his Covenant: After a Verdict for the Plaintiff, it was in Arreſt of Judgment, that here was no ſufficient Breach aſſigned; becauſe the Suit in Chancery, did not ralate to the Title or Poſſeſſion of the Plaintiff, and ſo it was no Interruption within the Covenant; for tho' the Suit was groundleſs, yet the ſubject Matter was for Waſte, and no ways concerning his Title. 2 *Vent.* 213. *Morgan* verſus *Hunt.*

Sid 466. Lev. 301. 1 Mod. 66, 290. 22. *Covenant, &c.* in which the Plaintiff declared, that a *Fine ſur conceſſit, &c.* was levied between *John Hele and Penelope* his Wife, and the Plaintiff, of Lands in *Devonſhire*, by which Fine the Husband and Wife, *conceſſerunt* the ſaid Tenements to the Plaintiff for ninety-nine Years, if he ſhould ſo long live, and *warranted* the ſame to him, *contra omnes homines toto Termino prædicto*; then he averred, that by Vertue of the ſaid Grant in the *Fine*, he entered, and was poſſeſſed, and that the Husband died, and *Penelope Hele*, the now Deſendant, ſurvived; then he aſſigned the Breach, that *H. S.* during the ſaid Term, and before this Action brought, (*viz.*) 29
* Antea 16, 20. *Sept.* 18 *Car.* 2. *Habens legale * jus & titulum* to the Tenements, entered upon the Poſſeſſion of the Plaintiff, and againſt his Will *per debitum legis proceſſum*, and ejected him, and kept the Poſſeſſion *contra formam & effectum Finis & Warranti præd'*, and ſo broke his Covenant *ad damnum, &c.* The Defendant *proteſtando*, that *H. S.* had no right Pleads, that *H. S.* did not eject the Party, *&c. modo & forma prout, &c.* upon which they were at Iſſue, and the Plaintiff had a Verdict, and 60 *l.* Damages; it was inſiſted in Arreſt of Judgment, that the Plaintiff had aſſigned no Breach, becauſe a *Warranty* is no more than a *Covenant* againſt one who enters *by Right*, and therefore he ſhould have ſhewed, that *H. S.* had a *Title to enter*; 'tis not ſufficient for the Plaintiff to alledge, that *H. S.* had *legale jus & titulum*, without ſhewing *what Eſtate* or Right he had at the Time of Entry; for he may have *lagale jus & titulum* to enter, and that under the Plaintiff himſelf, and for this Cauſe Judgment was given againſt him *quod nil capiat per Billam.* 2 *Saund.* 179. *Wootton* verſus *Hele.* See *Tiſdale* verſus *Eſſex*, and *Kirby* verſus *Hanſaker* in Point. *Nota*, There was no *Deed*, but the Action of Covenant was brought upon the Word *conceſſit* in the Fine.

23. Debt upon Bond conditioned to perform Covenants, one whereof was, that the Defendant was *ſeiſed of an indefeaſible Eſtate in Fee, &c.* The Defendant pleaded Performance; the Plaintiff replied, that he (the Deſendant) was not ſeiſed of an *indefeaſible Eſtate in Fee*; and upon a general Demurrer to this Replication, it was objected, that it was ill, becauſe the Plaintiff ought to ſhew of what Eſtate the Defendant was ſeiſed, if he was not ſeiſed in Fee; becauſe upon Sale of the Eſtate he had parted with all his Writings to the Plaintiff, who muſt therefore know what Eſtate the Deſendant had; and 'tis not like *Bradſhaw*'s Caſe, becauſe there the Covenant was made to
* Antea (E) 1. (B) 16. the Leſſee for Years, who had not the Writings; but adjudged, that the Breach was well aſſigned, it being in the very * Words of the Covenant. *Raym.* 14. *Gliniſter* verſus *Audley.*

2 Roll. Rep. 21. 24. *Aſſumpſit, &c.* in which the Plaintiff declared, that there was a Diſcourſe between him and the Deſendant concerning a Portion of Tithes in *Banbury*, and concerning a Verdict had againſt one *Henry Tasker* for 18 *l.* at the Suit of the now Plaintiff, for the Tithes of *Berrymore Mead*; the Deſendant in Conſideration the Plaintiff would at his (the Deſendant's) Requeſt, acquit the ſaid *Henry Tasker* from the ſaid 18 *l. &c.* and all Arrears of Tithes, *&c.* did promiſe to allow the Tithe Hay of *Berrymore* to be the Right of the Plaintiff, and that *he from thenceforth ſhould quietly receive the ſame without Interruption*; then he ſets forth, that he had done all on his Part, and aſſigned a Breach, that the Deſendant did not permit him to receive the Tithes of *Berrymore without any Interruption*, but in ſuch a Term *did proſecute two Suits in the Exchequer againſt him, ad damnum, &c.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, and upon a Writ of Error brought, the Queſtion was, whether a Suit in the Court of
*Antea 9. 20. cont. * Equity is ſuch a Breach of this Agreement as the Common Law can take Notice of it? and adjudged, that it was, for the Law takes Notice of ſuch Suits; as for Inſtance, the Forbearance to ſue in Chancery is a good Conſideration to ground an *Aſſumpſit.* *Cro. Eliz.* 768. *Dowdeney* verſus *Oland*, and 847. *Colſton* verſus *Carr.* 'Tis true, there is a contrary Judgment in the Caſe of *Selby* verſus *Chute*, as reported by *Moor and* 1 *Brownl.* 23. But the Record of that Caſe is in *Winch's Ent.* 116. where it appears, that Judgment was given for the Plaintiff; and he was one of the Judges who gave the Judgment, and muſt know it better than thoſe Reporters. *Raym.* 370. *Hunt* verſus *Danvers.* See 3 *Leon.* 71.

25. In Covenant, *&c.* to ſave the Plaintiff harmleſs in the Occupation of certain Cloſes, *&c.* the Breach aſſigned was, that the Defendant *non indempnem conſervavit* (the Plaintiff) *de & concernen' occupatione quorundam clauſorum*, for that *T. S.* commenced a Suit againſt him, *&c. concernen' occupationem clauſorum prædict'*, but did not ſet forth, that *T. S.* had any * *Title. Sed per*
* Antea 16. 20. *Curiam*, this being after a Verdict for the Plaintiff, and he having alledged in his Declaration, that *T. S.* recovered *per judicium Curiæ*; Judgment was given for the Plaintiff. 2 *Mod.* 213. *Major* verſus *Grigg.*

4 Mod. 249. 26. There was a Covenant in an Aſſignment of a Leaſe for *quiet Enjoyment*, and *free from all Arrears of Rent*, and the Plaintiff brought an Action of Covenant as Executor, and aſ-

ſigned the Breach, that ſo much *Rent was in Arrear*; the Defendant as to Part of the Rent alledged to be in Arrear, pleaded Payment to the Leſſor, and as to the Reſt, that he left Money in the Hands of the Plaintiff *ea intentione* that he ſhould pay it to the Leſſor, *&c.* and upon Demurrer to this Plea, it was objected, that it was ill, becauſe the *Intention* was not traverſable; but the Court inclined, that the Plea was good, and that it had been clearly ſo, if it had been *reliquit ad ſolvendum*, and that the Breach was not well aſſigned, becauſe the Plaintiff did not ſhew any * Diſturbance in the Enjoyment, or other ſpecial Damnification; for without that the Rent being arrear, is not a Breach of this Covenant, unleſs the Plaintiff was ſued or charged with it; for then, and not before, 'tis a Damage to him, and if paid at any Time before ſuch Damage, 'tis ſufficient. 1 *Salk.* 196. *Griffith* verſus *Harriſon.*

* Antea 3 14.

(G)

Of Covenants, that the Eſtate is free from all Incumbrances, and of ſuch a Value.

1. LEſſee for 31 Years deviſed, that his Wife ſhould have the Lands for ſo many Years of the ſaid Term as ſhe ſhould live and *remain ſole*, and if ſhe married and died, then his Son ſhould have the Reſidue of the Term; the Teſtator died, and his Widow entered, he who had the Reverſion in Fee conveyed the ſame to the Widow, and covenanted with her, that the Lands ſhould be diſcharged of *all former Bargains, Titles, Rights, and Incumbrances whatſoever*; *the Widow married*, and then her Son entered; adjudged in an Action of Debt brought by her againſt the Heir of him in Reverſion, upon the Bond of his Anceſtor for Performance of Covenants, that the Term was not *extinguiſhed* in the Widow by her accepting this Feoffment; and if ſo, then the Lands were not diſcharged of it, and of *all former Titles and Rights* at the Time of the Feoffment made; 'tis true, the Son at that Time had only a Reverſionary and incertain Intereſt in the Term, for he had no more than a bare Poſſibility to have it, if his Mother married; but when once ſhe was married, then he had a good Title precedent to the Feoffment, and that Title was a Charge *ab initio*, and by Conſequence the Lands were not diſcharged of all former Titles, *&c.* 'tis like the Caſe where a Man ſeiſed of Lands in Fee, grants a Rent-Charge out of the ſame *to commence at a Day to come*, and before that Day came, he bargained and ſold the Lands to another, and covenanted, that they were diſcharged of all Incumbrances; 'tis true, at the Time of the Bargain and Sale there was no Charge upon the Lands, becauſe the Day was not come on which the Rent was to commence; but when once that Day came, then this Rent was a Charge on the Lands, and by Conſequence they were not clearly diſcharged. 1 *Leon.* 92, 93. *Handington* verſus *Rider.* *Goldsb.* 59. *S. C.* reported by the Name of *Hannington* verſus *Oram*, and *Hammington* and *Richards.*

1 And. 163. Extinguiſhment. (E) 16. S. C. Goldſ. 59.

2. Covenant, that the Leſſee ſhould quietly enjoy without any Let, Interruption or *Incumbrance* of any Perſon, and in an Action of Covenant brought the Plaintiff ſet forth, that the Lands were extended by Proceſs out of the Exchequer for a Debt due to the King, and ſo they were incumbered; it was adjudged upon a Motion, that the Breach was not well aſſigned, becauſe the Plaintiff did not ſhew for whoſe Debt the Lands were extended, nor when, nor by whom it was due, for it might be extended for the Plaintiff's own Debt; therefore he ought to ſhew a lawful Incumbrance. *See Dyer* 328. *and antea* Breach of Promiſe, (A) 3. * *Brocking* verſus *Cham.*

* Covenant. (F) 21.

3. In Covenant, *&c.* in which the Plaintiff declared, that the Defendant aſſigned to him all the Right and Intereſt which he (the Defendant) had to the Lands in *Norton*, lately granted by the Lord *Darcey* to one *Fiske* for the Term of *twenty Years*, and covenanted, *that the ſaid Premiſſes* then were, and ſhould continue free from all Incumbrances and former Grants made by the Defendant, or the ſaid *Fiske*, and that the Defendant was lawful Owner of the ſaid Leaſe, Term and Premiſſes, and aſſigned a Breach, that *Fiske* before the Aſſignment of the Term to the Plaintiff, had granted Part to other Perſons for 20 Years, *&c.* The Defendant pleaded, that *Fiske* had granted his Intereſt *in the Lands*, except *the Lands* ſo ſeverally demiſed by him, *&c.* and upon Demurrer, the Queſtion was, whether by this Covenant the Defendant ſhall be intended to be Owner of the *Term only*, or of the *whole Land during the Term?* and adjudged, that the Word *Premiſſes* extends as well to the Land, as to the Term of Years; for it takes in every Thing before-mentioned, and which might be incumbered; and this appears more plain by the ſubſequent Words, *viz.*) that the Defendant is lawful Owner of the Leaſe, Demiſe, Term of Years, and *Premiſſes*, which Word would be inſignificant, if it were intended only, that the *Term of Years* aſſigned to the Plaintiff ſhould be diſcharged from Incumbrances, and *not the Lands* themſelves. 1 *And.* 236. *Ouſley* verſus *Fiske.*

4. The Cogniſee of a Statute extended the Land, and afterwards aſſigned the Statute to one, and granted the Land to another, and covenanted, that notwithſtanding any Act done by him, or by any other by his Conſent, that *the Statute was in Force*, and likewiſe the Execution and Extent thereon; and in an Action of Covenant brought, the Plaintiff aſſigned for Breach, that *the Statute was not in Force*, for that the Cogniſee had aſſigned it to another; and upon a Demurrer to the Declaration, the Plaintiff had Judgment, but upon a Writ of Error brought, that Judgment was reverſed, for the Aſſignment it ſelf proves the Statute to be in Force; 'tis true, if the Covenant had been for quiet Enjoyment, without any Diſturbance, then the Aſſignment had been a Breach. 2 *Roll. Rep.* 399. *Perſon* verſus *Jones.*

5. Leaſe

5. Leaſe for Years, in which the Leſſor covenanted, that the Lands were free from all lawful In-
* Antea (E) 4. cumbrances, and that they were of the * yearly Value of 200 *l.* and ſhould continue of ſuch a Va-
lue during the Term; afterwards the Leſſor entered on the Leſſee, and turned him out of Poſſeſſion, whereupon he brought an Action of Covenant, and adjudged, that it lies, for when the Leſſor entered, they could not be of that Value to the Leſſee, becauſe the Leſſor took the Profits, but if a Stranger had entered, it had been otherwiſe. *W. Jones* 360. *Cave* verſus *Brookesby.*

6. Covenant, *&c.* upon an Indenture, reciting a Leaſe made by *D. B.* of a Meſſuage, *&c.* in which Indenture the Defendant covenanted, that the original Leaſe was good, and not incumbred; then he aſſigned the Breach, that *A.* and *B.* claimed a Title under the Defendant, to Part of the Premiſſes, by Vertue of a Leaſe which he made to them; the Defendant pleaded as to Parcel, that *A.* and *B.* had no Title under him, and as to the Reſidue, that the Plaintiff had Notice of the Leaſe before the Defendant aſſigned the original Leaſe to the Plaintiff, and that after the Death of *A.* the other Tenant *B.* attorned Tenant to the Plaintiff: Upon Demurrer to this Plea the Plaintiff had Judgment, but the Book doth not tell us for what Reaſon. 1 *Lutw.* 317. *Levett* v. *Witherington.*

(H)

Of Covenants not to alien without Licenſe.

1. DEBT upon Bond, for Performance of Covenants, one whereof was, that the Leſſee, his Executors or *Aſſigns*, or any other who ſhall have any Intereſt in the Term, *&c.* ſhall not *alien* their Eſtate, without *Licenſe* of the Leſſor, but only to his Wife or Children; the Leſſee deviſed the Term to his Wife, and made her Executrix, and died, the Widow entered, and married again, and then they aliened the Eſtate, and the Leſſor brought an Action of Debt, *&c.* adjudged, that the Action was well brought, for the Covenant was broken, becauſe the Wife is
*Poſtea 2. reſtrained from aliening without Licenſe, ſhe being * Executrix which in Law is an Aſſignee of the Leſſee her Husband, and the Covenant extends to him and his Aſſigns; ſo, tho' there had been once an Alienation with Licenſe, yet an Aſſignee cannot alien without it. *Cro. Eliz.* 727. *Thornhill* verſus *King.*

Cro. Eliz. 26. 2. In Ejectment, upon Not guilty pleaded, the Caſe was, *William Moor* demiſed the Lands for a certain Term of Years to *Richard Farrant*, upon Condition, that he or his Executors *or Aſſigns* ſhould not depart with their Intereſt or Eſtate, or any Part thereof, without the Conſent of the Leſſor firſt had in Writing; afterwards *R. Farrant*, the Leſſee, died Inteſtate, and *Adminiſtration was granted to Anne his Widow*, who entered and ſold the Term to the Defendant *Evans*; the Queſtion was, whether by this Aſſignment the Term was forfeited, or not; and it was adjudged, that it was forfeited, becauſe the Adminiſtratrix is an Aſſignee of the Inteſtate her Husband, who was the Leſſee, and ſo the Condition both in Words and Intention is broken; but one Judge was
*Antea 1. of Opinion, that an Adminiſtratrix is not an Aſſignee, as an * Executrix would be, becauſe an Adminiſtratrix is made by the Act of the Court, and not by the Appointment of the Party, as an Executrix is. 1 *And.* 123. *Smalpeice* verſus *Evans.*

3. Leaſe of an Advowſon for forty Years, in which the Leſſee covenanted, that he would not alien without the Aſſent of the Leſſor, and becauſe *he had aliened*, without his Aſſent, he brought an Action of Covenant; the Defendant pleaded, that he had not aliened without his Aſſent; upon which they were at Iſſue, and it was found for the Plaintiff; but in Arreſt of Judgment it was objected, that the Plaintiff had alledged in his Declaration, that the Defendant *had aliened*, but did not ſay that it was *by Deed*; but adjudged, this being in the Caſe of an Advowſon, which cannot paſs without Deed, it ſhall therefore be intended, that the Alienation was by Deed. *Trin.* 20 *Jac. Winch* 34.

4. The Leſſee covenanted, that he would not aſſign without the Conſent of the Leſſor, afterwards *the Leſſor entered into Part of the Land demiſed*, and then the Leſſee aſſigned the Reſidue of the Term in the reſt of the Land, without the Conſent of the Leſſor; adjudged in an Action of Covenant brought againſt the Leſſee, that this being a collateral Covenant, it was broken by the Aſſignment of the Term, without the Conſent of the Leſſor, notwithſtanding he had entered on Part of the Lands. *Style* 265. *Collins* verſus *Shelley.*

(I)

Of Covenants for farther Aſſurance, and to make Conveyances, as Counſel ſhall adviſe. See *Breach of Condition.* (A) 8.

1. ERror in *B. R.* of a Judgment in Debt upon a Bond for Performance of Covenants, in which the Caſe was, the Obligor *bargained and ſold all his Lands in L.* to the Obligee, and covenanted, that he would make farther Aſſurance of *all his Lands* there; the Breach aſſigned was, that *he had not made any farther Aſſurance, &c.* and adjudged, that the Breach was not well aſſigned, becauſe it appeared, that the Obligor having ſold *all his Lands in L.* he had not any more Lands there at the Time of the Bargain and Sale. *Cro. Eliz.* 833. *Lane* verſus *Hodges.*

2. Debt upon Bond, conditioned, that if *W. R.* the Brother of the Plaintiff, ſhould make Aſſurance of ſuch a Manor to the Defendant, as his Counſel ſhould adviſe, then if the Defendant paid to the Plaintiff 50 *l.* the Bond ſhould be void; and the Breach aſſigned was, that the Counſel had adviſed, that the Defendant ſhould make a Leaſe of the ſaid Manor *with Warranty*, which the Plaintiff demanded, but the Defendant refuſed; adjudged, that this was not an *Aſſurance*, but a Means to recover in Value upon the Warranty, and ſo the Bond not forfeited, 'tis a collateral Warranty. *Paſch.* 27 *Eliz.* 2 *Leon.* 130. *Wie* verſus *Throgmorton.*

3. Caſe, *&c.* upon a Promiſe to make ſuch an Eſtate to the Plaintiff, as * *by his Counſel*, upon Requeſt made, ſhould be adviſed; adjudged, that the Advice of Counſel ought to be given to the Plaintiff, and that he is to certify ſuch Advice to the Defendant, becauſe 'tis the Plaintiff's Counſel who is to give the Advice, and this cannot be inconvenient to the Defendant, becauſe he is not to do any Thing till he hath Notice of the Advice, nor then without *Requeſt* made to do it; and if the Plaintiff ſhould give the Defendant Notice to make an Aſſurance, which was never adviſed by his (the Plaintiff's) Counſel, and ſuch Aſſurance is afterwards made at his Requeſt, he ſhall never ſay afterwards, that his Counſel adviſed ſome other Conveyance, for if he doth, the Defendant is not obliged to execute it, becauſe the Plaintiff is not to vary from his firſt Requeſt; beſides, the Defendant ought not only to have Notice of the Advice, and be required to make the Aſſurance, but the Plaintiff muſt tender it to him ready drawn, and it muſt be ſuch as is reaſonable for the Defendant to execute. 5 *Rep.* 20. *Higginbottom*'s Caſe. See 2 *Rep.* 3. in *Manſer*'s Caſe. 1 *Lutw.* 284. *Fullerhurſt* verſus *Broke. S. P.*

* *If the Defendant was a Lawyer himſelf, yet he ſhall not make the Conveyance, but it muſt be the Counſel of the Plaintiff,* 5 Rep. 19. *b.* Moor *v.* 297. S. C.

Roſewell. Cro. Eliz.

4. Bargain and Sale of Lands to the Uſe of the Bargainee and his Heirs, and a Covenant to *make any farther Aſſurance of the Lands*, as Counſel ſhould adviſe, and he entered into a Recognizance for Performance of Covenants; the Bargainor paid the Purchaſe-Money before the Day appointed to pay it, *&c.* and afterwards he tendered a Deed to the Bargainee to ſeal, containing *an Acquittance for the Receipt of the Money*, and alſo a Releaſe of all his Right to the Land, which he refuſed to ſeal; and in an Action of Debt brought againſt him upon his Recognizance, the Queſtion was, whether it was forfeited by this Refuſal; the Court doubted it, becauſe the Acquittance for the Money was not any Aſſurance of the Land, and he was not bound to execute any Deed, but only ſuch which concerned a farther Aſſurance of the Lands. *Moor* 366.

5. Bargain and Sale of his Lands in Fee, in which the Bargainor covenanted to make to the Bargainee a good Eſtate in Fee before *Chriſtmas* next following, afterwards and before *Chriſtmas*, the Bargainor cauſed the Deed to be enrolled; the Queſtion was, whether he had performed his Covenant without doing any more; and adjudged, that he had not, but that he ought to have levied a Fine, or made a Feoffment before *Chriſtmas*, and then the Fee would have paſſed by ſuch Feoffment, and not by the Enrollment. 1 *And.* 27.

6. Where a Man is bound to make ſuch Aſſurance of all his Lands, as * another ſhall adviſe or require; if 'tis to be at the Charge of the Purchaſer, he may require one Conveyance of one Part of the Lands, and another Conveyance of another Part; but if 'tis to be at the Charge of him who is to make the Aſſurance, there the Purchaſer ought to require but one Conveyance of the Whole. *Moor* 570. *Waſhington* verſus *Burgoine Morden.*

Cro. Eliz. 681. S. C. * *See* Moor *v.* Roſewell. S. P.

7. Debt upon Bond, conditioned to make ſuch farther Aſſurance, *as the Counſel of the Obligee ſhould adviſe*, afterwards the Obligee came to the Obligor and told him, that the Counſel had adviſed, that he ſhould make a Leaſe for Years to the Obligee, which the Obligor had refuſed to do; adjudged, that the Bond was forfeited, but it had been otherwiſe, if the Condition had been to make ſuch further *Aſſurance, as* * *Counſel ſhould adviſe*, for in ſuch Caſe the Counſel is to draw the Aſſurance, and the Obligee is to bring it ready engroſſed, and tender it to the Obligor to ſeal. *Moor* 595. *Stafford*'s Caſe.

5 Rep. 19. Cro. Eliz. 298. * Poſtea 8.

8. Covenant, *&c.* for farther Aſſurance, either by *Fine*, or otherwiſe; and the Breach aſſigned was, that the Plaintiff required the Defendant to acknowledge a *Note* of a Fine, which he had not done, tho' he delivered the ſaid *Note* to him in Writing; and upon Demurrer to the Declaration, it was inſiſted for the Defendant, that there was no Writ of Covenant brought to levy this Fine; but adjudged, that the Breach is well aſſigned, the Acknowledging a Note of a Fine is a preparatory Act to levy it, upon which the Writ of Covenant might afterwards be brought, ſo that 'tis an Act for farther Aſſurance, tho' the Writ of Covenant is not depending. *Moor* 810. *Boldney* verſus *Curtis.* *See* Fines. (I) 3. *S. P.*

2 Cro. 251. S. C. 1 Bulſt. 90. S. C. 1 Roll. Rep. 103. *cited.*

9. In Covenant, the Plaintiff declared, that the Defendant by ſuch a Deed did Covenant to make farther Aſſurance of ſuch Lands, in ſuch Manner as * *Counſel ſhould adviſe*, and Aſſigns for Breach, that the Counſel had adviſed ſuch a Deed, ſetting it forth, in which there was alſo a *Covenant for farther Aſſurance*, and for *quiet Enjoyment*; † and upon a Demurrer to this Declaration, for that the Defendant is not obliged to execute a Deed with Covenants, but only to make a farther Aſſurance, for Covenants are not mentioned in the firſt Deed; but the better Opinion was, that a Deed may be tendered to him to execute, with *reaſonable Covenants* againſt himſelf. *Sid.* 467. *Laſſels* verſus *Catterton.* See 2 *Cro.* 571. *Cole* verſus *Kinder.* See *Owen* 65. See 1 *Roll. Rep.* 71.

Raym. 190. 1 Mod. 67. * Antea 6. † *Tis reported in* 1 Mod. 67. *that there was a another.*

Warranty *againſt the Covenantor and*

10. In Debt upon Bond for Performance of Covenants, the Caſe was, two Women were Coparceners in Fee, and they, with their Husbands, conveyed the Lands to the Plaintiff and his Heirs, and covenanted,

covenanted, that they had good Right to aſſure the Lands, and that at any Time within ſeven Years, they would, upon Requeſt, make any farther Aſſurance; the Breach aſſigned was, that one of the Coparceners was an *Infant* at the Time of making this Conveyance, and that ſhe was now dead, ſo that her Moiety deſcended to her Son, who was likewiſe an *Infant*, by Reaſon whereof one Moiety was deveſted out of the Plaintiff; the Defendant pleaded, his Wife was of Age, upon which they were at Iſſue, and it was found, that ſhe was not, it was inſiſted in Arreſt of Judgment, that the Verdict having found the Wife within Age at the Time of the Covenant, ſhe had no Power to make a Conveyance of her Eſtate according to the Covenant, and for that Reaſon the Judgment was reverſed. *T. Jones* 195. *Naſh* verſus *Aſton*.

11. Covenant, *&c.* to make ſuch an *Aſſignment*, *&c.* to the Plaintiff, according to an Agreement between them, as *Counſel ſhould adviſe*; the Defendant pleaded *Non eſt factum*, and Judgment was againſt him, and upon a Writ of Error brought, it was inſiſted, that the Plaintiff's * Counſel ſhould give the Advice, becauſe the *Aſſignment was made to him*; for if the Counſel of the Defendant ſhould adviſe an inſufficient Deed, that would not ſave his Covenant; if it had been to make *ſuch a Conveyance* as Counſel ſhould adviſe, then the Covenantee might chuſe whether he would have a Feoffment, Releaſe, or Confirmation; and in ſuch Caſe his Counſel muſt adviſe what Sort of Conveyance would be proper; but the Covenant in the principal Caſe reſtraining it to a particular Sort of Conveyance, (*viz.*) to an *Aſſignment*, ſeems to make ſome Difference; the Caſe was not adjudged. 3 *Mod.* 191. *Heyward* verſus *Guppie*.

* *See* Baker *v.* Bulſtrode S. P. Raym. 281. S. C. 1 Mod. 104. S. C. 1 Vent. 255. S. C.

12. Debt upon Bond, conditioned to perform Covenants, one of which was for Payment of ſo much Money upon making ſuch an Aſſurance; the Defendant pleaded, that he paid the Money on ſuch a Day; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe it did not appear in the Plea when the Aſſurance was made, that the Court might judge that the Money was paid purſuant to the Condition. 2 *Mod.* 33. *Duck* verſus *Vincent*.

13. Debt upon Bond, conditioned, that if the Plaintiff ſhall ſeal a good Conveyance to the Defendant, of his (the Plaintiff's) Lands in *Jamaica*, with uſual Covenants, as by the Defendant's Counſel ſhall be adviſed, then if he (the Defendant) ſhould pay unto the Plaintiff ſuch a Sum of Money, the Bond ſhall be void, *&c.* The Defendant pleads, that Mr. *W.* a Counſellor at Law, did adviſe a Deed of Bargain and Sale, *&c.* and that he tendered *the Conveyance* to the Plaintiff, which he refuſed to ſeal; and upon a Demurrer it was objected, that this being an *affirmative Plea* ought to be *particular* and not ſo *general*, for to plead generally * *quod exoneravit*, is not good, without ſhewing how: *Sed per Curiam*, this Plea is good; for if the Defendant had ſet forth the Deed *Verbatim*, the Court could not judge of the Covenants, becauſe they muſt be ſuch as are uſual in *Jamaica*. 2 *Mod.* 239. *Goſſe* verſus *Elkin*.

* *See* Horſman *v.* Obbins.

(K)

What are mutual Covenants. See Antea (B) 8.

1. BCovenanted to enfranchiſe a Copyhold, and the Copyholder covenanted to pay ſo much Money in Conſideration of the *ſame performed*; if it had been in Conſideration of the ſame *to be performed*, then the Covenants had been mutual. 2 *Leon.* 211. 3 *Leon.* 219. *idem.*

2. In Covenant, the Words were, the Plaintiff *putting the Houſe in Repair*, the Defendant covenanted to *keep it ſo repaired*; adjudged, theſe were mutual Covenants. 2 *Cro.* 645. *Salter* verſus *Stone*. *Style* 140. *Bragg* verſus *Nightingale*. *S. P.* *See* Covenant. (M) 1.

Raym. 183. Sid. 423. 1 Vent. 147. Lev. 274. S. C.

3. An Agreement between the Parties in Writing, that one ſhould pay the other 500 *l.* *for all his Lands*, *&c.* In Witneſs whereof, *&c.* this Agreement was mutually executed, and afterwards the Plaintiff brought an Action of Debt for the Money, without averring, that he had conveyed the Lands, or tendered a Conveyance; adjudged, that after the *Day was paſt* on which the Lands were to be conveyed, that this Action is well brought for the Money, becauſe theſe are mutual Covenants, upon which each Party had a mutual Remedy. 1 *Saund.* 319. *Pordage* verſus *Cole*. 2 *Saund.* 147. *S. P.* *Poſtea* (N) 1. *contra* where the Prepoſition *Pro* makes it a Condition precedent.

4. Covenant upon a Charter-Party, by which the Maſter of a Ship *covenanted to ſail to Barcelona*, and that his Mariners ſhould attend with the Boat to relade her there, and then to return with the firſt fair Wind to *London*, *&c.* and the Merchants *covenanted to pay him ſo much for Freight*, and ſo much *per* Day during his ſtay there; and in an Action brought by the Maſter, the Defendant pleaded as to the Freight, the Ship did not return directly to *London*, but ſailed to *Alicant*, *&c.* by which the Goods were ſpoiled, and as to the Demurrage, that it was occaſioned by their Neglect to attend with the Boat; and upon Demurrer to this Plea the Plaintiff had Judgment, becauſe theſe are mutual Covenants, upon which each hath his Action againſt the other, and therefore cannot plead one in Bar to the other, becauſe the Damages on one Side may not be ſo great as on the other. 3 *Lev.* 41. *Cole* verſus *Shallett*.

5. In Covenant on a Charter-Party, the Plaintiff declared upon an Agreement, that the Ship *N. paratus erit*, on the 12*th of Auguſt*, to Sail to ſuch a Place beyond Sea, and ſhould be there loaded with *Figgs*, and other Merchandize, and ſhould return to *Topſam*, *&c.* and the Defendant covenanted to pay 3 *l.* 15 *s.* for every Tun freight, and aſſigns the Breach in Non-payment of ſuch a Sum, for the Freight of ſo many Tun; the Defendant pleads, that the Ship *non fuit*

paratus to Sail on the 12*th of Auguſt*, by Reaſon whereof he loſt the Profit of his Merchandize, and traverſed, that the Ship was *paratus to Sail*; and upon Demurrer *per Curiam* the Plea is ill, for theſe are mutual Covenants, and each Party hath a reciprocal Remedy for Non-performance. *T. Jones* 216. *Shower* verſus *Cudmore*.

6. Debt upon Bond for Performance of Covenants in a Leaſe, in which the Plaintiff covenanted to find *Coggs*, *Rounds*, *Braſſes* and *Timber*, *&c.* for the *Mill*, during the Term, and the Defendant covenanted to keep them in Repair; the Defendant pleaded Performance; the Plaintiff replied, that the Defendant ſuffered the Mill to be in Decay, for that the Cogg's Wheel was broken, *&c.* and ſo decayed, that the Mill could not be uſed; the Defendant rejoined, that he demanded Timber, for the Coggs and Wheel, of the Plaintiff to repair the Mill, but he refuſed to deliver any; and upon Demurrer to this Rejoinder the Court was divided, whether theſe were conditional or mutual Covenants. 1 *Lutw.* 394. *Brown* verſus *Walker*.

7. In *Covenant*, *&c.* the Caſe was, the Defendant covenanted to be accountable to the Plaintiff for all Arrears of Rent, Tithes and Compoſition Money for Tithes, *&c.* and aſſigns a Breach, that he hath not accounted, *&c.* when required thereunto; the Defendant pleads in Bar, and confeſſes the Covenant to be accountable, but that in the ſame Indenture, *agreatum fuit & ulterius proviſum*, that the Plaintiff ſhould allow and diſcount all Monies for Parſons Dinners, *&c.* which the Plaintiff refuſed to do; and upon Demurrer to this Plea, it was inſiſted to maintain it, that theſe where not diſtinct and independant Covenants, but that *ulterius proviſum eſt* mades a Condition precedent; ſo that the Senſe is, I will Account, if you will Diſcount: *Sed per Curiam*, theſe are mutual Covenants, upon which each Party hath a diſtinct Remedy, for the *Proviſum & agreatum eſt* doth not amount to a Condition, but to a Covenant; and in this Caſe the Defendant is bound to Account upon Requeſt, and therefore he ought to aver, that he did Account, or avoid or traverſe it. 2 *Mod.* 53. *Samway* verſus *Eldſley*.

(L)

What are not mutual Covenants. See *Conditions precedent*. (I) per totum.

1. THE Plaintiff covenanted with the Defendant to let a Ship to *W. R.* for Freight, after this Manner, (*viz.*) that the Ship ſhould ſail to *Lyme* and take Freight there, then to proceed to *Yarmouth*, and ſo on; and the Defendant covenanted to pay to the Plaintiff 147 *l. pro tota transfretatione illa*; the Plaintiff brought an Action of Covenant for the Money, *without averring Performance on his Part*, and had Judgment; but it was reverſed upon a Writ of Error in *B. R.* becauſe theſe are not mutual and diſtinct Covenants, upon which ſuch Party might have a mutual Remedy againſt the other; for the Word *pro* makes it *conditional*, and refers to ſome Matter precedent to be done before the Money becomes due, which is preparing the Ship, taking in Freight, *&c.* all which muſt be done and ſo averred in the Declaration, before the Plaintiff can be entituled to an Action for the Money. 1 *Bulſt.* 167. *Gurnell* verſus *Clerke*.

2. The Plaintiff, in Conſideration of 1100 *l.* to be paid to him by the Defendant, covenanted to *Aſſign* to him ten Shares in the Corporation of *Linen Manufacture* on the 30*th of January*, *&c.* and the Defendant covenanted, that he would *accept* thoſe Shares, and at the ſame Time *pay the Money*, on the Penalty of 2200 *l.* Adjudged, theſe were not mutual Covenants, for the *Aſſignment of the Shares*, ought to *precede* the Payment of the Money; becauſe the Covenant to pay it was in Nature of a Condition, to prevent the Penalty of 2200 *l.* which the Defendant was to forfeit, if he did not pay the Money on the Day, which Payment did not relate to the *Day of Aſſignment*, but to the *Acceptance of the Aſſignment*; 'tis plain, the Payment muſt relate either to the one or the other: Now 'tis a Rule in Law, that where one Thing may have ſeveral Intendments, it ſhall be expounded in the moſt favourable Manner for the Covenantor; if ſo, then this Payment muſt relate to the *Acceptance* of the Shares, becauſe 'tis for the Benefit of the Defendant it ſhould be ſo conſtrued; and he having pleaded, that the Plaintiff did *not aſſign* the Shares, if that is true, then 'tis impoſſible that the Defendant ſhould *accept* them, and certainly ſome Thing was intended when he covenantad to *accept*; the Defendant had Judgment. 1 *Lutw.* 490. *Elwick* verſus *Cudworth*. *See* Relation. (A) 3.

(M)

Pleading therein good.

1. COvenant, that *A.* ſhould permit *B.* and all the Tenants of *D.* to have Common of Paſture for their Cattle in the Fields of *D.* when they ſhould lie Fallow, and the Defendant farther covenanted not to do, ſuffer, or cauſe to be done, any Act or Thing, to *alter the Courſes* of the Fields in *D.* and he entered into a Recogniſance to perform thoſe Covenants; in a *Scire facias* brought againſt him upon this Recogniſance, *&c.* he pleaded as to the firſt Covenant, that he had permitted the ſaid *B. and* all the Tenants of *D.* to have Common, *&c.* and as to the ſecond Covenant, he pleaded, that he had not *altered the Courſe of the Fields*, *&c.* adjudged, that this general Pleading was good; but *Harper* Juſtice, *contra*. *Dyer* 279, 297.

2. There was a Bond for Performance of Covenants, one of which was, that the Obligor ſhould leave his Lands to deſcend to his Son, *&c.* and now the Obligee in the former Bond entered into another Bond, reciting the firſt, *&c.* and that if he at all Times, *upon reaſonable Requeſt*, was ready, and did, or ſuffered to be done, all Things which ſhould be thought reaſonable by the Counſel of the Obligor in the firſt Bond, for his Diſcharge and Releaſe of the ſaid Bond and Covenant, that then, *&c.* and in an Action of Debt upon this laſt Bond, the Defendant pleaded, that there was no *reaſonable Requeſt* made; the Plaintiff replied, that *W. R.* his Counſel, adviſed a Releaſe of all Actions and Demands between the Plaintiff and Defendant, and *one T. T. who was a Stranger to the Covenant*, which he ſent to the Defendant, and required him to Seal and Deliver as his Deed, which he refuſed, and averred, that there were no other Debts or Demands between him and the Defendant, beſides the ſaid Bond and Covenant; adjudged, that this Requeſt was unreaſonable, and not according to the Condition of the Bond; for he was not bound to ſeal a Releaſe to a *Third Perſon*, tho' there was no Action or Demand between them. *Dyer* 218. *Forteſcue* verſus *Dean.*

3. Debt upon Bond conditioned to perform Covenants in *an Indenture*, *&c.* when in Truth the Deed *was not indented*, but written, *This Indenture*, *&c.* adjudged, that this was no Indenture, tho' of two Parts, for the Words in the Beginning do not make it an Indenture, but there ought to be a manual Act of Indenting the Parchment. *Hill.* 38 *Eliz.* 5 *Rep.* 20. *Stile's* Caſe.

2 Roll. Rep. 110. 4. Error of a Judgment in Covenant, in which the Plaintiff declared, *quod cum per indenturam Teſtatum exiſtit*, that the Defendant made a *Feoffment* of ſuch Lands to the Plaintiff, and therein covenanted to ſave him harmleſs from all Incumbrances, which he had not done, *&c.* Upon a Demurrer to this Declaration, the Plaintiff had Judgment, and the Error now aſſigned was, that the Declaration was ill, becauſe the Plaintiff had not expreſly *alledged, that the Defendant made a Feoffment to him, but only by a *quod cum Teſtatum exiſtit*, *&c.* which is only a Recital; but adjudged good in a Declaration, becauſe 'tis ſufficient to induce the Action, and to aſſign the Breach; but 'tis not ſo in a Plea in Bar or Replication. 2 *Cro.* 537. *Bullivant* verſus *Holman.* *Poſtea* Declaration. (A) 5. *contra.*

Poſtea 6, 7.

Godb. 212. 1 Brownl. 65. S. C. 5. Debt upon Bond for Performance of Covenants brought by the High Sheriff againſt his Under-Sheriff, who covenanted, that *he would not ſerve any Execution above* 20 *l. and would not execute any Venire facias*, but in certain Caſes, *and would ſave the Plaintiff harmleſs from all Eſcapes*, *&c.* the Defendant pleaded Performance generally; the Plaintiff replied, that the Defendant ſuffered a Priſoner to Eſcape, and that he had paid the Money, and ſo was not ſaved harmleſs; and upon Demurrer it was adjudged, that where ſome Covenants are in the Negative, (as here) not to do any ſuch Thing, and ſome in the Affirmative to do a Thing (as here likewiſe) the Defendant ought to *plead* * *Specially* to the Negative Covenants, that *he had* not done the Thing, and Performance generally, as to the Affirmative; that where the Negative Covenants are againſt Law, (as in this Caſe) and the Affirmative agreeable to Law, he may plead Performance generally, and the Court will take Notice which of the Covenants is againſt Law. *Moor* 856. *In the Caſe of Norton and Simms.*

*Poſtea 9.

6. *In Covenant*, *&c.* the Defendant demurred to the Declaration, for that the Covenant was, that the *Plaintiff and his Wife* ſhould enjoy certain Farms, *&c.* and the Breach aſſigned was, that the Defendant did enter *on the Plaintiff*. *Sed per Coke* Ch. Juſt. 'tis well enough. 2. *Object.* The Declaration is, that *licet* the Plaintiff had performed all the Covenants on his Part, the Defendant had not performed the Covenants on his Part: Now the *Licet* is not a direct * Affirmative, without the Word *Tamen*; 'tis true, it had been better if the Plaintiff had ſet forth *Tamen* the Defendant had not performed on his Part; but as 'tis, the Court held it good. 1 *Roll. Rep.* 267. *Pemberton* verſus *Platt.*

*Antea 4.

3 Bulſt. 185. 7. In Covenant to pay ſo much yearly on ſeveral Days, and the Breach aſſigned was, for Non-payment on ſuch Days, which amounted to ſuch a Sum, but in caſting it up, it did not amount to ſo much by 10 *l.* and upon a Demurrer to the Declaration, it was adjudged well enough, becauſe in this Action Damages are to be recovered, not according to the Sum caſt up, but according to the Truth of the Matter; but 'tis otherwiſe in an Action of Debt for Rent, for there the Plaintiff is to recover the Thing it ſelf, and not Damages. 1 *Roll. Rep.* 335. *Farrer* verſus *Snelling.*

8. Leaſe for Years, rendering Rent, and in an Action of Covenant brought againſt the Executor in the *Detinet*, the Breach aſſigned was for Non-payment of Rent; the Defendant pleaded *Plene adminiſtravit*, upon which they were at Iſſue, and a Verdict for the Plaintiff; it was objected in Arreſt of Judgment, that the Declaration was ill, for it was *by a certain Writing per quod Teſtatum exiſtit:* Now the *per quod* ſhould be omitted, and then it would be Right, *per quoddam ſcriptum Teſtatum exiſtit*; beſides, the Breach aſſigned is for Non-payment of Rent, and it doth not appear, whether due in the Teſtator's Time, or ſince his Death; but adjudged, that *per quod Teſtatum exiſtit* is of the ſame Signification as *per quoddam ſcriptum Teſtatum exiſtit*, and that the Action being in the *Detinet*, ſhall be intended after a Verdict for Rent due in the Teſtator's Time. *Sid.* 376. *Stephenſon* v. *Stephenſon.*

9. Debt upon Bond conditioned, that the Defendant ſhould pay his Rent, and *not attorn* Tenant to another, without the Conſent of the Plaintiff; the Defendant pleaded, that he was Tenant at will to the Plaintiff, and that half a Year's Rent was due, which he was ready to pay at the Houſe, but no Body was there to receive it, and that afterwards *obtulit ſe* to pay the Money

Money to the Plaintiff, which he refuſed to receive, and that before any more Rent was due; he entered and determined his Will, and that he did not attorn Tenant to any one without the Plaintiff's Conſent, and pleaded general Performance as to the reſt; and upon a ſpecial Demurrer to this Plea it was held good, according to my Lord *Coke*'s Rule; for as to the * *negative* Part of the Condition, the Defendant pleaded Specially, and as to the *affirmative* Part, he pleaded Performance generally. 1 *Lutw.* 590. *Keating* verſus *Iriſh.* *Antea* 51.

10. In Debt for Rent on a Leaſe for Years; the Defendant pleaded in Bar, that the Leſſor did covenant, that the Leſſee might deduct ſo much for Charges; and upon Demurrer this was adjudged a good Plea, it being a Thing executory and the Covenant in the ſame Deed. 1 *Lev.* 152. *Johnſon* verſus *Carr.*

(N)

Pleadings therein not good.

1. DEBT upon Bond for Non-performance of Covenants, one of which was, that the Defendant, *and his Aſſigns*, ſhould diſcharge the Plaintiff of all Charges ordinary and extraordinary, *&c.* the Defendant pleaded, that he was poſſeſſed of, *&c.* till 1 *Aug.* 12 *H.* 8. during which Time *he paid the Rent*, which was all the Charge ordinary or extraordinary, to that Day, on which Day he aſſigned the Premiſſes to *W. R.* and upon a Demurrer this was held an ill Plea, becauſe the Covenant being in the *Copulative; that he and his Aſſigns* ſhould diſcharge the Plaintiff; it ought to have been pleaded jointly, (*viz.*) that he and his Aſſigns did diſcharge him. *Hill.* 28 *H.* 8. *Dyer* 27. *Abbot of Weſtminſter* verſus *Lemman.* Aſſigns. (E) 1. *S. C.*

2. There was a Leaſe of Tithes, paying *Rent*; *Proviſo*, that if the Leſſee attempt or proſecute any Action againſt *W. R.* who pretended a former Leaſe made to him of the ſame Tithes, and if upon ſuch Action a *Verdict ſhould paſs againſt the Leſſee*, that then the Term to him demiſed, ſhould ceaſe, and a Bond was given for Performance of Covenants; afterwards Debt was brought upon this Bond, and the Breach aſſigned was Non-payment of Rent; the Defendant pleaded, that *W. R.* enjoyed the Tithes by Vertue of his former Leaſe, ſo that the Defendant could not have them according to his Leaſe; and ſo there were no Covenants to be performed on his Part; adjudged an ill Plea, becauſe the Rent was not payable until a *Verdict ſhould paſs againſt him* *Mich.* 19 *Eliz. Dyer* 318.

3. Tenant for Life made a Leaſe for fifteen Years, rendring Rent to him, or to his Heirs or Aſſigns; but there was no expreſs Covenant, that the Leſſee ſhould *Enjoy* it during the Term; the Tenant for Life died within the Term, and he in Remainder entered on the Leſſee, who thereupon brought an Action of Covenant againſt the Executor of the Tenant for Life; but it was adjudged againſt him upon the Inſufficiency of his Declaration; firſt, becauſe he had not alledged in Fact, that he was *poſſeſſed of the Term*, and afterwards *expelled*, but only by *Implication*; ſecondly, becauſe both the particular Eſtate for Years, and the Eſtate in Remainder in Fee, were recited with a * *Cumque*, when both ought to have been certainly alledged. *Mich.* 9 *Eliz. Dyer* 257. * Antea (M) 4.

4. In *Covenant*, *&c.* the Plaintiff declared, that the Defendant *per ſcriptum Articulorum* made between them, did covenant, *&c.* After Judgment for the Plaintiff, it was objected, that the Declaration was not good, becauſe the Plaintiff did not ſet forth, that the Writing was (*ſigillo* of the Defendant) *ſigillat'*; and for this Reaſon the Judgment was arreſted; if it had been * *per ſcriptum ſuum*, *&c. factum*, it might have been good. *Mich.* 34 *Eliz. Cro. Eliz.* 571. *Southwell* verſus *Brown.* *See ibidem* 737. *Penſon* verſus *Hodge.* * Cro. Eliz. 737.

5. In Covenant, *&c.* Leſſee for ten Years did covenant to build an Houſe on the Land within the firſt five Years; the Defendant pleaded, that the Leſſor entered, and was poſſeſſed of the Lands for moſt Part of the fifth Year, *&c.* adjudged, that he ſhould have pleaded, that the Plaintiff entered, and *held him out with Force*, and would not ſuffer him to build. *Godb.* 69. *Barker* verſus *Fletwell.* *Antea* Aſſigns. (E) 1. *S. C.*

6. Where any of the Covenants are *in the Diſjunctive*, ſo that 'tis in the Election of the Covenantor to perform the one or the other, there the * Performance ought to be ſpecially pleaded, otherwiſe 'tis ill; becauſe if 'tis not pleaded ſpecially, the Court cannot know what Part hath been performed. 1 *Leon.* 311. *Oglethorpe* verſus *Hide.* *Cro. Eliz.* 232. *S. C.* *Style* 165. *Fines* verſus *Dell. S. P.* * Antea (M) 5. Poſtea 7.

7. Debt upon Bond to perform Covenants in an Indenture; the Defendant pleaded Performance generally; adjudged, that where ſome of the Covenants are in the *negative or diſjunctive*, ſuch Plea is not good, being in the *affirmative*; but if the Plaintiff reply, and aſſign an ill Breach, and the Defendant demurs, he ſhall have Judgment, becauſe upon the whole Record it doth not appear, that the Plaintiff had any Cauſe of Action. 8 *Rep.* 123. *in Turner*'s Caſe. *Cro. Car.* 421. *S. P.* 1 *Lutw.* 579. *Duke of Bolton* verſus *Clarke. S. P.* *Poſtea* Traverſe. (B) 14. *S. C.*

8. Debt upon a Bond to perform Covenants in an Indenture, one of which was, that the Defendant and his Wife ſhould, before ſuch a Term, *levy a Fine* of certain Lands to the Plaintiff's Daughter, *&c.* another was, that whereas the Defendant had made a Leaſe for Years of Part of the ſaid Lands to the Plaintiff's Daughter, he covenanted, that he had not made any former Grant or Leaſe thereof, nor would afterwards make or grant any thereof, without the Conſent of the Plaintiff firſt had; the Defendant pleaded, as to the laſt Covenant in the *negative*, that he had 2 Roll. Rep. 159. Palm. 70.

not

not made any former Grant of the Lands, *nor any Grant after he entered into the Bond, without the Plaintiff's Conſent*; and as to the other Covenant he pleaded Performance generally; and upon Demurrer this was adjudged no good Plea; becauſe the Pleading, that he had made no Grant, *&c. without the Conſent* of he Plaintiff, is a *negative pregnant*; beſides, he ought to have pleaded, *how he had levied the Fine*; for it being Matter of Record, ought to have been pleaded ſpecially how done, and not to have pleaded Performance * generally. 2 *Cro.* 559. *Lea* verſus *Lutterel.*

* Antsa (M) 5.

9. The Plaintiff was bound in a ſingle Bill for the Payment of a Debt owing to another by the Defendant, who covenanted in a Deed, amongſt other Things, to *diſcharge* the Plaintiff of this Bill; in an Action of Covenant brought againſt him, the Breach aſſigned was, that the Defendant had not paid the Money due on the Bill, but that a Suit was commenced againſt the Plaintiff for the ſame, and Judgment thereupon obtained againſt him, which remained in Force; the Defendant pleaded, that he paid the Money at the Day, and that he gave the Plaintiff Notice of it before he brought this Action; and upon Demurrer, this was held an ill Plea. 1 *Brownl.* 24. *Rider* verſus *Took.* *Antea* (D) 3. *S. C.*

10. Error of a Judgment in an Action of Covenant brought in an *inferior* Court; the Error aſſigned was, that the Declaration was ill, becauſe the Plaintiff had declared on a Covenant, by which the Defendant covenanted to find him Meat, Drink, Clothes, *and* * *other Neceſſaries*, and the Breach being aſſigned as general as the Covenant, the Plaintiff did not ſhew *what other Things are neceſſary*, and *intire Damages* were given; for which Reaſon the Judgment was reverſed. 2 *Cro.* 486. *Mills* verſus *Aſtell.*

* Mod. 69. Proctor *v.* Burdett contra, *that the Caſe of* Mills *and* Aſtell *is not Law.* 3 Lev. 170. S. C.

11. In Debt for Rent, *&c.* the Defendant pleaded in Bar, that Sir *Chriſtopher Broom* was ſeiſed of the Manor of *Duckington in Oxfordſhire*, and demiſed Part thereof (being Copyhold) to the Defendant for 2000 Years, and covenanted, that if the Leſſee, or his Aſſigns, ſhould be charged in Reſpect of *Homage* for the Premiſſes, and Notice thereof given to the Leſſor, his Heirs or Aſſigns, and if he ſhould not have Satisfaction for the ſame, that then he might *retain* ſo much of the Rent which ſhould amount to ſuch Charge; then he ſet forth, that the Reverſion, *&c.* by mean Conveyances, came to the Husband of the now Plaintiff, and to her, *for their Lives*, Remainder to the Heirs of the Body of the Husband, who died, leaving Iſſue; and that the Leſſee was *diſtrained for Homage, and Iſſues levied on him for the ſame*, of which he gave Notice to the Plaintiff, but had not received any Satisfaction, *&c.* and upon Demurrer to this Plea, it was adjudged ill, becauſe the Plaintiff being Tenant *for Life*, no Homage was due to her; and this Covenant extended only to a * lawful Charge in Reſpect of *Homage*; but this Charge was Wrongfull. *W. Jones* 242. *Baylie* verſus *Hughes.*

See Baylie *v.* Offord.

* *See* Covenant. (D) 1, 20.

12. Debt upon Bond for Performance of Covenants, if the Defendant pleads Performance without producing the Deed; 'tis a good cauſe of Demurrer. 1 *Vent.* 37. *Sid.* 425. *Tapſcott* verſus *Wooldridge.* 2 *Cro.* 360, 460. *S. P.* and if he hath not the Deed, the Court will order that he ſhall have it, or a true Copy. *Sid.* 50. *&* 97. *Lewis* verſus *Ball. S. P.*

(D) 1, 20.

13. In Covenant, after Judgment for the Plaintiff by Default, and a Writ of Enquiry, it was moved in Arreſt of Judgment, that the Declaration was ill; for that the Covenant was to pay to the Plaintiff 40 *l.* out of the Profits of the Prerogative-Office yearly, *after they had accounted, and the Profits had been clear above ſuch a Sum*, and did not ſay, *at what Time or Place they had accounted*, which is iſſuable; neither did he ſet forth, *for what they had accounted*; for it ought to be clear above ſuch a Sum, otherwiſe the Plaintiff was to have nothing; the Judgment was ſet aſide. *Sid.* 304. *Buckner* verſus *Cottle.*

14. Debt upon Bond for Performance of Articles: The Defendant ſet forth the Articles, and pleaded Performance; the Plaintiff prayed, that the Articles might be entered *in hæc verba*, which being done, he demurred generally, and ſhewed for Cauſe, that the Defendant in pleading the Articles had left out Part of them; and this was adjudged a good cauſe, becauſe the Plaintiff might have aſſigned a Breach in that Part which is omitted, of which he is now by that Means deprived. 3 *Lev.* 49. *Hudſon* verſus *Spier.*

15. *Covenant, &c.* in which the Plaintiff declared on an Indenture of Leaſe, reſerving Rent, and aſſigned the Breach in Non-payment of Rent, *&c.* according to the Covenant; the Defendant pleaded *Nil debet*, and upon a Demurrer, this was adjudged an ill Plea in this Caſe of an Indenture. 3 *Lev.* 170. *Tindale* verſus *Hutchinſon.*

16. Covenant, *&c.* upon an Indenture made between the Plaintiff and the Defendant, who covenanted to permit *Sarah* his Wife, to live ſeparate from him, *until he and ſhe ſhould by Writing under their Hands, atteſted by two Witneſſes, give Notice to each other to cohabit again*; and that during the Coverture, and until ſuch Notice, he would pay to the Plaintiff 300 *l. per Ann.* for the Maintenance of the ſaid *Sarah*, by quarterly Payments, *&c.* and for 75 *l.* being one quarterly Payment, this Action was brought; the Defendant pleaded in Bar, that after the ſaid Indenture, and before this Action brought, another Indenture was made between him, and *Sarah his Wife*, to which the Plaintiff was likewiſe a Party, reciting the firſt Indenture; and alſo, that he and his Wife did intend to cohabit, and did then actually cohabit, and ſo long as they ſhould cohabit, that the ſaid yearly Payment ſhould ceaſe; and that in the ſaid laſt recited Indenture the Plaintiff did covenant with the Defendant, that he ſhould be ſaved harmleſs from the ſaid yearly Payment, ſo long as he and his Wife ſhould cohabit, and that *during ſuch Cohabitation*

he might detain the ſame, &c. and avers, that ever ſince the laſt Indenture they did cohabit, and demands Judgment of the Action; and upon Demurrer it was inſiſted for the Defendant, that this mutual Agreement, which was confeſſed by the Demurrer, had diſpenſed with thoſe Circumſtances mentioned in the firſt Indenture, (viz.) *the Writing under their Hands atteſted by two Witneſſes, giving Notice to each other that they would cohabit*, and therefore the Covenant in the laſt Indenture, that the Defendant might detain the Money ſo long as the Cohabitation ſhould continue, might be well pleaded in Bar to this Action brought, upon the Covenant in the firſt Indenture; but adjudged, that unleſs the Cohabitation had been according to the Circumſtances in the firſt Indenture, it was no Bar, for a later Covenant cannot be pleaded in Bar to a former; but the Defendant, if he would keep himſelf, muſt bring an Action upon the Covenant in the laſt Indenture. 2 *Vent.* 217. *Gawden* verſus *Draper*.

17. In Covenant, the Caſe upon the Pleadings was, that by Articles of Agreement between the Plaintiff and the Defendant, the Plaintiff was to have the Cuſtody of the Body of a *Lunatick*, and the Defendant was to take Care of his Eſtate, that no Waſte and Deſtruction be done in the the Houſes, but that conſtant and *due Repairs be made*, and that the Defendant ſhould account to the Plaintiff for the Profits, and ſhould pay him 400 *l. per Annum*, for the Maintenance of the Lunatick; and in an Action of Covenant brought, the Breach aſſigned was, that the Defendant had received 800 *l.* of the Profits, and had not rendered an Account thereof to the Plaintiff, nor paid him 400 *l.* a Moiety thereof, for the Maintenance of the Lunatick, *&c.* The Defendant pleaded in Bar, and confeſſed the Receiving of 800 *l. &c.* but ſaid, that before he received it, he laid out about the Repairs, *& alia onera neceſſaria*, the Sum of 810 *l.* whereupon he retained 800 *l.* towards Satisfaction of the 810 *l.* ſo by him laid out, *&c.* and upon Demurrer to this Plea it was adjudged ill, becauſe it was incertain, for the Defendant ſhould have ſet forth what thoſe *alia onera neceſſaria* were, that it might appear to the Court, whether they were neceſſary, or not. 1 *Saund.* 47. *Barker* verſus *Thorold*.

18. In Covenant, the Plaintiff declared, upon an Indenture made between three Perſons, (*viz.*) *Tayler* of the firſt Part, *Clipſham* the Defendant of the ſecond Part, and *Caſtle*, the Plaintiff's Teſtator of the third Part, in which *quilibet eorum* covenanted with *each other* reſpectively, to raiſe a Joint Stock of 6000 *l.* and to depoſit it in the Hands of *Hinton*, a Goldſmith, and to buy all the *Prize Brandies* in Partnerſhip, and that none of them, during the Partnerſhip, ſhould trade in Brandies upon his own Account, *&c.* or in Company with any other, but only upon the *joint Account*, &c. *Caſtle* died, having made the Wife of the Plaintiff, Executrix, and the Action was brought by him and his Wife, without *Tayler*, and againſt *Clipſham* the Defendant; and amongſt other Things it was aſſigned for Breach, that *Clipſham* the Defendant had, during the Partnerſhip, traded for 200 *Tuns of Brandy* (but did not ſay *Prize Brandy*) upon his own Account, and not upon the joint Account; and upon Demurrer it was objected againſt this Declaration, that the Plaintiff ought to have alledged, that the Defendant traded for 200 Tuns of *Prize Brandy*; beſides, *Tayler* ought to be joined with him in this Action, for tho' the Covenant, by the Words of it, was *joint and ſeveral* between all the Parties, yet the *Intereſt and Cauſe of Action is joint and not ſeveral*; for upon every Breach of this Covenant *Tayler* had an equal Damage with the Teſtator of the Plaintiff, and therefore *he ought to be joined with the Plaintiff in this Action*; and for theſe Reaſons, there being a Judgment by Default, it was ſtayed, but no Judgment was given, for the Plaintiffs had Leave to diſcontinue, and to bring a new Action. 1 *Saund.* 153. *Eccleſton & Ux'* verſus *Clipſham*. See *Slingsby's* Caſe. *S. P.*

19. In Debt upon Bond, it appeared upon *Oyer*, that it was for Performance of Covenants in an Indenture, between the Plaintiff of one Part and *Humphry Holloway* of the other Part, on his Part to be performed; the Defendant pleaded, that in the ſaid Indenture there were no Covenants on the Part of the ſaid *Holloway* to be performed; the Plaintiff prayed *Oyer* of the Indenture brought by the Defendant into Court, which was entered *in hæc verba*; and it appearing that there were ſeveral Covenants in it on the Part of the ſaid *Holloway* to be performed, he did not think fit to aſſign any Breach, but demurred to the Plea; and it was objected, that he had demurred too ſoon, becauſe the Plaintiff could not maintain the Action without aſſigning a Breach in one Covenant; for the Defendant having pleaded, that there were no Covenants on *Holloway's* Part, 'tis not ſufficient for the Plaintiff to ſhew, that there were Covenants, but he muſt aſſign a Breach in one; but adjudged, that ſince the Defendant had produced the Indenture in Court, and pleaded, that there were no Covenants on *Holloway's* Part, and being entered *in hæc verba*, 'tis now a Part of his Plea, and it appears judicially to the Court, that his Plea is falſe, and therefore there is no Occaſion for the Plaintiff to ſhew any Thing in his Replication to maintain his Action, but 'tis proper for him to demur. 1 *Saund.* 316. *Smith* verſus *Yeomans*.

20. Debt upon Bond for Performance of Covenants, one of which was for quiet Enjoyment, and free from all Incumbrances, and another was for farther Aſſurance, *&c.* the Defendant pleaded Performance generally; and upon Demurrer it was objected, that the Defendant could not plead * Performance generally, but he ought to have ſet forth, that the Houſe was free from Incumbrances at the Time of the Conveyance made, and not charged at any Time ſince, and that no farther Aſſurance hath been required, or ſuch an Aſſurance, and no other, which he had executed, yet this Plea was held good, but that it had been better, if pleaded, as above-mentioned. 1 *Lutw.* 603. *Butterfeild* verſus *Marſhall*. * Antea 5.

Covenant to Repair. See *Repairs* per totum.

Covenant to ſtand ſeiſed. See **Conveyance and Uſes.**

County-Court. See **Falſe Judgment.**

County Palatine.

(A)

Of Counties Palatine. See *Chancery.* (A) 5.

1. QUO *Warranto* againſt the *Biſhop of Durham*, for that he claimed *Felons Goods* and thoſe of *Felo de ſe* in the Manor of *D.* the Biſhop pleaded, that *Durham is a County Palatine*, and preſcribes to have *jura Regalia*, and that his Juriſdiction extended, *&c.* between the Rivers *Tyne and Teſe*, and that this Manor is within his Juriſdiction; and upon Demurrer to this Plea it was objected, that the Biſhop could not have *Felons Goods by Preſcription*, and if he could, yet he cannot have the Goods of a *Felo de ſe*, becauſe that is a particular Felon: *Sed per Curiam*, tho' a Man cannot *ſingly preſcribe* to have *Felons Goods*, yet a *County Palatine* may, for he hath *jura Regalia*, and may therefore preſcribe, not only to have Felons Goods, but the Goods of *Felo de ſe*. 1 *Roll. Rep.* 399. *The King* verſus *Biſhop of Durham.*

2. The *Sheriff of Durham* was ſued before the Counſel of *York*, for an Eſcape, and becauſe this concerned his Office of Sheriff, and that he was an Officer of *the Biſhop of Durham*, a Prohibition was granted; and *per Dodderidge*, as often as Suits are in Chancery, which concern any County Palatine, the Lord Chancellor diſmiſſes them. 2 *Roll. Rep.* 53. *Selby's* Caſe.

2 Roll. Rep. 436. 3. The Plaintiff had Judgment in an Action of Debt on a Bond, and brought an *Elegit* to the *Chamberlain of Cheſter*, requiring him to make a Warrant to the Sheriff to execute it, who returned, that Time out of Memory, and until 34 *H.* 8, there was a *Cuſtom* in the County Palatine of *Cheſter*, that if any Perſon having Lands there, would make Oath in the Exchequer there, that he had not ſufficient to pay his Debts, but would pay them as ſoon as able, then *Ex communi curſu* of the ſaid Court of Exchequer, he uſed to grant him a *Protection* for his Lands and Goods, againſt all Judgments, Executions and Diſtreſſes; and that *Anno* 34 *H.* 8, it was enacted, that no *Protection* ſhould be granted of Courſe, without a ſpecial Warrant from the King, that ſuch a Warrant was granted to the Defendant under the Privy Seal, (*viz.*) to permit him to make *Oath*, *&c.* and thereupon to grant him a *Protection* under the Exchequer-Seal, according to Cuſtom, which was granted accordingly, and for that Reaſon he could not make his Warrant to the Sheriff for Execution: Adjudged, that this Cuſtom doth not bind *B. R.* becauſe Cuſtoms of Courts have no Force out of the Courts where thoſe Cuſtoms are received; and notwithſtanding the Statute, this Caſe ſtill depends upon the Cuſtom, for the Statute provides, that with Leave from the King, a Protection ſhall be granted according to Cuſtom. *Palm.* 414. *Paſton* v. *Lea.*

4. A Writ was directed *to the Juſtice of Cheſter, or his Deputy*, and this was to try a local Iſſue; he who was then *Juſtice*, *&c.* made a Return by the Name of *John Bradſhaw Chief Juſtice*, *&c.* adjudged a good Return, becauſe the Direction of this Writ implies the Superior, tho' it was directed to *the Juſtice, or his Deputy*, and the Statute of *H.* 8. calls him the *High Juſtice*, and there is no great Difference between *High and Chief*; beſides, the Court will not intend that there is any other Juſtice than he who returned this Writ. *Sid.* 64. *Barrow* verſus *Huit.* 1 *Lev.* 50. *S. C.* See *Biſſe* verſus *Thriſt. Hob.* 135. See 2 *Salk.* 452.

5. *Mandamus* to the *Mayor of Wiggan in Lancaſhire*, to reſtore an *Alderman of Wiggan* to the ſaid Place of Alderman: The Mayor returned, that they were a Corporation in *Lancaſhire*, which is a *County Palatine*, and for that Reaſon were not compellable to anſwer in *B. R.* The Mayor was fined 100 Marks, and the *Biſhop of Durham* was fined 1000, for ſuch another Return. *Sid.* 92. *Wiggan Mayor's* Caſe.

6. Prohibition upon a Suggeſtion, that the Plaintiff preferred a Bill in the *Chancery of Cheſter*, before the *Earl of Derby*, *Lord Chamberlain* there, in which he ſet forth, that all the Inhabitants of *Cheſhire* have a Privilege not to be ſued elſewhere, and that the Defendant in the Prohibition knowing it, had ſued him (the Plaintiff) in *B. R.* in Trover, to which he appeared, and that the Plaintiff in the Action proceeded there againſt this Privilege; but adjudged, that if he had ſuch Privilege, 'tis now too late to move for a Prohibition, becauſe it appears upon his own Suggeſtion, that he had pleaded to the Action, and by Conſequence had waived the Privilege, but in Truth he had none in this Caſe, becauſe 'tis a meer perſonal Action; 'tis true, it might be otherwiſe where an Action is brought in which the Realty of Lands lying there might come in Queſtion. *Sid.* 309. *Minſhull* verſus *Starkey.*

7. The *Courts* held in *Counties Palatine* are not in the Nature of other inferior Courts, and therefore if the Stile of thoſe Courts is not ſet forth, whether it be held by *Charter or Preſcription*, if the Judgment is *conſideratum eſt*, without ſaying *per Curiam*, if the *Writ of Inquiry* is *per ſacramentum duodecim*, without ſaying *proborum & legalium hominum*, if 'tis not ſaid in an *Aſſumpſit*, that the Goods were ſold and delivered * *infra juriſdictionem*, theſe are no good Exceptions or Errors in the Judgments in thoſe Courts, as they are in other inferior Courts. 1 *Lev.* 208. *Pigg* verſus *Gardner*. Sid. 331. * Poſtea 9.

8. Indictment for forging and publiſhing a Deed at *Cheſter*, was ſent thither to be tried by *Mittimus*, and was accordingly tried; and it was objected, that the *Mittimus* was directed to the *Juſtices of Aſſize at Cheſter*, and not to the *Chamberlain*, as it ought; but adjudged, that tho' it ought to be ſo in Writs of * Proceſs, (*viz.*) to him, to command the Sheriff to execute ſuch Writs, yet it ought not to be to command the Judges to try a Cauſe, for all Records to be tried are immediately ſent to the Judges. 2 *Lev.* 111. *The King* verſus *Newton*. * 2 Lev. 223. The King v. Leaver.

9. Error on a Judgment in the County Palatine of *Durham*, wherein the Plaintiff declared, that the Defendant was indebted to him *apud Civitat' Durham* in 39 *l.* for divers Wares, *&c.* to him ſold and delivered (leaving out the Word *Ibidem* ſold and delivered) ſo that the Goods might be delivered in another Place out of the * Juriſdiction of the Court; 'tis true, this is a good Exception to a Declaration in inferior Courts; but the *Courts in the Counties Palatine are not inferior Courts*, but are accounted original and ſuperior Courts, and therefore by the Statute 3 *Jac. cap.* 8, Executions in Counties Palatine ſhall not be ſtayed by Writ of Error, and they never certify their Juriſdiction upon a Writ of Error, no more than the Court of Common Pleas, which is a ſuperior Court, tho' inferior to *B. R.* but not in that Senſe, as to certify their Proceedings preciſely; ſo a Recovery ſuffered in the Court of Common Pleas, of Lands in a County Palatine, is void, becauſe 'tis out of the Juriſdiction of the Courts at *Weſtminſter*, and the Entry of their Judgments there is like the Entry of the Judgments in thoſe ſuperior Courts, for 'tis *Ideo conſideratum eſt* generally, without ſaying *per Curiam*, therefore this being a ſuperior Court, then the Rule is, that nothing ſhall be intended to be out of its Juriſdiction, except what plainly appears to be ſo, whereupon the Judgment was affirmed. 1 *Saund.* 73. *Peacock* verſus *Bell*. Sid. 330. Lev. 200. *Antea 7.

10. *Ejectment* in *B. R.* of Lands in the County Palatine of *Lancaſter*; upon Trial at the Aſſiſes in *Lancaſter*, the Judge cauſed the *Poſtea* to be marked, in order to have it moved in Court, whether this Ejectment was well brought, or not. *Raym.* 81. *Long* verſus *Emott*. *On an Attainder for Treaſon, the Sheriff ſhall ſeiſe for the King, and not the Baily of the Dutchy.* 4 Leon. 34. Leak v. Hollis.

11. Upon a Judgment in *B. R.* there was a *Teſtatum Fieri facias* to the Sheriff of *Cheſter*, who returned *Fieri feci*, and that the Goods remained in his Hands for Want of Buyers, thereupon a *Venditioni exponas* was awarded to him, of which he took no Notice, nor made any Satisfaction to the Plaintiff, who moved for an *Attachment* againſt him; it was inſiſted in the Sheriff's Behalf, that a *Fieri facias* would not lie into a County Palatine, but the Court were of another Opinion, and granted the Attachment. *Raym.* 171. *Needham* verſus *Bennett*. See 2 *Saund.* 193. *See* Execution. (D) 12. Sid. 407. 1 Lev. 256.

12. In a Special Verdict in Ejectment, the Caſe was, that the Lands in Queſtion were *Dutchy Lands*, and that there was a Leaſe for Years made thereof to *T. P.* rendring Rent; that the Reverſion was granted to two under the *Great Seal*, *the Dutchy Seal*, and *the County Palatine Seal*, that the Rent was conſtantly paid to theſe Grantees, that one of them died, and that the Survivor made the aforeſaid Leaſe to the ſaid *T. P.* but there being no Attornment made to the Grantees of this Reverſion, and the Defendant ſuppoſing the Leaſe to be void for that Reaſon, procured a Grant from *the King*, reciting the Grant to the two former Perſons, and by this new Grant the Reverſion was granted to the Defendant; and the only Queſtion was, whether an Attornment was neceſſary to the firſt Grant, or not; and adjudged, that it was not, becauſe in the Caſe of the King, who could not compel the Tenant to attorn as a common Perſon may; therefore the Precedents are, that this Caſe is good without Attornment, tho' if it was *Res integra* an Attornment ſeems as neceſſary as Livery to a Feoffment. *Raym.* 90. *Carpenter* verſus *Marſhall*. Sid. 189. 1 Lev. 28.

13. Prohibition was granted to the Chancery in *Cheſter*, for that the Plaintiff had brought an *Engliſh* Bill there for the Jointure of his Wife, which is Matter of Freehold, and ſo it appeared to be by the Anſwer to the Bill, and yet they proceeded to make a Decree. *Sid.* 189. *Gerrard* verſus *Butler*.

14. Writ of Error out of the Chancery to reverſe an *Outlawry in Cheſter*; upon a Motion to ſtay the Return of the Writ, upon the Opinion of the *Lord Coke*, 4 *Inſt.* 214. it was denied, becauſe this old Uſage is gone by the Statutes 32 *H.* 8. *cap.* 43. and 33 *H.* 8. *cap.* 13, before which laſt Statute there were no *Outlaries in Cheſter*; 'tis by that Statute, that Coroners are introduced there, and they had no *Chief Juſtice* there till *Queen Elizabeth*, for till then there was but one Judge there. 2 *Salk.* 500. *Wilbraham* verſus *Poley*. See *Dyer* 320, 321, 345.

Curteſy of England.

(A)

What it is, and who ſhall be Tenant by the Curteſy, and who not, and of Leaſes made by him.

1. IF after Marriage, a Child is born alive, 'tis not material whether 'tis *baptiſed*, or ever heard to cry, to make the Husband Tenant by the Curteſy; for if 'tis born alive, he ſhall be Tenant by the Curteſy. 1 *And.* 35.

2. The Teſtator being ſeiſed in Fee of an Houſe in *London*, deviſed it to *Alice his Couſin*, and after her Deceaſe to *W. R.* her Son and Heir apparent, and died, *Alice* married, and had Iſſue by her ſecond Husband, ſhe being a Widow when the Will took Effect, and afterwards ſhe died; adjudged, that her Husband ſhould not be Tenant by the Curteſy, becauſe his Wife was only *Tenant for Life*. *Paſch.* 19 *Eliz. Dyer* 357. *Chick*'s Caſe.

3. In Treſpaſs, upon Not guilty pleaded, a Special Verdict was found: *ſſ.* A Feoffment to the Uſe of *Jane* for Life, and after her Death to *Elizabeth in Tail, upon Condition* of Payment of 30 *l. to Joan* (the now Plaintiff) within one Year after the Death of *Jane*, or within one Year after *Joan* ſhould be eighteen Years old, and if *Elizabeth* died before the Days of Payment, and without Iſſue, or *ſhall fail in the Payment of the* 30 *l.* then to the Uſe of *Jane* in Tail; *Elizabeth* married *Samms* (the Defendant) and had Iſſue a Child born alive, but died a Year after the Death of *Jane*, and ſhe the ſaid *Elizabeth died before Joan* was eighteen Years of Age, and without Iſſue, and the 30 *l.* was not paid, and yet her Husband *Samms* kept the Poſſeſſion as *Tenant by the Curteſy*, upon whom *Joan* entered, the 30 *l.* not being paid to her; and adjudged, that her Entry was not lawful, becauſe, if this was a Condition, and broken, the *Heir*, and not a Stranger (as *Joan* was) muſt enter to defeat the Eſtate, but the Entry of *Joan* could not, for that Reaſon defeat it, but the Eſtate-tail is determined by the Non-payment of the 30 *l.* and wherever ſuch an Eſtate is determined, and not defeated, the Husband is Tenant by the Curteſy. 1 *And.* 184. *Paine* verſus *Samms*.

4. The Husband, who in Right of his Wife, as Tenant by the Curteſy, made a Leaſe for Years to *T. S.* rendring Rent; the Wife died, leaving Iſſue, then the Husband died; adjudged, that the Leaſe is now void without Entry, and the Leſſee is become Tenant at Sufferance. *W. Jones* 354. In *Miller* and *Manwaring*'s Caſe.

5. Upon a Demurrer to an Avowry, the Caſe was, a Rent-Charge was granted to a Feme ſole and her Heirs, payable yearly by equal Portions on two Feaſt-Days in the Year, the firſt Payment to be made on the firſt of thoſe Feaſt-Days, which ſhould happen after the Death of *W. R. &c.* The Woman married, and had Iſſue and died, then *W. R.* died, and the Husband, as *Tenant by the Curteſy*, diſtrained for the Rent; it was objected againſt him, that he could not be Tenant by the Curteſy, becauſe the Freehold of this Rent was to commence *in futuro*, (*viz.*) after the Death of *W. R.* who ſurvived the Wife; for then, and not before, it is payable; and 'tis a Rule in Law, that the Husband cannot be Tenant by the Curteſy, where the Wife was not ſeiſed of the Freehold and Inheritance, *uno tempore*, during the Coverture; now here the Rent-Charge is an executory Inheritance, and the Limitation when it ſhall be paid guides the Eſtate, (*viz.*) after the Death of *W. R.* and he ſurviving the Wife, prevented the Seiſin in her, and by Conſequence there could be none during the Coverture, but the Court inclined, that the Husband was Tenant by the Curteſy, becauſe, tho' the *Rent was payable in futuro*, yet it was aſſignable, and might be granted over, which proves that it was *in eſſe*, not adjudged. 2 *Sid.* 110, 117. *Dethick* verſus *Bradbourne*.

Cuſtom.

What it is, and how it differs from a Preſcription, and of good Cuſtoms. (A)
Cuſtoms which are void, and not good. (B)
Pleading Cuſtoms. (C)

Cuſtoms.

Cuſtoms of the King. (A)

(A)

What it is, how it differs from Preſcription, and of good Cuſtoms.

1. A Cuſtom may be good where 'tis againſt the *Particular Intereſt of a Perſon*, and prejudicial to him, if 'tis for the *Publick Good*, as a Cuſtom to make Bulwarks upon the Land of another, for Defence of the Realm, or to pull down a Houſe, to prevent the Spreading of Fire. *36 H.* 8. *Dyer* 60.

2. In Replevin, the Defendant entituled himſelf to Common of Paſture, in the Place where, *&c.* as to his Copyhold Tenement belonging; the Jury found, that he ought to have Common in the Place, *&c.* but that every Copyholder had, Time out of Mind, uſed to pay yearly one Hen and five Eggs; adjudged, that this Payment did not limit or qualifie the Cuſtom; 'tis only a Recompence for the Common, for which the Lord might diſtrain. 5 *Rep.* 78. *Grey*'s Caſe. *Poſtea* Preſcription. (B) *6. S. C.*

3. Cuſtom is defined by my Lord *Coke*, to be an Uſage which hath obtained the Force of a Law, as to *particular Places and Things*; for that which is a general Cuſtom throughout the Kingdom, is the Common Law; but Cuſtom is properly applicable to a *certain Place*, as to a *County*, *Town*, *Hundred* or *Manor*, and runs with the Land, as the Cuſtom of *Gavelkind*, *Borough-Engliſh*, *&c.* But *Preſcription* is applicable to the *Perſon*; as where a Man claims a Thing, becauſe he and his Anceſtors, and all thoſe whoſe Eſtates he hath in the Thing, have Time out of Mind enjoyed the ſame; and every *Preſcription* ought by Common Intendment, to have a reaſonable Beginning; but 'tis not ſo in a Cuſtom. *6 Rep. Gateway*'s Caſe. 8 *Rep. 62 in Becher*'s Caſe.

4. Cuſtom, that *every Inhabitant of a Town* hath paid *modum decimandi* to the Parſon, is good; for 'tis not a Claim of any Charge or Profit in the Land of another, but a Diſcharge in their own Land; ſo a Cuſtom, that every *Inhabitant of ſuch a Town* ſhall have a *Way* over ſuch a Place to Church, or to the Market, is good, becauſe 'tis but an * *Eaſement*, and no Profit. *6 Rep. 69. In Gateward*'s Caſe. *Poſtea* (B) *pl. 7. S. C.* * Poſtea 15.

5. In Trover, *&c.* the Defendant pleaded, and juſtified the Taking, *&c.* at ſuch a Place in *L.* as *Bellman* there, by Vertue of a Cuſtom to take out of every Bag of Corn *brought to the Market to be ſold*, and holding the Quantity of a Buſhel, one Pint, and no more; and if it ho'd more, then to take a Quart; and ſhews, that he was choſen *Bellman*, *&c.* and that he took the Corn, for which the Action was now brought againſt him, as by Cuſtom did belong to him in *L.* and that he converted the ſame to his own Uſe at *M.* Adjudged, this was a good Cuſtom, tho' the Corn *was brought to be ſold*, and was not ſold; for the Office of a Bellman is to clean the Streets, and he hath this Allowance for his Labour, which is for the Publick Good: Now, tho' the Trover was in one Place, and the Converſion in another, yet having conveyed to himſelf a Property, he may convert his own Goods where he will. 2 *Bulſt.* 201. *Hill* verſus *Banks*. *Moor* 835. *S. C.* by the Name of *Hill* verſus *Hawker*. 1 Roll. Rep. 1, 44. Moor 815. *See* Traverſe. (A) 1.

6. Where the Cuſtom is, that the *eldeſt* * *Daughter* ſhall inherit, this is a good Cuſtom; but then, if there is no Daughter, the *eldeſt Siſter* ſhall not inherit by Vertue of this Cuſtom; ſo if the Cuſtom is, that the *youngeſt Son* ſhall inherit, the *younger Brother* ſhall not inherit by that Cuſtom. *Godb.* 166. *Rapley* verſus *Chaplin*. 2 *Cro.* 198. *Baily* v. *Stephens*. *S. P. See Cro. Car.* 411. * Poſtea 13. 4 Leon. 242. S. C. *By the Name of* Ratcliffe *v.* Chaplin.

7. A Cuſtom may be good which is contrary to a particular Rule of the Common Law; becauſe ſuch a Cuſtom may have a reaſonable Commencement, when 'tis not againſt the Publick Good; as the Cuſtom of *Gavel-kind* and *Borough-Engliſh*, are againſt the Rules of Deſcent, yet they are good Cuſtoms. *Davis*'s *Rep.* in the Caſe of *Taneſtry*.

8. In *Falſe Impriſonment*, the Defendant juſtified by a Cuſtom in *Sandwich*, which is within the *Cinque-Ports*, that if the Goods of a Freeman of *Sandwich*, ſhould come to the Hands of a Freeman and Citizen of *London*, that in ſuch Caſe the Mayor and *Jurats of Sandwich* ſhould write to the Lord Mayor and Aldermen of *London* to Summon the Perſon before them, and to order Reſtitution, which, if they refuſe, or give no Anſwer after a ſecond and third Letter for that purpoſe, then there ſhall be a Judgment of *Withernam* againſt the *Mayor and Commonalty of* 2 And. 151.

London, which ſhall be certified to the Lord Mayor, and if he doth not make Reſtitution within fifteen Days, then they of *Sandwich* have uſed to detain the Perſon of any *Londoner*, who ſhould have come there, and until he make Reſtitution; and upon Demurrer to this Plea, one of the Judges held this to be a good Cuſtom, becauſe the *Cinque-Ports* being Places for the Defence of the Kingdom, it may be reaſonable that Juſtice ſhould be done there, without attending for it in any other Place; but the other Judges were of a contrary Opinion. *Moor* 603. *Paramour* verſus *Verrall*. *Antea* Averment. (B) 6. *S. C.*

9. Cuſtom, that the Pariſhioners, without the Parſon, ſhall chooſe *Churchwardens*, is good; ſo adjudged in the Caſe of *St. Ethelburgh* in *London*. *Paſch.* 15 *Car. in B. R.*

10. The Cuſtom in the Town of *Newcaſtle* is, that the *Owners* of Houſes in that Town in *Fee-ſimple*, may deviſe them by Will or by Parol, but not Tenants in Tail; it was found by the Jury, that the Teſtator was ſeiſed *in Tail in Poſſeſſion* of ſeveral Houſes there, and deviſed them by Parol, but that the *Reverſion in Fee* was likewiſe in him; and it was objected, that this Deviſe was not warranted by the Cuſtom, which is to be taken ſtrictly, and not to be enlarged, and therefore it ſhall extend to him who is abſolute Owner of the *Fee-ſimple in Poſſeſſion*, and not in Reverſion; 'tis true, a Reverſioner in Fee is within the Letter of the Cuſtom; and tho' Cuſtoms are to be taken * ſtrictly, yet they ſhall be taken likewiſe reaſonably, having Reſpect to the Benefit of the Party. *Adjornatur. Style* 409. *Swan* verſus *Tenham*.

* Poſtea (B) 5.

11. Cuſtom for the *Freemen and Proprietors* of Ships in *Lynn*, to dig Gravel in ſuch a Place for *Ballaſt*, is good, becauſe 'tis to maintain *Navigation*, which is for the *Publick Good*; and ſo 'tis to repair the Highways; for the Inhabitants do not claim any particular Profit themſelves, but for the Publick Uſe and Benefit. 3 *Lev.* 160. *Mayor of Lynn Regis* verſus *Tailor*.

1 Lev. 293. S. C. Antea 6. S. P.

12. Cuſtom of *Newcaſtle upon Tyne*, that Lands ſhall deſcend to the eldeſt Daughter for Life, and to the Males of the collateral Line, excluſive to Females in the lineal, was held good. 1 *Vent.* 88. *Simpſon* verſus *Quinley*. See * *Newton* verſus *Shafton*.

* Copyhold. (G.)

13. In Ejectment for eight Boyleries of Salt, in *Droitwich*, which is made of Water drawn out of a Well; the Evidence was, that the Soil of this Well, out of which the Water was drawn, is in the King, but that the Inheritance of the Water was in ſeveral Proprietors; that the Governing and repairing this Well belonged to the Bailiffs and Burgeſſes of *Droitwich*, who in Recompence for their Trouble, were accuſtomed to allow themſelves Boyleries proportionable to their Charge, every Year; the Queſtion was, whether this was a good Cuſtom, becauſe it went in Deſtruction of the Inheritances of other Men? adjudged a good Cuſtom; for 'tis to preſerve their Inheritance, becauſe the Well would be damnified, unleſs there was an yearly Charge to repair it. *Sid.* 161. *Smith* verſus *Barrett*.

14. A Burgeſs of *Ipſwich* being committed to Priſon, brought an *Habeas Corpus*, and upon the Return thereof, the Cauſe of his Commitment appeared to be, that there was *a Cuſtom in Ipſwich*, to elect two Burgeſſes every Year, *who uſed to make a Feaſt* on a certain Day, and that *Wallis* was elected Burgeſs, but refuſed to make a *Feaſt*, for which he was fined 20 *l.* and committed till he paid it; and this was held to be a good Cuſtom. *Wallis's* Caſe cited in 2 *Lutw.* in the Caſe of *Gee and Wilden*.

15. In Treſpaſs, *&c.* the Defendant pleaded in Bar a Cuſtom for the *Inhabitants of ſuch a Pariſh*, to dig Stones and Gravel in ſuch a Place to repair the Highways, *&c.* and upon Demurrer it was inſiſted, that this Cuſtom was not good, either as to the Perſons, or to the Matter; for as to the Perſons, it was too general for *Inhabitants* of a Pariſh to preſcribe, becauſe *Sojourners*, *Apprentices*, *Children* and *Servants*, are comprehended under that Word; then as to the Matter, this was a Cuſtom for a Profit to be taken *in alieno ſolo*, for which *Inhabitants of a Pariſh* cannot preſcribe; but it was inſiſted for the Defendants, that if *Inhabitants of a Pariſh* may preſcribe for a *Way*, *&c.* they may preſcribe to dig neceſſary Materials to repair that Way, and this ſeemed to be Law, upon the Authority of *Gateward's* Caſe; where the Judges diſtinguiſhed between an Intereſt or Profit to be taken, *in alieno ſolo*, and where it was only by way of *Eaſement*; for in the firſt Caſe a Preſcription by *Inhabitants* is too general; but that *Inhabitants*, *&c.* may preſcribe for an * *Eaſement*; and ſuch it is to have a Way, or to repair a Way. 2 *Lutw.* 1344. *Johnſon* verſus *Wyard*.

*Antea 4.

(B)

Of Cuſtoms which are void, and not good.

1. A Cuſtom which is againſt the *Publick Good* and injurious to many People, is void; as a Cuſtom, that none ſhall put his or their Cattle into the Common until the Lord hath put in his Cattle, is void, becauſe 'tis injurious to many Commoners. 2 *H.* 4. 24.

2. Where a Cuſtom was alledged, that Tenant in Fee-ſimple might make a Leaſe for ſix Years, and no longer; this is void, becauſe unreaſonable and repugnant to his Eſtate. 19 *Eliz. Dyer* 358. *Sasford's* Caſe.

3. A Cuſtom, that the Land ſhall go *Digniſſimo* of the Sex, is void for the Incertainty, and can never be reduced to any Certainty; for Dignity conſiſts in the Opinion of the People, which is the moſt incertain Thing immaginable. *Davis's Rep.* in Caſe of *Taneſtry*.

4. Cuſtom, that an *Infant* may be impleaded in a Court of *Antient Demeſne*, at the Age of ſixteen Years, and be compelled to plead, is not good, becauſe 'tis contrary to the Common Law. *Dyer* 262.

5. An *Executor* was ſued in an Action of Covenant in the Court at *Briſtol*, in which the Plaintiff declared on a Covenant made to him by the Teſtator of the Defendant by *Word* only, and ſet forth a Cuſtom in that City, that *conventio ore tenus* ſhall bind the Covenantor as ſtrong as if it had been in Writing; after Judgment for the Plaintiff in that Court, a Writ of Error was brought, and adjudged, that the Cuſtom, if it had been good, did not warrant this Action, for it extends to the Covenantor, and not to his Executors; for all Cuſtoms muſt be taken * ſtrictly. *Hill.* 25 *Eliz.* 1 *Leon.* 3. *Wade* verſus *Bemboe.* * Antea (A) 10.

6. A Cuſtom was alledged in the City of *York*, that a Merchant Stranger ſhould not ſell Goods to a Merchant Stranger within the Liberties of the City, nor buy Goods, *&c.* upon Pain of forfeiting the ſame to the *Mayor, Sheriffs and Citizens*; they were incorporated by a Charter of *R.* 2. by the Name of *Mayor, Viſcounts and* Sheriffs, and before their Incorporation they were called *Mayor, Bailiffs and Sheriffs*; ſo as this Cuſtom muſt ariſe ſince the Reign of *R.* 2. which is within Time of * Memory, and by Conſequence it cannot be a Cuſtom, if the Beginning is known. *Paſch.* 28 *H.* 8. *Bendl.* 35. * Poſtea (C) 2.

7. Cuſtom, *&c.* for the Inhabitants of ſuch a Pariſh, living in antient Houſes, to have Right of Common in ſuch a Field, *ratione commorantiæ*, is not good, for 'tis againſt Law, that an * Inhabitant ſhould have Common in a Place where he hath no Manner of Intereſt in the Houſe; for if that ſhould be admitted, his Right would be only tranſitory, and for no certain Time or Eſtate, but only during his *Inhabitancy*; and to ſuch a Right (if 'tis any) a Cuſtom cannot extend, becauſe that ought to be to a Right which hath a Certainty and Continuance. 6 *Rep. Gateward's* Caſe. *Antea pl.* 4. *S. C.* * Poſtea (C) 6.

8. Caſe in an inferior Court, the Defendant was *eſſoined*, and the Plaintiff had the ſame Day by *Eſſoin*; at which Day the Defendant being demanded made Default, *& habuit poſt defaltam ſecundum conſuetudinem Curiæ*, at which Day both Parties appeared, and Judgment was given againſt the Defendant hy *Nil dicit*; and upon a Writ of Error brought, the Error aſſigned was, that the Place was diſcontinued; for when the Defendant made Default, no farther Day could be given to him, becauſe he was then out of Court; and tho' it was done *ſecundum conſuetudinem*, that cannot be a good Cuſtom, to help what is againſt the Common Law. 2 *Cro.* 357. *Popham* verſus *Rowley.*

9. Debt was brought upon a *Conceſſit ſolvere*, according to the Law of Merchants, and the *Cuſtom of the City of Briſtol*; this was held good in *Mich.* 29 *Eliz. Godb.* 49. but where it was brought in *Briſtol*, againſt an Executor, for a Debt upon ſimple Contract due by the Teſtator, tho' the Plaintiff had Judgment, yet it was reverſed upon a Writ of Error; and the Error aſſigned was, that the Cuſtom of bringing an Action of Debt upon a *conceſſit ſolvere*, was not good; and ſo it was adjudged, becauſe it hinders the Party to wage his Law, and 'tis without any Manner of Conſideration, eſpecially againſt an Executor. *Style* 195. *Twigg* verſus *Roberts.*

10. A Cuſtom was alledged in the City of *Norwich*, for that they maintained a Common Key for the *unlading* ſuch Goods as were brought up the River in Veſſels *to the ſaid City*, that every Veſſel *paſſing the ſaid River by the ſaid Key* ſhould pay a certain Sum; this was held a void Cuſtom, as to the Veſſels *paſſing by and not unlading*, for the maintaining the Key, is no Benefit to them. 1 *Vent.* 71. *Haſpurt* verſus *Wills.* 1 *Mod.* 47, 104. *S. P.*

11. A Cuſtom in a Court of *Stanneries*, to try Cauſe there by ſix Jurors, not good; 'tis true, it may be otherwiſe in *Wales*, where 'tis confirmed by Act of Parliament: So a Cuſtom of that Court, to take out Execution both againſt Body and Goods, is void. *Sid.* 253. *Aike* verſus *Hunkin.*

12. The Plaintiff exhibited an *Engliſh Bill* for *Multure* due to his Mill, by Vertue of a Cuſtom, *That all the Inhabitants of H. (where the Mill is) ought to grind all their Corn and Grain*, &c. *to be uſed or ſpent*, at the Plaintiff's Mill; the Queſtion upon hearing the Cauſe was, whether this was a good Cuſtom, or not? becauſe as it was laid, a Man could not diſpoſe of any Corn but what was ground at that Mill; 'tis true, a Cuſtom *to grind all the Corn ſpent in ſuch an Houſe in H. is good*; but a Cuſtom to grind *all that is ſpent*, is unreaſonable, for then he muſt grind his Oats and Peaſe for his Horſes and Hogs: The Court was divided; two of the Barons, that the Cuſtom is good, for it ſhall have a reaſonable Intendment, (*viz.*) *That all Corn which is ground, ſhall be grinded at that Mill*; but two other Barons, that a Cuſtom againſt Right, ſhall not be taken by Intendment. *Hardr.* 68. *Vaughan* verſus *Manſell. See Hob.* 189. *Harbin* verſus *Green. S. P.*

13. The Defendant was indicted and found guilty at the Seſſions, for not executing the Office of Conſtable, tho' he had pleaded a Cuſtom, that every *Watchman of the Cuſtom-Houſe in London* ſhall be diſcharged from being Conſtable, and becauſe it appeared, that there were ſeveral of that Pariſh which were Watchmen, *&c.* this Cuſtom was not allowed; like the Caſe, where the King grants to certain Perſons to be diſcharged from being of a Jury, 'tis void, if there are not ſufficient beſides. *Sid.* 272. *The King* verſus *Clerke.*

(C)

Of pleading Cuſtoms.

1. THAT which is by *Cuſtom*, is not to be laid as at *Common Law*; therefore the alledging *quod talis habetur conſuetudo inter mercatores per totum Angliam*, is not good, becauſe a Cuſtom throughout *England* is the Common Law. 34 *H.* 8. *Dyer* 288. 9 *Rep.* 74. *In Combe's* Caſe.

2. Treſpaſs for Aſſault, Battery and *Wounding* the Plaintiff's Wife; the Defendant pleaded, that *Salisbury* is an antient City, and that there is a Cuſtom in the ſame, that if any Perſon make an Affray or aſſault another, he may complain to the Mayor, who may *ſend for him* that made the Affray, as a *Juſtice of Peace*, and make him anſwer it; that the Plaintiff made an Affray in the City, of which Complaint being made to the Mayor, he ſent the Defendant (being Conſtable) to bring the now Plaintiff before him; who accordingly went to his Houſe, and ſignified to him the Command of the Mayor, and thereupon the Wife of the Plaintiff aſſaulted him, and that he *molliter* put his Hands upon her, *&c.* which is the ſame Aſſault, Battery and Wounding; and upon Demurrer to this Plea, it was adjudged ill; for that the Cuſtom is laid for the Mayor, as *a Juſtice of Peace*, to ſend for one who had committed an Affray, when there was *no Juſtice of Peace* before the Statute 1 *Ed.* 3. therefore the Commencement of him being known, a Cuſtom cannot be laid for a Mayor, as *a Juſtice of Peace*, to ſend for any one, becauſe a Cuſtom cannot be within Time of * Memory; beſides, the Cuſtom is laid for the Mayor to *ſend for him* who made the Affray, and doth not ſay, *within the City*; and 'tis unreaſonable for the Mayor to ſend for him in any Place in *England*; and laſtly, the *Wounding* is not anſwered, he ſhould have pleaded Not guilty as to that; for *molliter manus imponere*, cannot anſwer the *Wounding*. 1 *Leon.* 103. *Jerome* verſus *Neale*.

* Antea (B) 6.

3. Where a Cuſtom is alledged in a Vill, the Party in Pleading cannot apply it to a particular Place in that Will; as where the Cuſtom of the Vill of *Peplow* was ſet forth to be, that *all the Occupiers of a Cloſe* there, had uſed to maintain a Fence againſt another Cloſe, this was held ill, for the Reaſon before-mentioned, unleſs it had been in the Caſe of a Copyholder; for he may apply a Cuſtom in a Pariſh, to a particular Place in that Pariſh, becauſe he cannot preſcribe. *Cro. Car.* 418. 1 *Vent.* 97. *See* Copyhold. (H) 8. *See Title* Way. (A) 15 *S. P.*

4. Treſpaſs for taking the Plaintiff's Nag in a Place called *Boughton*; the Defendant pleads in Bar, that the Truſtees in Fee of the *Honour of Clare*, had demiſed to him that *Honour* for 22 Years, and that Sir *Thomas Hare* was ſeiſed in Fee of the *Manor of Boughton*, which held of the *Honour of Clare*; then he ſets forth a Cuſtom, Time out of Mind, within that Honour, for the Lord thereof to have Fines upon Deſcents and Alienations, *&c.* of thoſe who held any Lan of the aid *Honour*, (viz.) for every Houſe, 1 *s.* and for every Acre of encloſed Land, 1 *s.* and if not encloſed, 6 *d.* (*Except thoſe who held of the ſaid Honour by the Payment of a certain Sum*), for which the Lord of the ſaid Honour might *diſtrain and impound*; then he ſets forth, that the Father of the now Plaintiff died ſeiſed in Fee of the Manor of *Boughton*, *and of ſeveral other Lands and Tenements in the County of N.* that upon his Death the ſame deſcended to the Plaintiff, and for not paying the Fine, the Defendant *diſtrained and carried away the Nag*; and upon Demurrer, it was inſiſted, that the Defendant had not brought his Caſe within the Cuſtom; for that was alledged to *diſtrain and impound*, but he *diſtrained and carried away the Nag*; beſides, 'tis incertain by this Plea, of how many Acres the Plaintiff's Father died ſeiſed; for 'tis alledged, that he died ſeiſed of the Manor, *and of ſeveral other Lands and Tenements* in *N.* when, to bring his Caſe within the Cuſtom, he ought to have ſhewed of how many Meſſuages the Plaintiff's Father died ſeiſed, which he held of the Honour, and of how many Acres encloſed, and then he ought to have averred, that thoſe Meſſuages and Acres were not within the *Exception*. 2 *Lutw.* 1297. *Hare* verſus *Hampſon*.

5. Treſpaſs, *&c.* for breaking his Cloſe, *&c.* and taking and carrying away a Load of *Lead-Mine*; the Defendant pleaded, that the Cloſe lies in *Kingsfield*, and then ſets forth a *Cuſtom in that Place quod bene licuit*, for any Perſon to work in Lead-Mines, and to dig to find Lead-Ore, and to take and carry away the ſame *after the uſual Duty is paid*, and ſo entitles himſelf under this Cuſtom, *&c. quæ eſt eadem fractio, &c* and upon Demurrer to this Plea, the Plaintiff had Judgment, becauſe the Cuſtom is not well ſet forth; for it ought to be poſitively alledged by *an Uſage in Fact*, by theſe Words *uſi fuerunt*, and not by thoſe Words *Bene licuit*, for any Perſon to work there; for that is no poſitive Allegation of the *Uſage*; beſides the Cuſtom ought to have been alledged in ſome *Manor*, *Vill*, or *Pariſh*, or that 'tis the Cuſtom of ſome *Hundred* or *County*; but here 'tis only alledged in a *particular Cloſe called Kingsfield*, which is ill, becauſe a Cuſtom cannot be applied to a *particular Cloſe*; then the Cuſtom is alledged to carry away the Lead-Ore, *after* the *uſual Duties paid*, and the Plea doth not ſhew *what thoſe Duties are*, *or to whom to be paid*; for this being Part of the Cuſtom, ought to be pa ticularly ſhewed. 2 *Lutw.* 1317. *Beresford* verſus *Bacon*.

6. In Replevin, the Caſe upon the Pleadings was, a Cuſtom *for the Freemen and Burgeſſes*, * *Inhabitants* of any Houſes in the *Borough of Sunderland*, to have Common; it was ob-

* Antea (B) 7.

jected, that this was ill, it being a Cuſtom for *Inhabitants* to have Common; but adjudged, that 'tis not only for Inhabitants, but for Freemen and Burgeſſes of the Corporation, and the Word *Inhabitants* is reſtrictive, (*viz.*) that they ſhall have no Common, unleſs they inhabit Houſes there; beſides, a Cuſtom alledged for every Member, is good, as well as where a Cuſtom is laid in a Corporation for them, and for each Member thereof to have Common. 2 *Lev.* 252. In *Hinks* and *Clerk*'s Caſe. *See* Common. (C) 6. *S. P.*

7. A Common Recovery formerly ſuffered, was lately reverſed upon a Writ of Error, and the Sheriff would have executed it by the Number of Acres contained in the Writ of Execution, by Meaſure, according to the Statute, and not according to the Cuſtom of the Country, and if ſo, then a *Welſh* Acre is more than two Statute Acres by Meaſure; but it was ruled, that the Sheriff deliver Poſſeſſion of the Acres, according as accounted by the Cuſtom and Uſage of the Country. 1 *Roll. Rep.* 420. *Lloyd* verſus *Bethell.*

8. In Covenant, the Plaintiff declared upon the *Cuſtom of London*, that every Freeman *may take* Apprentices, and that *Infants may bind* themſelves, *&c.* after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Cuſtom was pleaded *in Fieri*, when it ought to be *in facto*; ſo a Cuſtom within a Manor, that every Tenant, *&c. potuit & potuiſſet* ſurrender, *&c.* adjudged naught, and this was *Biſhop*'s Caſe. *Paſch.* 37 *Eliz.* ſo where it was ſet forth, that the Lord of the Manor, *licet & licuit* to aſſeſs a Pain for a Breach of a By-Law; and the Reaſon is, becauſe Cuſtoms and Preſcriptions conſiſt in reiterated Acts, and therefore there muſt be an * Uſage to ſupport them; but adjudged, that this Declaration was well enough, for a Cuſtom that every Citizen, *&c. might deviſe* in Mortmain, was held good, and ſo likewiſe in the King and *Bagſhaw*'s Caſe. *Cro. Car.* 347. *Raym.* 4. *Windhurſt* verſus *Gibbs.* * Antea 5.

9. In Covenant, the Caſe was, upon the Cuſtom of the Manor of *Weſtham in Eſſex*, which is, that the *Wife* ſhall be endowed of a Moiety of the Lands of which her Husband died ſeiſed, and that a Copyholder died, leaving a Widow and one Son, that the Widow had a Moiety of the Copyhold Lands aſſigned her, and the Son had the other Moiety, that they both joined in a Leaſe, reſerving Rent of 100 *l. per Annum*, (*viz.*) 50 *l.* to the Widow, and 50 *l.* to the Son, who died, and his Widow brought an Action againſt the Leſſee for 25 *l.* being a Moiety of her Husband's Moiety, upon *Nil debet* pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Breach was not aſſigned purſuant to the Cuſtom, which is, that the Widow ſhall be endowed of a Moiety, but this was of a Moiety of a Moiety; adjudged, that 'tis directly within the Cuſtom. *Raym.* 58. *Baker* verſus *Berisford.*

10. In Treſpaſs for Taking his Beef, the Defendant pleads a Cuſtom in ſuch a Place to chuſe Superviſors of Victuals at a Court-Leet, that he was choſen Superviſor, *&c.* and having viewed the Plaintiff's Beef, found it to be corrupt, which he took and burned; and upon a Demurrer to this Plea it was objected to be an unreaſonable Cuſtom, becauſe when Meat is corrupt, there are proper Remedies againſt ſelling it, either by Action on the Caſe, or by Preſentment at the Leet: *Sed per* three Juſtices, the Cuſtom is good. *North Ch. Juſt. dubitante.* 2 *Mod.* 56. *Vaughan* verſus *Wood.* 1 Mod. 202.

Cuſtom of the King.

(A)

1. CUſtoms are duties payable to the Crown for Goods exported and imported, and are due to the King of *Common Right*; firſt, becauſe the Subject hath Leave to depart the Kingdom, and to export the Commodities thereof; they are due likewiſe for the Intereſt which the King hath in the Sea, and as he is Guardian of all the Ports; and laſtly, for protecting Merchants from Enemies and Pirates. *Mich.* 30 *Eliz. Dyer* 43.

The Word *Cuſtoms* is *nomen collectivum*, and comprehends *Magna & Antiqua Cuſtuma*, ſo called, becauſe payable out of our own *native Commodities*, as *Wool*, *Woolfells*, *and Leather*, and *parva Cuſtuma*, which are Cuſtoms payable by *Merchants*, *Strangers*, *and Denizens*, and this began in the Reign of *Ed.* 1. when the Parliament granted him 3 *d.* in the Pound for all Merchandizes exported and imported. *Dyer* 165. 1 *Eliz.*

But that which is granted by Parliament is properly called a *Subſidy*, which is a Duty likewiſe payable to the Crown for Goods exported and imported, and ſometimes granted to the King for Life, and there are ſeveral Sorts of theſe *Subſidies*, as *Tunnage*, which is a Subſidy granted out of every *Tun of Wine* imported, which was firſt granted by the Parliament to *Ed.* 3. in the 45th Year of his Reign, and *Poundage*, which is a Subſidy granted for all Goods exported and imported, except Wines by Merchants, *Strangers and Denizens*, and is uſually the 20th Part of the

Value

Value of the Goods, or 12 *d.* in the Pound, and this was firſt given to *H. 6. for Life*, and afterwards to *Car.* 2. for Life, by the Statute 12 *Car.* 2. *cap.* 4.

2. *Quo Warranto* againſt the Mayor, *&c.* of *Waterford*, for receiving the great and ſmall Cuſtoms, and Subſidies and Poundage for Goods imported and exported there, and converting them to his own Uſe without Warrant; the Defendants juſtify under three Charters of ſeveral Kings, firſt under a Grant, 8 *Novemb.* 9 *Johannis*, by which that King granted to them the Cuſtom called *Murage*, of all Things bought and ſold in that City; adjudged, that by the Word *Murage*, no Cuſtom or Subſidy was granted to them, becauſe *Murage* is a Toll to be taken of every Cart or Horſe which comes loaded into the City, or to be taken out of Goods ſold by Retail in open Market, and is payable for Repairing the Walls; but *Cuſtoms* are of another Nature, for thoſe are due for Goods exported or imported in Groſs; beſides, *Murage* doth not lie in Grant, but in Preſcription, then they juſtify under a Charter 6 *Maii*, 1 *H.* 5, by which that King granted to them for ever the *Cuſtom Cocquet*; adjudged, that by that Word the antient *Cuſtoms of Wool*, *Woolfells*, and *Hides* was granted, becauſe this Cuſtom is known by that Name in all Ports of *England* and *Ireland*: Then they juſtify under a Grant 3 *H.* 7. by which that King granted, that the Citizens, *&c.* ſhould be for ever *diſcharged de nova Cuſtuma*, called *Poundage*; adjudged, that by this Grant they had no Authority to receive *Poundage*, becauſe it extends only to diſcharge it, and not to give it; beſides, the *Poundage* for which this *Quo Warranto* was brought, was granted by the Parliament, *Anno* 15 *H.* 7, and is therefore called *Nova Cuſtuma*, which could never be given or diſcharged by a Grant *Anno* 3 *H.* 7. which was *twelve Years* before any ſuch Poundage was in Being. *Davis Rep. Caſe of Cuſtoms.*

* *The* Spaniards *call it* Quintal, *'tis about* 100 *Weight.*

3. A Merchant beyond Sea ſhipped 4500 * *Kentals* of Woad for *England*, and a Tempeſt ariſing the Maſter of the Ship and the Mariners threw great Part of it into the Sea to ſave their Lives; the Ship arrived at *Southampton*, and the Maſter not knowing how much remained, but believing there might be 2000 *Kentals left*, *agreed with the Cuſtom-houſe Officer* to pay the Duty for ſo much, and for what ſhould be more, when weighed at the King's Beam, and thereupon had Leave to land the Goods, which he did, *and* 1693 *Kentals more* than 2000, all which were ſeiſed as forfeited by Vertue of the Statute 1 *Ed.* 6. *cap.* 13. and upon an Information in the Exchequer, and all this Matter appearing in Evidence, adjudged, that no Part of the Goods were forfeited, for the Agreement with the Officer extended to the Whole. *Plowd.* 1. *Reneger* verſus *Fogoſſa.*

Moor 832.

4. Information by *Sir Tho. Waller*, chief Butler to the King againſt the Defendant, for detaining eight Tun of Wine due to the King for *Priſage*, ſetting forth, amongſt other Things, that two Ships laden with Wine, of the Goods of *G. H.* came to the Port of *London*, and afterwards two more, in which four Ships there were 124 Tuns of Wine, of which eight Tuns were due to the King for Priſage, and that the Defendant refuſed to deliver them: The Defendant, by Proteſtation, that *Sir Tho. Waller* was not chief Butler, confeſſed that the four Ships did arrive in the Port at *London*, two in the Life-time of her Husband, and two after his Death, and that he was poſſeſſed of the Wines *ut de bonis propriis*, and ſo poſſeſſed made her Executrix, and died, that ſhe proved the Will and took upon her the Executorſhip, and did unlade thoſe two Ships which arrived after the Death of her Husband; then ſhe pleaded the Grant 1 *Ed.* 3, unto the Mayor, *&c.* of *London*, *quod de vinis Civium* no Priſage ſhall be taken, but that they ſhall for ever be diſcharged of the ſame, and traverſed, that theſe Wines were her Goods, and that ſhe had nothing in them but as Executrix to her Husband, with an Averment, that he was a *Freeman and Citizen of London*; and upon Demurrer to this Plea by the *Attorney General*, the Queſtion was, whether *Priſage* was due for theſe Wines; and adjudged, that the Husband was a Citizen of *London* at the Time of his Death, and that theſe Wines were *Bona Civis*, and ſo within the Grant, and by Conſequence diſcharged from the Payment of Priſage in the Hands of the Executrix, who repreſented his Perſon. *Bridg.* 1. *Waller* verſus *Hanger*. *Trin.* 11 *Jac.* 2 *Bulſt.* 250. *Kennycott* verſus *Bogen.*

5. Upon a Reference on a Judgment in the Exchequer, where an Impoſt was put on Currans, it was reſolved by *Popham* and *Cook*, that the King cannot, at his Pleaſure, lay a Duty upon any Merchandize *imported* or exported, unleſs it be for the Advancement of Trade, as where a foreign Prince lays a Duty upon Merchandizes imported by our Merchants, in ſuch Caſe the King may lay a Duty on their Goods imported here, to make an Equality for the Benefit of Trade, but then ſuch Duties cannot be aſſigned or granted to another, becauſe they have no certain Continuance, but are to be augmented, decreaſed, or quite taken away upon juſt Occaſion, for the Advancement of Trade, and for the publick Good; reſolved, that at Common Law, no Cuſtom was payable, but for *Wool*, *Woolfells*, and *Leather*, which in *Magna Charta* is called *Recta conſuetudo*, and all other Cuſtoms are called *Mala Tolneta*; reſolved, that it hath been uſual at the Beginning of a Reign, for the Parliament to grant to the King, the *Subſidies of Tunnage and Poundage* for Life, which proves, that the King alone cannot impoſe ſuch Duties. *Trin.* 5 *Jac.* 12 *Rep.* 33.

* Swinnerton's *Caſe.* Hardres 359. S. P.

6. In a Special Verdict upon an Information upon a Seiſure of *Canary Wines* for not paying Cuſtom, the Queſtion was, whether Cuſtom was due upon *Importation*, and in what Proportion it ought to be paid; and adjudged, that 'tis not due before * *Landing*, becauſe Goods may be imported by Streſs of Weather, or for Want of Water or Victuals, and not by Way of Merchandize; 'tis true, the Act of Tunnage and Poundage ſeems to make it due by Importation; but the firſt Rule in the Book of Rates, which is annexed to that Statute, makes it due at the *Landing*, and

and this is agreeable to the Common Law, and that 'tis due for no more than is brought on Shore, and this is different from *Priſage*, for that is due upon breaking Bulk, as appears in *Waller* and *Hanger*'s Caſe; 'tis likewiſe due, according to the true Eſtimate of the Quantity landed, and not according to the Veſſel in which it is contained. *Hardres* 358. In *Holton* and *Raworth*'s Caſe.

7. At a Trial at Bar, in Trover, it was held, that if Goods are landed, and pay Cuſtom, and are carried over Land or Sea to another Port, they ſhall not pay Cuſtom there, for ſuch are not within the Statute 3 *H.* 7. *cap.* 7, that before any Man ſeiſes ſuch Goods, there ought to be great Cauſe of Suſpicion, that the Duty was not paid; for tho' they are condemned in the Exchequer, upon an Information, at the Suit of the King, that will not indempnify another from converting them before that Time, and probably not at all, becauſe ſuch Informations are frequently contrived by Practiſe. *Sid.* 264. *Bruen* verſus *Roe.*

8. The Plaintiff ſets forth, that he was poſſeſſed of 226 Hundred of Lamb-skins, which he intended to tranſport from *Dublin* to *England*, and had paid the Duty of *Tonnage and Poundage*, *&c.* but that the Defendant *Vi & Armis* aſſaulted the Plaintiff, and hindred him from exporting till he had paid 84 *l.* 8 *s.* over and above the ſaid Duty, *&c.* the Defendant pleads the *Statute* 14 *Car.* 2. made at *Dublin*, by which it was enacted, that every one exporting *Iriſh* Wool, ſhall pay for every Stone, containing *eighteen Pounds*, 1 *s.* 8 *d.* to the King, who granted that Duty to the Defendant for ſeven Years, and that there was upon the ſaid Skins, 1351 *Stone of Wool*, of ſix Months Growth, and that 84 *l.* 8 *s.* was due for the ſame, and for Non-payment he ſeiſed, *&c.* and upon Demurrer to this Plea the Plaintiff had Judgment in *C. B.* in *Ireland*, which was affirmed in Error in *B. R.* there, and now upon a Writ of Error brought in *B. R.* here, it was adjudged, that the Duty ſhall be *ſingly paid for the Skins*, and not *ſeparately* both for *Skins and Wool*, for it ſhall never be preſumed, that Men would kill Lambs, barely to deprive the King of his Cuſtoms. *Raym.* 368. *Muſchamp* verſus *Aſton.*

9. In a Special Verdict in Treſpaſs for Taking his Goods (naming them) *ad damnum*, *&c.* the Jury, upon Not guilty pleaded, find the Statute 12 *Car.* 2. *cap.* 23, and 29 *Car.* 2, by which an additional Duty was impoſed on every *Gallon of Low Wines*, of the firſt Extraction, made of any Kind of imported Wine or Cyder, *or other imported Materials*, to be paid by the Maker or Seller: They find that the Plaintiff was a Diſtiller of Strong Waters, and that in a Month laſt paſt he made 5880 Gallons of Low-Wines, *&c.* of Cyder or *other Materials imported*, and did not pay the Exciſe for the ſame; That an Information was exhibited againſt him for this Offence before the Commiſſioners of Exciſe, to which he pleaded Not guilty, but upon Examination of the Matter was found guilty, and adjudged to forfeit 98 *l.* (being double the Value of the ſaid Low-Wines) to be levied on his Goods and Chattels, that the ſaid Commiſſioners made a Warrant to the Defendant, being a Meſſenger belonging to the Office of Exciſe, to levy the ſaid Sum by Diſtreſs, *&c.* and that by Vertue thereof he did enter the Plaintiff's Houſe, and did take the Goods, *&c.* That there are Dregs of Sugar made beyond Sea, called *Molaſſes*, which are imported here, and that there are *Molaſſes* made in *England*, that the Low-Wines in the Information, and Judgment mentioned, were extracted from the *Molaſſes made in England*, *extracted from Sugar imported from beyond Sea*, and from other *Engliſh Materials*, that the Sugars from which the *Molaſſes*, *&c.* were ſo extracted, were ten Times of more Value than the reſt of the Materials of which the ſaid Low-Wines were extracted, that the *Molaſſes* can never be made Sugar again; that the Plaintiff in making the ſaid Low-Wines, doth uſually add ſeven Hogſheads of *Waſh*, in which is put one Quarter of Malt, and twelve Hogſheads of Water to produce the Extract of 200 Gallons of Low-Wines; that the principal Spirit of that Extraction is produced from the *Molaſſes*: The Queſtion upon this Special Verdict was, *Whether Molaſſes is an imported Material* within the Meaning of the Statute 29 *Car.* 2. it was argued, that it was not within the Words of the Act, becauſe it was never imported with the Sugar, for it was not then in Being, it was extracted from it after it was imported, and therefore it could not be a *Material imported*: It doth not conſiſt with the Grounds of Philoſophy, for Molaſſes differs eſſentially from Sugar, becauſe it doth not partake of the ſame Specifick Form, for in making *Molaſſes*, there muſt be a Separation of Parts, and conſequently a new Specifick Form, as *Cheeſe*, *Butter*, *&c.* are produced by *Separation of Parts*, and ſpecifically differ from *Milk*, of which thoſe Things are made, neither can *Molaſſes* be ſaid to be a Material, from the Reaſon of the Law it ſelf, for *mutata forma*, *mutatur ſubſtantia*: No Judgment was given. *Raym.* 305. *Bambridge* verſus *Bates*, 328. *S. C.* 337. *S. C.*

10. The Duty of Tunnage was firſt impoſed by the Statute 12 *Car.* 2. *cap.* 4. and it was 4 *l.* 10 *s.* on all *French Wine*; and by the Statute 1 *Jac. cap.* 3, it was 8 *l. per Tun*, with a Clauſe, that the *Grantee of Priſage ſhould pay the Duty*: By the Statute 7 *&* 8 *Will.* 3. *cap.* 20. it was 25 *l. per Tun*, and afterwards, by the Statute 9 *&* 10 *Will.* 3. *cap.* 23. *there was an additional Duty of* 4 *l.* 10 *s. per Tun, to be levied, as by the Statute* 12 *Car.* 2. Now in an *Aſſumpſit* for 500 *l.* received to the Plaintiff's Uſe, on *Non Aſſumpſit* pleaded, there was a Special Verdict, (*viz.*) That King *Charles* the firſt granted the *Priſage of Wines* to *I. S.* and his Heirs, *diſcharged of all Aids and Taxes*; and the Queſtion was, whether the Grantee ſhould pay *Tunnage*, or not; it was adjudged in the Exchequer, that he ſhould not, and upon a Writ of Error brought, that it was inſiſted for him, that *Priſage* was a Royal Revenue, and if the Crown had not granted it away, *Tunnage* could not be due to her, becauſe ſhe could not pay that Duty out of her own *Priſage*, therefore the Grantee claiming under the Crown ſhould have the ſame Exemption, and the rather, becauſe it was granted to him with this Immunity: But adjudged by ſeven Judges,

that Tunnage ſhall be paid for Priſage Wines by the *Grantee of Priſage*, becauſe immediately upon the Importation, this Duty attaches upon the Wines; therefore whatever Part the Grantee takes for Priſage, muſt of Conſequence be charged with this Duty, otherwiſe this Duty would be raiſed on the People to enrich a private Man, which could never be intended by the Law-Makers; and the Grantee of Priſage always paid Tunnage impoſed by former Laws: As to the original Grant made by *King Charles the Firſt*, of Priſage Wines diſcharged of *all Aids and Taxes*, that only extends to the Tunnage then in Being, and which he then had, and not to what he had not, and by Conſequence not to what might afterwards be given to his Succeſſors; the Judgment was reverſed. 2 *Salk.* 617. *Paul* verſus *Shaw*.

Damages.

Where more are given than laid in the Declaration, and where ſmall Damages and exceſſive Damages are given. (A)
In *Aſſault*, *Annuity*, *Maihem*, *Treſpaſs*, and on *Penal Statutes*. (B)
Damages in *Aſſumpſit*. (C)
Damages in *Dower*. (D)
Damages, where the Party hath no Loſs, and for Things not in Being. (E)
Of Several and entire Damages. (F)
Where Damages may be mitigated, where not. (G)
Of double and treble Damages. (H)
Of Damages in Prohibitions. (I)

(A)

Where more are given than laid in the Declaration, and where ſmall Damages are given, and where exceſſive Damages. See *Error*. (I) 3. *Relinquiſhment* per totum. *Trover*. (B) 15. *Writ of Inquiry* per totum.

1. THIS Word is often confounded with the Words *Coſts and Expences*, in Latin *Cuſtagia & miſæ*, but there is a wide Difference between them, for *Damages* are a Compenſation given by the Jury for an Injury or Wrong done before the Action brought; *Coſts* are the Expences of a Suit after the Action brought, this is called by the *Civilians expenſæ Litis*. 1 *Inſt.* 257. 10 *Rep.* 116.

2. 'Tis generally true, that tho' the Jury give *more*, yet the Plaintiff ſhall recover no more than he laid in his Declaration, as for Inſtance, in *Treſpaſs*, *Aſſault and Battery*, the Plaintiff declared to his Damage of 40 *l.* and the Jury found for him and gave him 50 *l. Damages*; adjudged, that he ſhall recover no more than he laid in his Declaration, and that this ought to be done of Courſe by the Clerks, without moving the Court. *Paſch.* 13 *Eliz. Owen* 45. *Hill.* 9 *Eliz. Dyer* 258. *S. P.*

3. In *Treſpaſs*, the Plaintiff declared to his Damage of 40 *l.* the Jury gave him 49 *l.* and 20 *s.* for Coſts; the Plaintiff waived the 9 *l.* which was ſo much more than for what he declared, and prayed Judgment for the 40 *l.* and for *Encreaſe of Coſts*, which were encreaſed by the Court to 10 *l.* and ſo for thoſe Damages and Coſts he had Judgment; and upon a Writ of Error brought, the Error aſſigned was, that the Damages and Coſts amounted to more than for what the Plaintiff had declared; adjudged, that where an Act of Parliament gives Damages where none were to be given before, there the Plaintiff ſhall not have Damages and Coſts likewiſe, but where a Statute adds only a farther Recompence in Caſes where Damages were before given at Common Law, there the Plaintiff ſhall have both Damages and Coſts; now, before the Statute of *Glouceſter*, 6 *Ed.* 1. *cap.* 1. Damages were recoverable in perſonal and mix'd Actions, but not *in real Actions*, and by that Statute Coſts are given in all Caſes where Damages were recoverable, either before or by Vertue of that Statute; now the principal Caſe being an *Action of Treſpaſs*, which is a *perſonal Action*, in ſuch Caſe Damages were recoverable at Common Law, before the Making that Statute, and therefore the Plaintiff ſhall have Coſts *de incremento* by Vertue of the Statute; and tho' 'tis true, that a Man ſhall recover no more Damages than laid in the Declaration, yet that muſt be underſtood Damages for Wrongs done, becauſe in *Detinue* he ſhall recover more than for what he hath declared. 10 *Rep.* 116, 166. *Pilford*'s Caſe.

4. But in *Eaſter Term*, 3 *Jac.* a Writ of Error was brought in *B. R.* upom a Judgment in *Detinue*, wherein the Plaintiff declared to his *Damage* 100 *l.* and the Jury gave him 150 *l.* *Damages*, and this was aſſigned for Error; adjudged, that where the Plaintiff declares for no certain Damages, there he ſhall have what the Jury finds; but where his Damages are laid in his Declaration to a certain Sum, as in this Caſe, there he ſhall have no more than for what he declared. 1 *Bulſt.* 49. *Hoblin* verſus *Kimble.* *Poſtea* Variance. (C) 10. *and* Verdict. (F) 3. *S. C.*

5. Leaſe for Life, *rendring Rent*, the Leſſee granted all his Eſtate to the Defendant, the Leſſor demanded the Rent of him, which was due for many Years, and he promiſed, that if he could ſhew a Deed that the Rent was due, he would pay it, and all the Arrears; in *Aſſumpſit* brought, the Plaintiff ſet forth this Matter, and that he ſhewed the Defendant the Deed, *&c.* and that he had not paid the Rent: Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and Damages aſſeſſed to as much as the Rent in arrear did amount unto; and upon a Motion in Arreſt of Judgment, it was objected, that Damages ought not to be aſſeſſed for all the Rent arrear, but only to ſo much as became due after the Aſſignment of the Eſtate to the Defendant; but adjudged, that the Rent then due, and all the Arrears might be as well aſſeſſed in Damages. *Mich.* 30 *Eliz. Sturton Sir Anth.* verſus *Albany.* *Cro. Eliz.* 67.

6. *In Treſpaſs*, upon Not guilty pleaded, the Jury found for the Plaintiff, and gave *half a Farthing Damages*; it was moved in Arreſt of Judgment, that Damages ought to be of ſome Value, but that half a Farthing was not valuable, for there was no ſuch Coin. *Sed per Curiam*, an Egg may be taken in Execution for half a Farthing. 2 *Roll. Rep.* 21. *Marſham* verſus *Buller.*

7. *Caſe, &c.* the Plaintiff had but ſmall Damages given by the Jury, and thereupon the Defendant moved the Court, that Judgment might be entered againſt himſelf, becauſe he feared that the Plaintiff would have waived the Judgment, and begin again; adjudged, that the Defendant might enter the Judgment, or compel the Plaintiff to be nonſuit. *Mich.* 2 *Car. Latch.* 216. *Stockland*'s Caſe.

8. *Caſe, &c.* wherein the Plaintiff declared *ad damnum* 20 *l.* there was a Judgment upon Demurrer for the 20 *l.* and 10 *s. aſſeſſed for Damages*; adjudged, that the Judgment ſhould be reverſed for that Reaſon; becauſe the Damages being incertain, they cannot be aſſeſſed by the Court, without a Writ of Enquiry firſt awarded. *Paſch.* 2 *Car. Latch.* 213. *Wood* verſus *Brooks.*

9. In an *Action on the Caſe for Slander*, the Jury gave 159 *l. Damages*, which upon the Conſideration of ſome Circumſtances, the Court reduced to 50 *l.* but afterwards, upon great Advice, they ſet aſide this Rule, and would not alter the Courſe of the Law; the Jury being the proper Judges of the Quality of the Parties, and the Loſſes ſuſtained; but 'tis otherwiſe where the Action is founded upon a Cauſe apparent to the Court, as *Maihem, &c.* for there they may encreaſe the Damages, or mitigate them. *Palm.* 314. *Hawkins* verſus *Sciet.* *See* 4 *Rep.* 17. *B. S. C. in the Margin.* Hutt. 49.

10. Where there is a Demurrer upon the Evidence, tho' the Jury are diſcharged by it, they may aſſeſs Damages conditionally, *(viz.)* If Judgment ſhall be given for the Plaintiff, ſo much, *&c.* *Cro. Car.* 143. *Damoſe* verſus *Newbot.*

11. In a Prohibition the Parties were at Iſſue, and the Jury found, that the Defendant had proſecuted *contra Prohibitionem*, and Damages given for 15 *l.* it was moved in Arreſt of Judgment, that Damages ought not to be given in this Caſe; but the Plaintiff had Judgment to recover Damages. *Cro. Car.* 559. *Facy* verſus *Lang.* W. Jones. 447.

12. Treſpaſs for an Aſſault, Battery, and Wounding, but the particular Manner was not ſet forth in the Declaration; the Jury gave ſmall Damages, and upon a Motion made to encreaſe them, the Court ordered a Surgeon to view the Wound, and upon a Certificate of the Judge of Aſſiſe, before whom the Cauſe was tried, that it was the ſame Wound for which the Action was brought, the Court encreaſed the Damages. *Latch* 223. *Hook* verſus *Pope.* *In Aſſault, Battery and Maihem.*

13. In an Action on the Caſe for calling the Plaintiff *Traitor*, the Jury gave 1500 *l. Damages*; the Defendant moved for a new Trial, and had it, by Reaſon the Damages were exceſſive. *Style* 465. *Wood* verſus *Gunſton.*

14. In Treſpaſs, Aſſault and Wounding, where the Truth was, that the Plaintiff's Arm was broke, and the Jury gave but a Penny Damages; the Court would not encreaſe them, becauſe the Manner of Wounding was not ſet forth in the Declaration; and it might be, that his Arm was broke ſince the Action. *Style* 345. *Jervis* verſus *Lucas.*

15. *Caſe, &c.* in which the Plaintiff declared, that *Henry Veer* became an *Apprentice* to him, 29 *Septemb.* 16. *Car.* 2. *for nine Years*; that the ſaid Apprentice had ſerved him five Years faithfully, and that the Defendant had procured him to depart out of his (the Plaintiff's) Service, and accordingly, that he did leave his Service, 1 *Novemb.* 21 *Car.* 2. by which he loſt the Profit of his Service *for all the Reſidue of the ſaid Term:* Upon Not guilty pleaded, the Plaintiff had a Verdict, and *Damages aſſeſſed generally*, and Coſts of Suit, *&c.* and it was moved in Arreſt of Judgment, that the Plaintiff had declared and had a Verdict for *more Damages* than by his own ſhewing, he ought; and that was Damages not only for *enticing his Apprentice* to leave his (the Plaintiff's) Service, but likewiſe Damages which he might receive for the Loſs of his Service, for *all the Reſidue of the Term*; by which it appears, that the Term was not expired, and he ought not to have Damages for that, becauſe the Apprentice might return to his Service, and ſerve out that very Time for which his Maſter had already recovered Damages, or he might die within the Time; beſides, if the Apprentice ſhould not voluntarely return, the Plaintiff may com- 1 Lev. 299. Raym. 200.

compel him by Action, or recover Damages in such Action against the Apprentice, and so he would be doubly satisfied; so that the Plaintiff in this Case ought to have declared for the Loss of Service *from the Time of the Departure of the Apprentice, to the Time of this Action brought*; but having declared for the Loss of his Service, as well for the *Time to come*, as for what was past, and *entire Damages* being assessed when he could have none for *what is to come*, therefore the Judgment was arrested; tho' it was insisted for the Plaintiff, that Damages were only assessed for the wrong Doing, in enticing the Servant to leave his Service, and not for the Loss of Service; but if it shou'd be so intended, it could never be for the * *Time to come*, but only to the Time of exhibiting the Bill; for the Jury had Cognisance of that, but not of the Time to come, for that was impossible. 2 *Saund.* 169. *Hambleton* versus *Veer.*

* *See Time* (A) per totum.

16. *Case, &c* in which the Plaintiff declared, that he was seised in Fee of one *Messuage*, with the Appurtenances in *D.* of which one House called the Garden-House, and *one Garden were* Parcel, *&c.* and that the Defendant digged Stones so near the *Garden-House and Garden*, that the said House, and thirty Perch of Stone Wall of the said Garden, fell down, *&c.* Upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought, it was assigned for Error, that this Action being brought for throwing down the Garden Wall, the Plaintiff ought to shew where the Garden was situate, and what Estate he had in the Garden; but here he had only set forth, that he was seised of an *House, of which one Garden was Parcel*, which is *impossible*; for it may *appertain* to a House, but it cannot be *Parcel* of it; because a Messuage and *Garden* are distinct Things, and are demandable in a *Præcipe* by distinct Names; therefore the Plaintiff having made no Title to the Garden, and entire Damages being given as well for subverting the Garden Wall, as the House, the Plaintiff ought not to have Judgment; but adjudged, that a *Garden may be Parcel* of an *House*, and pass as such in a Conveyance; 'tis true, in a *Præcipe* it must be demanded by the Name of *Garden*, because there the Land it self is demanded; but in this Action the Land is not in Demand, 'tis only an Action to recover Damages for an Injury done; the Judgment was affirmed. 2 *Saund.* 400. *Smith* versus *Martin.*

17. *Assumpsit, &c.* in which the Plaintiff declared, that in Consideration of 10 *l.* paid by him to the Defendant, he promised to let him (the Plaintiff) enjoy certain Iron Mills for six Months: Upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict, and 500 *l. Damages*, tho' it appeared at the Trial, that the Mills were worth but 20 *l. per Ann.* yet upon Motion for a new Trial, it was held, that the Damages were well given *to* 500 *l.* by Reason of the Loss of Stock laid in; for the Jury may give all the Special Damages, and not only the 10 *l. Raym.* 77. *Nurse* v. *Barnes.*

18. *Covenant, &c.* in which the Plaintiff declared upon a Lease made to him by the Defendant, wherein he covenanted, that the Plaintiff should *enjoy the House*, and assigned a Breach, that the Defendant had built another House so near it, that it darkened the Plaintiff's House, that *adhuc existit* greatly dakened; after a Verdict for the Plaintiff, it was objected, that *adhuc existit* must refer to the Time of the Declaration brought, and so Damages are given for a Thing after the Original filed; for that is the Commencement of the Action in *C. B.* where the Declarations are always upon Originals, and they are recited in the Declarations, as *Attachiatus*, or *Summonitus fuit, &c.* and Damages cannot be given after the Commencement of the Action; and so is * *Harbin and Green*, and *Hamilton and Vere*'s Case; which is very true, but in the first of those Cases Damages were given for *ten Years* after the Action, and in the other, for *three Years* at least; but in the principal Case, it could be but for fifteen Days, (for there are always so many Days after the Original, and before the Declaration) and probably the Defendant may appear *gratis*, without any Original; and if so, then the Action commences by the Declaration; and tho' 'tis *summonitus fuit*, that is only Form. 3 *Lev.* 246. *Hent* versus *Burton.* 3 *Lev.* 345. *Carter* versus *Calthrope. S. P.* 4 *Mod.* 152. *S. C.*

* Raym. 200. 2 Saund. 169.

19. Case, *&c.* against the Defendant for taking away the Plaintiff's Wife, and keeping her *usque* such a Day, which was some Time *after the Action brought*: After a Verdict for the Plaintiff the Judgment was staid, because the Jury shall be intended to have given Damages for the whole Trespass, when it appeared by the Declaration, that Part of it was done after the Action brought. 1 *Vent.* 103. *Ward* versus *Rich.*

20. *Case, &c.* against three Defendants; there was Judgment by Default against one, and *the other two pleaded Not guilty*; the Plaintiff had a Verdict, and 1000 *l.* Damages against one, and 50 *l.* Damages against the other; it was objected in Arrest of Judgment, that since the Jury have found both guilty, they could not assess several Damages; for this being a joint Action, and the Defendants have joined in one Plea, and the Jury having found them guilty *modo & forma*, the Damage must be the same by the one as the other; 'tis true, when several Persons are found guilty criminally, the Damages may be severed in Proportion to their Guilt; but here both are equally guilty of the same Offence, and therefore 'tis absurd to say, that the Plaintiff is so much damnified by the one, and so little by the other: *Sed per Curiam*, regularly the Damages ought to be entire where the Action is joint; but where the Facts are several, Damages may be assessed severally; and in this Case the Jury have done what the Court would have done, had it been in a Criminal Case; so the Plaintiff had Judgment. 3 *Mod.* 101. *Rodney* versus *Strode & al'.*

See Austen *v.* Millard *See* Sampson *v.* Cranfield.

21. *Case*, in which the Plaintiff declared, that on the 2*d Day of July, &c.* he was possessed of a Close of Meadow, and that on the 3*d Day of August* the Defendant built a new Water-Mill, by which the Water overflowed the said Close, and that the Plaintiff lost *totum usum & proficuum* thereof, on the 2*d Day of July*, to the Time of the exhibiting the Bill; there was a Verdict for the

the Plaintiff, and entire Damages; but the Judgment was arreſted, becauſe, tho' the Building the Mill on the 3*d Day of Auguſt*, might occaſion the Loſs of ſome *particular Profit* from the *ſecond Day of July*, as by laying down his Cloſe to Hay, yet it could not occaſion him to looſe *totum uſum & proficuum* of his Cloſe, from that Time to the Time the Mill was built; therefore the Plaintiff hath recovered more Damages than he ought. 2 *Salk.* 663. *Prince* verſus *Molt.*

22. In Treſpaſs for Aſſault and Battery, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the *Time laid in the Declaration was not yet come*; but the Plaintiff had Judgment, becauſe in ſuch Caſe the Jury ſhall be ſuppoſed to give Damages for another Treſpaſs; and 'tis as if no Time had been alledged. 2 *Salk.* 662. *Aſton* verſus *Eales*. *See* 2 *Saund.* 169.

23. Upon a *Sci. fa.* on a Recogniſance in *C. B.* againſt the Bail, to a Writ of Error, the Plaintiff had Judgment for Execution, *& quod recuperet damna ſua occaſione dilationis Executionis*; and upon a Writ of Error in *B. R.* this Judgment was reverſed; becauſe by the * Statute the Bail are only liable to *Coſts of Suit*, but *Damages for Delay of Execution, are not Coſts of Suit*, but are ſuſtained for being ſo long out of the Money, and thoſe are uſually aſſeſſed by allowing the Party what lawful Intereſt he might have. 1 *Salk.* 208. *Fanſhaw* verſus *Morriſon*. *See* 2 *Cro.* 420. *See* Pleas. Mod. Ca. 157. * 3 Jac 1. cap. 1.

(B)

In Aſſault, Annuity, Mayhem, Treſpaſs, &c. and on penal Statutes.

Antea (A) 12, 14.

1. IN Aſſault and Battery, upon Not guilty pleaded, it appeared upon the Evidence, that the Defendant had thrown a Dagger and greivouſly hurt and maihemed the Plaintiff, and *being put in fear of his Life*; the Court directed the Jury to give Damages as well for the Aſſault and Fear, as for the Maihem. *Mich.* 29 *Eliz. Goldsb.* 34. *Lea's* Caſe.

2. In Treſpaſs, upon Not guilty pleaded, the Parties were at Iſſue, and it appeared upon the Evidence, that the Defendant had cut off the Right-Hand Thumb of the Plaintiff, and thereupon the Jury found for him, and gave him 40 *l.* Damages; and he appearing in the Court, moved for an * Encreaſe of Damages, which was ruled accordingly, and encreaſed to 100 *l.* Damages, for which he had Judgment. *Hill.* 30 *Eliz.* 1 *Leon.* 139. *Mallett* verſus *Ferrers*. * *See* (A) pl. 12, 14. S. P.

3. In Treſpaſs for breaking his Cloſe, with a *Continuando*, &c. adjudged, that if the Eſtate of the Plaintiff be not determined, he muſt ſhew another Entry after the firſt, otherwiſe he ſhall not have Damages for the Continuance of the Treſpaſs. *Trin.* 31 *Eliz.* 1 *Leon.* 302. *Rawlyns's* Caſe.

4. In Aſſault, Battery, and Falſe Impriſonment; the Defendant, as to the Aſſault and Battery *juſtified*, to which the Plaintiff *demurred*; and as to the Impriſonment, he pleaded *another Juſtification*; to which the Plaintiff replied, *de injuria ſua propria*; upon which they were at Iſſue, and the Jury found, as to the Juſtification for the Battery, *de injuria ſua propria*, which is quite wrong, becauſe there was no *Demurrer to that Juſtification*; and therefore they ought not to have meddled with it; yet as to that they aſſeſſed 5 *l. Damages*, when they ought to have aſſeſſed *conditional Damages*, if it ſhould be adjuded for the Plaintiff; and as to the *Impriſonment*, they aſſeſſed 20 *s.* conditional Damages, but did not find the Iſſue; ſo that they found merely croſs to what they ought to have found; and upon a Writ of Error brought, the Judgment was reverſed for that Reaſon. *Paſch.* 2 *Car. Cro. Car.* 22. *Stony* verſus *Rogers*.

5. In an Action of Debt for 5 *l.* upon the Statute 1 *& 2 Ph. & Ma.* for taking more than 4 *d.* for pounding a Diſtreſs; the Plaintiff had Judgment in *C. B.* and upon a Writ of Error in *B. R.* the Error aſſigned was, that *Damages and Coſts* were given in this Caſe, which ought not to be done; becauſe a *certain Sum* is given as a Forfeiture upon a *Penal Statute*, there no Damages are to be recovered. *Sed per Curiam*, Damages and Coſts are well given; for the certain Sum of 5 *l.* is immediately due to the Plaintiff grieved, as ſoon as the Offence is committed, and Damages ſhall be given for the detaining it; and where Damages are given, there ſhall be Coſts likewiſe. *W. Jones* 447. *Muſgrave* verſus *North*. *See* Diſtreſs. (B) 6. S. C.

6. Treſpaſs *quare clauſum & domum fregit & alia enormia ei intulit*; there was a Verdict for the Plaintiff, and 60 *l.* Damages; and upon a Motion for a new Trial, becauſe of the exceſſive Damages, and upon an *Affidavit*, that the Jury intended great Part of the Damages for the Injury done to the Plaintiff's Daughter, in not marrying of her, and a new Trial was denied; becauſe where the Matter of Treſpaſs ariſes *ex turpi cauſa*, as in this Caſe, there it may be given in Evidence upon ſuch a general Declaration, under the Words *alia enormia*, becauſe the Law will not compel a Man to ſhew it upon Record; but in Treſpaſs, for taking an Horſe, or the like, there nothing ſhall be given in Evidence, but what is ſpecially ſet forth in the Declaration. *Sid.* 225. *Sippora* verſus *Baſſett*.

7. Treſpaſs againſt *Garth* and his Wife, *Robinſon* and his Wife, and one *Sarah Richmond*, for an Aſſault, Battery and Impriſonment, and taking two Silver Buttons, &c. The Defendants *Sarah Richmond, and Robinſon* and his Wife, plead Not guilty to the Whole, upon which they were at Iſſue, and *Garth* and his Wife, as to the Force and Arms, plead Not guilty, and as to the Reſidue of the Treſpaſs (but ſay nothing of the Impriſonment and taking the Buttons) they plead *Son Aſſault Demeſne*; the Plaintiff replied *de injuria ſua propria abſque tali cauſa*,

that he aſſaulted, beat and impriſoned the Defendant, upon which they were likewiſe at Iſſue, and the Plaintiff had a Verdict, and *intire Damages*; it was objected, that here was a Diſcontinuance, becauſe *Garth* and his Wife had ſaid nothing as to the Impriſonment, and taking the Buttons; and if ſo, they ought not to be charged in Damages for that Matter, but only for that to which they had pleaded Not guilty, which was to the Force and Arms; but adjudged, that the Plaintiff having charged all of them jointly with the whole Matter, tho' one of them had committed the Battery, another had been guilty of the Impriſonment, and the third of taking the Buttons, yet, being all done at one Time, they are all guilty of the whole Damages; then it was objected, that *Garth* and his Wife having ſaid nothing as to the Impriſonment and taking the Buttons, nor the Plaintiff in his Replication, yet this was therefore a Diſcontinuance by the Plaintiff himſelf; but adjudged, that 'tis cured by the Statute 32 *H.* 8, it being after a Verdict. 3 *Lev.* 324. *Smithſon* verſus *Garth.*

(C)

In Aſſumpſit.

1. IN *Aſſumpſit*, the Plaintiff declared, that in Conſideration of a *French* Crown paid by him to the Defendant, he promiſed to do ſuch a Thing before ſuch a Time, which he had not done: After a Verdict for the Plaintiff, it was moved, that the Plaintiff ſhould have no more than what he was damnified by the *French* Crown; like a Caſe in Chancery, where a Widow lamenting the Death of her Husband, and her Son telling her, that God would provide another for her, ſhe ſaid, give me 10 *l.* and I will give you 100 *l.* when I marry again, and within a Year afterwards ſhe married; and upon an *Aſſumpſit* brought, the Defendant exhibited a Bill in Equity, to be relieved againſt this Promiſe, and the Defendant had only the 10 *l.* decreed to him; becauſe 'twas unreaſonable to bar a Widow from marrying. *Trin.* 31 *Eliz. Owen* 34.

2. *Aſſumpſit, &c.* in Conſideration the Defendant had given to the Plaintiff four Pence, he promiſed to pay 10 *l.* Damages; adjudged, that the Damages ſhall be given according to the 10 *l.* and not to the four Pence. *Moor* 419. *Coleman*'s Caſe.

Allen 67. S. C. 3. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration the Plaintiff would marry the Defendant's Daughter, he promiſed to give up his Shop to him, and *not uſe his Trade in Dale, and alſo, that he would lend him* 50 *l.* Upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, and * *entire Damages*; and upon a Writ of Error brought, it was aſſigned for Error, that the Plaintiff had declared upon two Breaches of Promiſe, one of which was againſt Law, (*viz.*) *not to uſe his Trade*, and *entire Damages* being given, it muſt be as well for a Breach of that Promiſe which was againſt the Law, as for the Breach of that Promiſe which was good; but adjudged, that a Promiſe is good, not to uſe a Trade, if 'tis made upon a valuable Conſideration, as in the Principal Caſe; adjudged likewiſe, that where entire Damages are given for ſeveral Things, whereof ſome are impoſſible to be done or performed, and others are not, it ſhall be intended they were given for thoſe Things which were poſſible, and void for the reſt. *Paſch.* 24 *Car. Style* 111. *Goffe* verſus *Pragnell.*

Poſt. (F.) 8 S. P.

4. *Aſſumpſit, &c.* in which the Plaintiff declared on a Promiſe to deliver ſeveral particular Things of ſeveral Values, amounting to 69 *l.* 9 *s.* but by miſcaſting it at laſt he made it amount to 70 *l.* 14 *s.* After a Verdict for the Plaintiff, this was objected in Arreſt of Judgment; but adjudged, that ſince the Jury gave no more in Damages than 69 *l.* 9 *s.* 'tis well enough; but if they had given more, it had been ill. 1 *Lev.* 58. *Hunt* verſus *Hurlewood.*

(D)

In Dower.

1. JUdgment by *Nil dicit* in Dower, and upon a Writ of Enquiry of Damages, the Jury found, that the third Part of the Land, of which ſhe ſhould have Dower, was of the yearly Value *of* 8 *l.* and that *eight Years* were paſt from the Death of her Husband to the Time of the Inquiſition, and aſſeſs *Damages to* 80 *l.* Now it appeared upon the Record, that after the Judgment, and before the Writ of Enquiry, the Plaintiff had Execution of the Lands by an *Habere facias Seiſinam*; and upon a Writ of Error brought, it was aſſigned for Error, that Damages were aſſeſſed *for eight Years paſt after the Death of the Husband*, when the Wife was ſeiſed of Part of the Lands for *Part of thoſe eight Years* by Vertue of the Judgment and *Execution*; and this was adjudged good Cauſe for Error; there was alſo another Cauſe aſſigned, and that was, the Jury had aſſeſſed Damages to 80 *l.* when 8 *l. per Ann.* for eight Years, being the Value of the Lands, and the Time it was detained from the Widow, amounted to 64 *l.* and no more; but this was diſallowed, becauſe it might be, that ſhe ſuſtained more Damage by the long Detaining her Dower, than the yearly Value did amount to. *Paſch.* 29. *Eliz.* 1 *Leon.* 56. *Walter* verſus *Nevill.*

(E)

Where the Party had no Loſs, and for Things not in Being.

1. THE Plaintiff had *Common of Eſtovers* in ſuch Land, and the Defendant grubbed up the Roots of all the Wood, ſo that it neither was or would be Wood again; it was the Opinion of *Hobart* Ch. Juſt. that he may have an *Aſſiſe* from Year to Year of his Common of *Eſtovers*, for tho' there are none, yet the Inheritance remains in him, and he ſhall recover Seiſin, and Damages likewiſe, according to that Value it might have yielded *Communibus Annis*, tho' 'tis incertain. *Mich.* 10 *Jac. Hob.* 43. In *Cooper* and *Andrews*'s Caſe.

2. In a *Warrantia Chartæ*, the Plaintiff declared, that the Cogniſor and his Wife levied a *Fine* to the Uſe of him and his Heirs, and by the ſame Fine did grant for themſelves, and for the Heirs of the Husband, to warrant the Lands, *&c.* to the Plaintiff and his Heirs, againſt all Men, and then ſhewed, that he being ſo ſeiſed, one *W. R. impleaded him by a Writ of Entry ſur diſſeiſin in le poſt* for the Lands, pending which Plea he required the Cogniſor and his Wife to warrant the Lands to him, or to offer him a Plea in Bar to that Action, which they refuſed, *&c. ad damnum, &c.* it was objected againſt this Declaration, that the Plaintiff had declared to his Damage, when he had no Manner of Loſs, for the Suit was depending, there being as yet no Judgment in the Action, but by the Opinion of *Hobart* Ch. Juſt. the Declaration was good, for 'tis according to the Form, as in a *Quare Impedit* for the King, the Declaration is always *ad Damnum*, when the King can have no Damages in that Action. *Trin.* 9 *Jac. Hob.* 201. *Sir H. Roll* verſus *Osborne.*

(F)

Of ſeveral and entire Damages. See *Treſpaſs.* (B) 4.

1. CASE, *&c.* wherein the Plaintiff declared, that in Conſideration of, *&c.* the Defendant *promiſed to perform the Award of W. R.* and alſo *promiſed*, that he would not ſue out Execution upon a Judgment which he had obtained againſt him; then he ſets forth an Award made by *W. R.* (which Award was void in Law) and that the Defendant had not performed it, and alſo, that he had ſued out Execution upon the Judgment; the Defendant pleaded *Non Aſſumpſit*, which was but *one Iſſue* to both the Promiſes laid in the Declaration, and the Jury found for the Plaintiff, and entire Damages, who had Judgment accordingly; and upon a Writ of Error brought in the Exchequer-Chamber, it was aſſigned for Error, that the Plaintiff had declared upon *ſeveral Breaches* of ſeveral Promiſes, and the Jury had aſſeſſed *entire Damages* for both the Breaches, when for one of them there was no Cauſe of Action, becauſe the Award was void in Law, ſo that no Breach could be aſſigned in that, and for this Reaſon the Judgment was reverſed, tho' it was inſiſted for the Plaintiff, that there was but one Iſſue to both the Promiſes, and that it was the Fault of the Defendant not to demur to that Part of the Declaration where the Breach is laid for Non-performance of the Award, and to traverſe the other Part, where 'tis laid for ſuing out Execution upon the Judgment. *Mich.* 31 *Eliz.* 1 *Leon.* 170. *Bedle* verſus *Moor.*

2. Aſſault and Battery againſt three Defendants, two of them pleaded *Son Aſſault Demeſne*; and the Third pleaded Not guilty; the Jury found for the Plaintiff in both Iſſues, and aſſeſſed *ſeveral Damages*; adjudged not good, becauſe 'tis in a joint Action for one Offence, and when all are found equally guilty, the Damages ought to have been entire. *Mich.* 43 *Eliz. Johnſon* verſus *Barton. Cro. Eliz.* 860.

3. In Treſpaſs, the Plaintiff declared for Breaking his Cloſe and Beating his Servant, but did not ſay *per quod ſervitium amiſit*; upon Not guilty pleaded, the Jury found him guilty, and *entire Damages*, whereupon a Writ of Error was brought, and aſſigned for Error, that no Damages ought to be given for Beating the Servant, becauſe he did not alledge, that he loſt his Service by the Beating, and ſo it was adjudged; for when entire Damages are given, they muſt be intended for every Thing for which the Plaintiff had declared, and in this Caſe no Damages ought to be given for Beating the Servant. 15 *Eliz. Pale* verſus *Osborne*, vouched in *James Osborne*'s Caſe.

4. Aſſault and Battery againſt three Defendants, one pleaded Not guilty, and the other two *Son Aſſault Demeſne*, and the Jury found ſeveral Damages, for which Reaſon, in Arreſt of Judgment, it was held ill, becauſe, where the Offence is joint, the * Damages cannot be ſeveral. *Cro. Eliz.* 860. *Auſten* verſus *Millard.*

* *See* Sampſon v. Cranfeild. *See* Rodney v. Strode.

5. In Treſpaſs, *&c.* the Plaintiff declared for Breaking his Houſe at *O.* and Beating him; the Defendant pleaded, that he, together with *one W. R.* did beat him, and that afterwards the Plaintiff did *releaſe the ſaid W. R. all Actions real and perſonal*; and averred, that the Treſpaſs, for which the Action was now brought, and that which was done by him, and the ſaid *W. R.* was one and the ſame Treſpaſs; and upon Demurrer to this Plea it was adjudged for the Defendant,

dant; becauſe where there are joint Treſpaſſers, there ſhall be but one Satisfaction made, and therefore, tho' they may ſever in Pleas and Iſſues, the Jury ſhall aſſeſs entire Damages for all. *Trin.* 11 *Jac. Hob.* 66. *Cook* verſus *James.*

6. In Treſpaſs, *&c.* againſt three Defendants, one of them pleaded Not guilty, another juſtified as Conſtable, *&c.* and the Third pleaded *Son Aſſault Demeſne*; the Jury found all three Iſſues for the Plaintiff, and aſſeſſed *Damages entirely* to 40 *l.* and upon a Writ of Error brought, this was aſſigned for Error; and it was inſiſted, that they ought to have found ſeveral Damages upon the ſeveral Iſſues; but adjudged, that the entire Damages were well aſſeſſed. *Mich.* 13 *Jac.* 2 *Cro.* 385. *Matthews* verſus *Cole.*

2 Cro. 358. S. C. 1 Roll. Rep. 30. S. C.

7. In Treſpaſs, Aſſault and Battery againſt three Defendants, one of them pleaded Not guilty, the Plaintiff having declared againſt him *ſimul cum, &c.* afterwards another of the Defendants appeared, and the Plaintiff having declared againſt him in like Manner, he likewiſe pleaded Not guilty, and at the Aſſiſes the Jury found for the Plaintiff in the firſt Iſſue, and aſſeſſed 200 *l.* Damages, and they likewiſe found for the Plaintiff in the ſecond Iſſue, and aſſeſſed 50 *l.* Damages; the third Defendant appeared and confeſſed the Action, whereupon a Writ of Enquiry of Damages was awarded againſt him; adjudged, that where Treſpaſs is brought againſt ſeveral Defendants, and they plead either Not guilty, or ſeveral Pleas, and the Jury finds for the Plaintiff in all, in ſuch Caſe they cannot aſſeſs ſeveral Damages, becauſe 'tis all but one Treſpaſs, and 'tis made joint by the very Declaration; but if they find one guilty at one Time, and another guilty at a different Time, there they may aſſeſs ſeveral Damages; but to aſſeſs ſeveral Damages in a joint Treſpaſs againſt Three, where they plead ſeveral Pleas, and all triable at one Time by the ſame Jury, this will make the Verdict naught: Reſolved likewiſe, that the Defendant who pleads laſt, ſhall be charged with the Damages aſſeſſed againſt him who pleaded firſt, but he ſhall be contributory to thoſe Damages; and if they are exceſſive, he who pleaded laſt may have an Attaint againſt the Jury, but the Treſpaſs which the Plaintiff hath made by his Declaration ſhall not be ſevered by them, if they find that it was done *at one and the ſame Time:* And to ſave a Diſcontinuance, if one Defendant makes a Default, a Writ of Inquiry ſhall be awarded againſt him, but none ſhall iſſue forth: But becauſe in Judgment of Law the Verdict given by both the Juries againſt both Defendants, is but one Verdict, it being given at one Time, the Plaintiff ſhall have his Election to have Judgment *de melioribus damnis*, which ſhall bind all the Defendants, but he ſhall have but one Execution. 11 *Rep.* 5. *Sir John Heydon's* Caſe.

8. Caſe, *&c.* for Words ſpoken *at ſeveral Times*, where thoſe which were ſpoken at one Time were actionable, and thoſe which were ſpoken at the other Time were not; upon Not guilty pleaded, the Jury found for the Plaintiff, and aſſeſſed *entire Damages*; and it being objected in Arreſt of Judgment, that theſe *Damages being entire*, were given as well for the Words which were *not actionable* as for thoſe which *were actionable*; but adjudged, that the Damages were well given for the Words which were actionable, and it ſhall never be intended they were given for thoſe which were not. *Hill.* 14 *Jac.* 3 *Bulſt.* 283. *Meffline* verſus *Farrington.* *Antea* Action on the Caſe 9. 20. *S. C.* *Antea* (C) 3. *S. P.*

9. Leſſee for Years covenanted with the Leſſor, to pay yearly, during the Term, twenty Shillings *to the Church-wardens* of the Pariſh of *S.* and alſo to *repair* the Houſes afterwards; the Leſſee aſſigned the Term to another, and an Action of Covenant was brought againſt the Aſſignee for not paying the Rent, and for not repairing the Houſes; and there being Judgment againſt him by *Nil dicit* and *entire Damages* aſſeſſed, a Writ of Error was brought, and the Error aſſigned was, that the Aſſignee was not chargeable to pay the Rent, becauſe the Leſſee having covenanted to pay it to the *Church-wardens, &c.* and not to the Leſſor himſelf, this is a mere collateral Covenant, and doth not bind the Aſſignee; 'tis true, he is bound by the Covenant to repair, becauſe that is a Covenant which runs with the Land; but entire Damages being given againſt him, as well for a Thing with which he is not chargeable, as for a Thing which he is bound to do; for that Reaſon the Judgment was reverſed. *Mich.* 15 *Jac.* 2 *Cro.* 439. *Mayhoe* verſus *Eirkett.* *Antea* Aſſigns. (F) 4. *S. C.*

10. The Plaintiff declared in *Ejectment*, and alſo for a *Battery*, and had a Verdict and *Damages aſſeſſed ſeverally*; afterwards he releaſed the Damages for the Battery, and prayed Judgment in the Ejectment, but it was objected againſt him, that he ought not to have *joined the Battery with the Ejectment*, yet he had Judgment. *Hill.* 16 *Jac.* 1 *Brownl.* 235. *Bide* verſus *Snelling.*

11. *In Waſte, &c.* the Plaintiff declared for Waſte done in ſeveral Cloſes, naming them, to his Damage 300 *l.* the Defendant pleaded *Nul Waſt fait*, upon which they were at Iſſue, and the Jury found Waſte done in ſome of the Cloſes, and in other Cloſes none; all the Judges were of Opinion in the Common Pleas, that the Plaintiff could not have Judgment, becauſe he declared of Waſte done in eight ſeveral Cloſes, to his Damage of 300 *generally*, when he ought to have ſevered the Damages; but at another Time, two new Judges being made of that Court, (*viz.*) the *Chief Juſtice Hobart and Warburton*, they held, that both the Declaration and Verdict was good; but the Caſe was adjourned. *Mich.* 11 *Jac. Godbolt* 209. *Sir John Gage* verſus *Smith.* *Poſtea* Waſte. (K) 3. *S. C.*

12. In *Aſſumpſit*, the Plaintiff declared upon a Promiſe made by the Defendant to deliver ſeveral Goods which he had brought, and amongſt the reſt, *unum fulcrum lecti, Anglice* a Field Bedſtead, *with Curtains and Vallance of Say*; upon *Non Aſſumpſit* pleaded, there was a Verdict for the Plaintiff, and *entire Damages* aſſeſſed; and upon a Writ of Error brought, it was aſſigned for

Error, that entire Damages were given, where none ought to be for ſome of the Goods, (*viz.*) *for the Curtains and Vallance of Say*; 'tis true, Damages may be given, for *fulcrum lecti*, but that includes no more than the Bedſtead; but adjudged, that *Fulcrum lecti* is the only Thing in Iſſue, and for that it ſhall be intended, that Damages were given, and not for *the Curtains and Vallance*, and the rather, becauſe they are not poſitively alledged in the Declaration, but only by Way of Explanation, which being larger, and ſignifying more than *Fulcrum lecti*, it ſhall be therefore void. 11 *Jac.* 11 *Rep.* 403. *James Osborne*'s Caſe.

13. Debt, *&c.* in which the Plaintiff declared for three ſeveral Sums, but upon *Oyer* of the Bill, it appeared, that one of the Sums was not due till after the Action brought; the Defendant pleaded Conditions performed, upon which they were at Iſſue, and the Plaintiff had a Verdict, and entire Damages and Coſts aſſeſſed; adjudged, that if he *Releaſe* the Damages and Coſts, he may have * Judgment for theſe two Sums which were due. *Hill.* 14 *Jac. Hob.* 178. *Andrews* verſus *De le Hay*.

* *See* Relinquiſhment. (A) 5. Judgment. (C) 7.

14. Caſe, *&c.* in which the Plaintiff declared, that he was ſeiſed of the Manor of *S.* to which the Office of Keeper of the Foreſt of *F.* did belong, and preſcribed to have *omnia Bona forisfacta* in the ſaid Foreſt, and to have *Quicquid de fugatione accidere poſſet*, and to have *mel, ceram, & mortuum Boſcum, &c.* as appertaining to his ſaid Office, and alledged, that the Defendant had diſturbed him in the Exerciſe of his ſaid Office; after a Judgment for the Plaintiff, and entire Damages, a Writ of Error was brought in the Exchequer-Chamber, and the Error aſſigned was, that *entire Damages* were given for ſeveral Wrongs done, every one of which would bear an Action, if they had been certainly alledged, but in this Declaration they were very incertainly laid; for the Plaintiff preſcribed to have *omnia Bona forisfact'*, *&c.* which he cannot have without a Grant; he preſcribed likewiſe to have *Quicquid de fugatione accidere poſſit*, and did not ſet forth *Quid ſolet accidere*, which leaves it incertain; and when entire Damages are aſſeſſed, as well for thoſe Things which are incertainly alledged as for thoſe which are made certain, and Judgment given, *&c.* ſuch Judgment is erroneous, and 'tis not like an Action on the Caſe for Words, where ſome are laid in the Declaration, and are actionable, and ſome not, and entire Damages given, for in ſuch Caſe it ſhall be intended to be given for thoſe Words which are actionable, and that the other are but to aggravate the Damages; but in the principal Caſe, all the Matters alledged in the Declaration are actionable, and therefore it ſhall be intended, that Damages were given for all, which ought not to be, becauſe ſome Things were very incertainly ſet forth, and for this Reaſon the Judgment was reverſed. *Moor* 706. *Berkley* verſus *Lord Pembroke*.

15. In falſe Impriſonment againſt three Defendants, two of them juſtified as Juſtices of Peace, *&c.* The Plaintiff replied, *Non habetur tale Recordum*, and upon a Demurrer to this Replication, there was Judgment againſt thoſe two Defendants; the third Defendant pleaded another Plea, upon which they were at Iſſue, but before it was tried there were 200*l.* Damages given againſt the other Two; upon a Writ of Inquiry it was objected, that the Damages upon a Writ of Inquiry ought not to be given before the Iſſue tried againſt the other, which *per Curiam* is very true, but the Plaintiff may * relinquiſh his Suit againſt the third Perſon, and take his Damages againſt the other Two. 1 *Roll. Rep. Headley* verſus *Sir Anthony Mildmay & al'*.

* *See* Heydon's *Caſe*. Antea pl. 7.

16. Caſe, in which the Plaintiff declared upon two Promiſes, and upon *Non Aſſumpſit* pleaded he had a Verdict and entire Damages, it was moved in Arreſt of Judgment, that the Jury ought to have given Damages upon each Promiſe, and not entire, when it ought to be ſeveral: *Sed per Curiam*, the Jury may give either joint or entire Damages, and if they give entire Damages, as in this Caſe, 'tis no Prejudice to the Defendant, but to the Plaintiff himſelf, for if Damages are given for one Promiſe, which ought not to be given, the Judgment ſhall be arreſted. 1 *Roll. Rep.* 423. *Payne* verſus *Selby*.

3 Bulſt. 258.

17. A Tapſter deſired an Inn-keeper to entertain *T. S.* as his Gueſt, and he promiſed to pay him for his *Diet*, and in *Aſſumpſit*, *&c.* the Inn-keeper declared, that he had given *T. S.* ſo much Meat, Drink, and *Apparel*, and concluded, that his Charges *pro hoſpitio & pro Eſculando & poculando*, *&c.* amounted to 9*l.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict and entire Damages; it was objected in Arreſt of Judgment, that an Inn-keeper is not bound to find *Apparel* for his Gueſts, and Damages being given for that as well as for Meat and Drink, therefore the Plaintiff cannot have Judgment: *Sed per Curiam*, the Plaintiff having declared for ſo much *pro hoſpitio*, that alone is ſufficient, and the Words which follow are Surpluſage; and where an Action will lie for Part, as in this Caſe, and not for the other Part, as for the Apparel, it ſhall be intended, that the Jury gave Damages only for that Part for which the Action would lie. 2 *Roll. Rep.* 79.

See 3 Rep. 14, 68.

18. In Trover and Converſion of 2000 Loads of Coal, upon Not guilty pleaded, the Defendants were found ſeverally guilty for ſeveral Loads, and were ſeverally found Not guilty as to the Reſidue, and *ſeveral Damages* upon a Writ of Error brought in the Exchequer-Chamber; it was objected, that ſeveral Damages ought not to be given, this being a joint Trover and Converſion againſt both, and therefore they ought not to be divided in the Verdict in aſſeſſing the Damages, but adjudged, that they being ſeverally found guilty of converting ſeveral and unequal Loads, the Plaintiff ſhall have ſeveral Damages, according to the ſeveral Loads converted by each of them. *Mich.* 2 *Car. Cro. Car.* 39. *Player & al'* verſus *Warne*.

(G)

Where they may be mitigated, where not. See Antea (A) 12, 14.

1. IN Treſpaſs for Breaking his Cloſe, and cropping 200 Pear-Trees and 100 Apple-Trees, upon Not guilty pleaded, the Plaintiff had a Verdict and 40 *l.* Damages; afterwards the Defendant moved the Court, that the Damages might be mitigated, upon producing an Affidavit, that the Plaintiff offered to accept 5 *l.* before the Action brought; but adjudged, that they could not mitigate Damages in an Action of *Treſpaſs*, becauſe 'tis *local*, and therefore it could not appear to the Court, how much the Plaintiff was damnified, otherwiſe than by the Verdict; but they were of Opinion, that it might amount to 40 *l.* for Cropping ſo many Fruit-Trees. *Mich.* 3 *Jac.* 1 *Brownl.* 204. *Delves* verſus *Wyatt.* *Poſtea* Treſpaſs. (E) 2. *S. C.*

2. Information for Foreſtalling, *&c.* the Defendant confeſſed the Offence, and prayed that the Damages might be mitigated: *Per Curiam*, it may be done in the Court of Exchequer, becauſe they have a Privy Seal for it, but where a Statute preſcribes a certain Penalty, *B. R.* cannot mitigate it; but where it enacts a Forfeiture of double or treble Value, there the Court may mitigate. 1 *Roll. Rep.* 194. *The King* verſus *Wray.*

Godb. 135. S. C. 3. In *Aſſumpſit*, there was a Demurrer to the Declaration, and the Plaintiff joined in Demurrer and had Judgment; and upon a Writ of Enquiry, Damages were given, *&c.* and upon a Motion to mitigate the Damages, it was denied, becauſe being upon a Demurrer, they, as Judges, could not know what Damages the Plaintiff had ſuſtained. 3 *Leon.* 150. *Tooly* verſus *Preſton.*

Hetl. 93. S. C. 4. Judgment by Default in Aſſault and Battery, and upon a Writ of Enquiry, Damages were found; adjudged on a Motion, that ſuch Damages are never mitigated. *Litt. Rep.* 150. *Stanley's* Caſe.

5. Aſſault, Battery, and Wounding, and the Manner thereof was ſpecially laid in the Declaration, tho' the Inqueſt gave but 200 Damages, yet upon Examination of Surgeons and View of the Wound, the Damages were encreaſed to 400 *l.* this was, becauſe the Particulars of the Wounding were laid in the Declaration. *Style* 345. *Davis* or *Lee* verſus *Lord Foliott.*

(H)

Of double and treble Damages. See *Indictment.* (N) 3. *Tithes.* (O) 6.

1. IN Aſſiſe of freſh Force, which was uſually brought for a Diſſeiſin in a City or Borough, within forty Days after the Title accrewed, the Jury gave Damages to the Demandant, which were encreaſed by the Court, and trebled in the Judgment; and upon a Writ of Error brought, that was aſſigned for Error, but adjudged well enough; for in an Action of forcible Entry, upon the Statute 8 *H.* 6, or in an Aſſiſe for a Diſſeiſin done with Force, the Plaintiff ſhall recover treble Damages, and Coſts likewiſe, becauſe he might have recovered the ſame at Common Law. *Mich.* 29 *Eliz. Dixy* verſus *Spencer. Goldſ.* 40. *Antea* Attaint. (D) 2. *S. C.* Forfeiture. (A) 2. *S. C.* 10 *Rep.* 116. *S. P.*

2. Error of a Judgment in *C. B.* upon the Statute 8 *H.* 6. of forcible Entry, the Error aſſigned was, that the Jury having found Damages to 20 *l.* and Coſts to 20 *s.* and the Coſts being encreaſed by the Court to 20 *s.* more, they were trebled in the Judgment as well as the Damages, for the Plaintiff had Judgment to recover 63 *l.* whereas the Coſts encreaſed by the Court ought not to be trebled, but only the Coſts aſſeſſed by the Jury, but the Judgment was affirmed. *Mich.* 39 *Eliz. Thoroughgood* verſus *Scroggs. Cro. Eliz.* 582.

In Treſpaſs, upon the Statute 8 *H.* 6, of forcible Entry, if Judgment paſſes by Default, the Plaintiff ſhall have treble Damages, as if he had Verdict; this was affirmed upon a Writ of Error in the Exchequer-Chamber. 1 *And.* 25, 26.

(I)

Allowed in a Prohibition.

1. ATtachment upon a Prohibition, and the Plaintiff declared, that the Defendant ſued in the Eccleſiaſtical Court, after a Prohibition granted, and this was for the Profits of the Office of Regiſter to the Archdeacon of *Huntingdon*; there was Judgment by Default, and a Writ of Inquiry, and Damages and Coſts; it was objected, that Damages, *&c.* could not be given in a Prohibition: But adjudged, that they ſhall, by Reaſon of the Contempt of ſuing after the Prohibition, and ſo is * *Facy* and *Long's* Caſe. 3 *Lev.* 360. *Heywood* verſus *Foſter.*

* Cro. Car. 559. S. C. Jones 447. S. C. Antea (A) 11. S. C.

Dates of Bonds, Leaſes, &c.

(A)

See *Deeds.* (B) per Totum. *Leaſes.* (O)

1. DEBT upon Bond conditioned to pay Money upon the delivering up ſome Receipts, *&c.* The Defendant pleaded, that the Plaintiff did not deliver up the Receipts, *&c.* and upon Demurrer this Plea was adjudged ill; but then the Defendant objected, that the Action was brought in *Middleſex*, when by Record it appeared that the Bond was dated in *London*; now, tho' the Plaintiff need not alledge any Place where the Bond was dated, yet having alledged a Place certain, he muſt not vary from it, and alledge it to be in another Place. *Raym.* 430. *Berning* verſus *Foliat.* *Co. Lit. 6. a. S. P.*

2. In Special Verdict in Ejectment, the Caſe was, the Jury find, that the Biſhop of *Oxford* by Indenture dated 14 *Octob.* *Anno* 1 *Mariæ*, did demiſe the Manor of *Hooknorton* to one *Crocker*, *habendum* to him and his Aſſigns from the End and Expiration of a former Leaſe thereof, *in the ſaid Indenture mentioned*, for and during the Term of ninety Years then next following; then they find the Indenture 1 *Mariæ* in *hæc verba*, *reciting*, that whereas the ſaid Biſhop, when Abbot of *Thame*, and the Convent by their Deed, dated *6 April 29 H.* 8. had demiſed the ſaid Manor to the aforeſaid *Croker* for the Term of eighty Years, and by another Deed dated 8 *Octob.* 1 *Ed. 6.* had demiſed to him the ſaid Manor for ninety Years: Now the ſaid Biſhop demiſed the ſaid Manor to the aforeſaid *Croker* and his Aſſigns, from the End of the ſaid Term ſpecified in the firſt Deed, unto the End of ninety Years next enſuing, *&c.* The Queſtion was, whether by this Verdict the Jury had well and ſufficiently found any Leaſes made *Anno 29 H.* 8. *or* 1 *Ed.* 6. for if they had, then the Commencement of the Term demiſed by the Deed 1 *Mariæ*, muſt be from the Expiration of thoſe former Leaſes: But it was adjudged, that they had not; 'tis plain, that the Jury have not poſitively found either of thoſe Leaſes to be made; 'tis true, in the Leaſe 1 *Mariæ* thoſe Deeds are *recited* to be made, but it doth not follow from thence, that they were actually made; becauſe a *Recital* in a Deed may be falſe, and if a feigned Recital in a true Deed, ſhould be admitted likewiſe to be true, then by ſuch falſe Recitals Men might make what Titles they would; ſo that the Jury have not found a *former Demiſe to be made*, *&c.* but they found a *former Demiſe mentioned to be made* by the Indenture 1 *Mariæ*; and it may be *mentioned to be made*, and yet never actually made; but if it had been actually made, then the Deed 1 *Mariæ* had been void, becauſe it was *habendum from the End and Expiration of a former Leaſe*, *&c.* Now there were *two former Leaſes* mentioned in the Indenture 1 *Mariæ*, the one dated *6 April 29 H.* 8. *habendum for* 80 *Years*, and the other dated 8 *Octob.* 1 *Ed. 6. habendum for* 90 *Years*, and ſo expiring at different Times, and it being incertain from which Expiration the Leaſe of 1 *Mariæ* ſhall commence, 'tis therefore void, according to the *Rector of Chedington's* Caſe; but there being no former Leaſe expreſly found, the Term for ninety Years muſt commence from the Date of the Deed, 14 *Octob.* 1 *Mariæ*, *&c. Vaughan 66*, 84, *Rowe* verſus *Huntington.*

3. Error of a Judgment in a *Quare Impedit*, where the Plaintiff being nonſuit, the Defendant had a Writ to the Biſhop, (*viz.*) That the Dean and Chapter of, *&c.* were ſeiſed, *&c.* and preſented *W. R.* and granted the Advowſon for Years to *R. W. from the Time when the Advowſon then in Grant ſhould determine*; it was aſſigned for Error, this was void for Incertainty, becauſe it was not known when the Grant of the Advowſon did determine, or when it ſhould commence; but adjudged, if that be not known, then the Grant to *R. W.* ſhall commence preſently. 1 *Lev.* 77. *Baſſet* verſus *Lewis.*

4. Debt upon Bond for Performance of an Award: Upon *Nullum arbitrium* pleaded, the Plaintiff ſet forth an Award made on ſuch a Day; but it did not appear, whether after the Submiſſion, or not; and this being objected upon a Demurrer to the Replication, it was adjudged, that if no Date had been ſet forth, it ſhall be intended, that it had none; and in ſuch Caſe 'tis good from the * *Delivery*, for every Deed or Writing hath a Date in Law, and that is the Day on which 'tis delivered; for 'tis the *Delivery* which gives it the Eſſence and Effect of a Deed, and not the Date written in the Deed it ſelf, for a Deed may bear Date and be delivered on another Day; but 'tis no Deed till the Delivery, and that is the Date of it. *Mod Caſes* 244. *Arnot* verſus *Bream.*

* 5 Rep. Clayton's *Caſe.*]

5. A Leaſe to commence a *die datus* includes the Day of the Date *per* three Judges againſt one. 2 *Salk.* 413. *Hath* verſus *Aſh.*

3 Lev. 438.

6. The Leſſor made a Leaſe for one Year, and ſo from Year to Year, as long as both Parties ſhall pleaſe; adjudged, this is a good Leaſe for two Years, and afterwards at Will. See *Bellaſis* verſus *Burbridge*, and 2 *Salk.* 413. *Stomfill* verſus *Hicks.* Yet *per Holt*, 'tis a Leaſe for every particular Year, and after the Year is begun, the Leſſor cannot determine it.

7. In Replevin, the Defendant avowed, for that he being ſeiſed in Fee of the Place where, demiſed the ſame by Parol from Year to Year, and ſo on as long as both Parties ſhou'd agree, to commence from *Lady-Day* 1703. rendring Rent quarterly; the Leſſee entered, and died in *December* 1706. and there being a Year and half Arrear at *Chriſtmas* before, the Leſſor entered and diſtrained for the ſame; and upon a Demurrer to this Avowry, adjudged, that after two Years the Leſſor and Leſſee might determine this Eſtate; and if the Leſſee hold over, he is Tenant for that Year, becauſe it ſhall be intended an Agreement for ſo long, founded on the original Contract, and in Execution of it, which was from Year to Year, and the third Year is not in Nature of a diſtinct Intereſt, becauſe it ariſes from the ſame executory Contract: and therefore the Leſſor may diſtrain in the third Year for the Rent due in the ſecond Year, and this is not void by the Statute of Frauds; for tho' 'tis more than for three Years, yet there is no ſubſiſting Term for above two Years together. 2 *Salk.* 414. *Legg* verſus *Strudwick.* *See Cro. Eliz.* 775. *Allen* 4. 2 *Jones* 5. *Sid.* 359. *S. P.*

5 Mod. 462. S C. 8. Debt upon Bond, upon *non eſt factum* pleaded, the Jury found, that it was dated 1 *July Anno Regni Car.* 2. *millimo ſexcent ſeptua quarto*; adjudged, that an impoſſible Date is no Date at all, but the Plaintiff muſt declare on the Bond as made at a certain Time; and 'tis better for him to reſt there, than to ſay *cujus dat' eiſdem die & Anno*, for that ties it up to the Bond mentioned in the Declaration, and if that is taken to be the expreſs Date, then there muſt be a Variance between that Date and the true Date of the Bond; and in this Caſe, if the Plaintiff declared on a Bond *geren' dat'*, *&c.* it had been ill, becauſe that could not refer to any Thing but the expreſs Date; but being *Cujus dat'*, the Court will intend it to be the real Date, which is the Delivery, and not the *expreſs Date*, becauſe that being inſenſible, it would not relate to that Date. 2 *Salk.* 463. *Cromwell* verſus *Grunſden.* *Yelv.* 193. 2 *Cro.* 136, *Hill*'s Caſe denied to be Law.

9. In Covenant, the Plaintiff declared on a Deed, bearing Date 30 *Martii Anno Domini* 1701. *Annoq; Regni, &c. decimo tertio*, with a *profert hic in Curia*, the Deed *cujus dat' eſt eiſdem die & Anno*; the Defendant craved *Oyer* of the Deed, which appeared to be dated 30*th of March* 1701 but without *Anno Domini* and *Anno Regni*; and upon a Demurrer to the Declaration for this Variance, it was adjudged none, for both the Year of the Lord and the King were implicitly in the Deed. 2 *Salk.* 658. *Holman* verſus *Borough.*

10. Debt upon Bond, in which the Plaintiff declared, *quod cum* (the Defendant) *apud London*, (viz) *in Paroch' beatæ Mariæ, &c.* the Defendant craved *Oyer*, and it appeared to be dated at *Port St. David*'s *in the Eaſt-Indies*; and upon Demurrer for this Variance, it was adjudged fatal; 'tis true, that the Place is only for the *Venue*, but the Dating the Bond made it local; this is not a Bond dated at *London*, becauſe there is an expreſs Date *at Port St. David*'s; the Plaintiff ſhould have declared, that the Defendant *at Port St. David*'s *in the Eaſt-Indies*, (viz.) *apud London in Parochia, &c.* for there the mentioning *London* was only a Place for Trial. 2 *Salk.* 660. *Darby* verſus *Anly.*

Dean and Chapter.

(A)

1. THere are four Sorts of Deans, the firſt is a Dean, who hath a Chapter, as the *Dean of Canterbury, &c.* and formerly they were made as Biſhops are now, (*viz.*) by a *Conge de Eſlire*; but now ſuch Deaneries which were tranſlated from Abbies and Priories, upon the Diſſolution thereof by *H.* 8. are donative, and the Patronage of all ſuch Deaneries are in the Crown.

2. A Deanery is a Spiritual Dignity, and therefore a Man cannot be a Dean and Prebendary in the ſame Church; this was *Goodman*'s Caſe, who was made Dean of *Wells*, and afterwards took a Prebend in that Church, for which he was deprived. 10 *Eliz. Dyer* 273.

3. The Tranſlations made by *H.* 8. of Priors and Convents into Deans and Chapters, were adjudged good by the Parliament *Anno* 33 *H.* 8. but if there had been any Defect in ſuch Tranſlations, they were afterwards made good by the Statute 35 *Eliz.* but if before that Time a Dean and Chapter had made a Surrender of their Poſſeſſions, yet the Corporation ſtill remained, becauſe of the Neceſſity to aſſiſt the Biſhop in his Office, and to give their Aſſent to ſuch Eſtates as he ſhould make of the Temporalties. 3 *Rep.* 74. *Dean and Chapter of Norwich*'s Caſe.

4. A Prebendary made a Leaſe for ſeventy Years, the Dean and Chapter reciting the ſaid *Leaſe, confirmed it* for fifty-one Years; adjudged, that this Confirmation did not extend to the whole Term, but if they had *confirmed the Land* demiſed for ſeventy Years, it had been good; but ſince the Patron, Dean and Chapter have an *Aſſent*, accompanied with an *Intereſt*, they may confirm a Grant in Part, or in All, or even upon a Condition. 5 *Rep.* 81. *Ford*'s Caſe.

5. In a Prohibition there was a Trial at Bar, in which the Queſtion was, whether the Dean and Chapter of *Durham* were Guardians of the Spiritualties, *ſede vacante*, or the *Archbiſhop of York*: *Hale* ſaid, the Dean and Chapter were *communi jure*, as to Matters of *Juriſdiction*; but as to Ordination, they are to call in Aid ſome neighbouring Biſhop; but the *Uſage* here in *England* is for the Archbiſhop to be Guardian, *&c.* in the Suffragan Dioceſes; and it being proved, that the Uſage ever ſince the Reign of *H.* 8. had been in the Dean and Chapter, they had a Verdict. 1 *Vent.* 225. *Dean and Chapter of Durham* verſus *Archbiſhop of York.*

Dean without a Chapter, and preſentable and donative.

(A)

1. THIS Dean is *preſentable*, and hath a peculiar Juriſdiction and Court; but he is not ſubject to the Viſitation of the Biſhop, and ſuch a Dean is the Dean of *Battle* in *Suſſex*; the Deanery was founded by *William the Conqueror*, and the *Dean* hath Eccleſiaſtical Juriſdiction within the Liberty of *Battle*; he is preſented by the *Viſcount Montacute*, and inſtituted and inducted by the Biſhop of *Chicheſter*, tho' not ſubject to his Viſitation.

2. Dean without a Chapter, and Donative, is ſuch as the Dean of *Bocking*, who hath a Court, and a peculiar Juriſdiction to hold Plea of all Eccleſiaſtical Matters ariſing in ſeveral Pariſhes within his Peculiar; he is conſtituted by a Commiſſion from the Archbiſhop of *Canterbury*.

Dean Rural.

(A)

EVERY Dioceſe is divided into Archdeaconries and Deaneries, and Rural Deans had firſt Juriſdiction over thoſe Deaneries; afterwards their Power was diminiſhed, and they were only the Biſhops Subſtitutes, to grant Letters of Adminiſtration, Probate of Wills, *&c.* but now their Power is wholly extinguiſhed in the Office of Archdeacon and Chancellor of Biſhops, who execute the Authority which Rural Deans had thro' all the Dioceſes of *England.*

Death.

(A)

What Alteration it makes in the Proceedings, and how to be pleaded.

See *Abatement.* (D) per totum. *Inrolment.* (A) 4. *Legatee.* (A) per totum.

1. LIBEL by the Biſhop of *Carſlile*, againſt another of his Dioceſe; the Cauſe was removed before the Archbiſhop, and then the Biſhop died, and the Defendant in the Suit was proſecuted to an Excommunication for Non-appearance; adjudged, that the Plea being once before the Archbiſhop, and he being poſſeſſed of the Cauſe, it always remains before him, notwithſtanding the Death of the Biſhop. 2 *Roll. Rep.* 20. *Dobſon* verſus *Scott.*

2. Treſpaſs againſt two Defendants; Upon Not guilty pleaded, there was a *Venire facias* returned to try the Iſſue, and one of them died, and afterwards a *Diſtringas* was awarded againſt both, and the Cauſe was tried, and the Plaintiff had a Verdict; and he ſuggeſting on the Roll, that Cro. Car. 426.

that one of the Defendants was dead, had Judgment againſt the other; and upon a Writ of Error brought, the Judgment was affirmed; but if Judgment had been againſt both, it had been Error. *W. Jones* 367. *Tippin* verſus *Fenton.*

3. Ejectment againſt ſeveral Defendants; upon Not guilty pleaded, there were ſeveral Continuances entered as to all, when in Truth one of them was dead after Iſſue joined. After a Verdict for the Plaintiff, and before Judgment, he ſuggeſted, that one of the Defendants died after the Verdict, and before the Judgment, (when in Truth he died before the Verdict) and prayed Judgment againſt the Survivors, which they not denying, Judgment was entered againſt them; and after a Writ of Error in the Exchequer-Chamber, the Court of King's Bench was moved to amend the Record according to the Truth: *Sed per Curiam*, it ſhall not be allowed; for if in Truth one of the Defendants was dead before the Verdict, the other may alledge and aver it; adjudged likewiſe, that the Exchequer-Chamber may examine Errors in Fact, as well as in Law, and that by the Statute 27 *Eliz. W. Jones* 410. *Fitzherbert* verſus *Leech.*

W. Jones 171. 4. Debt upon Bond conditioned, that if *Abigail Bate* ſhall not *receive*, and have paid unto her 200 *l.* by her Husband, *within two Months after his Death*, if ſhe ſhould ſurvive; then if the Obligor, *&c.* pay to the ſaid *Abigail*, *her Executors*, 100 *l.* within five Months, next after the Deceaſe of the Husband, the Bond to be void; The Obligor pleaded, that after the Marriage, *&c.* the Husband died, and *within two Months afterwards*, (*viz.*) on ſuch a Day, the *Wife died*; the Queſtion was, whether her Death had diſpenſed with the Condition? and adjudged, that it had not, for a Right was veſted in the Wife upon the Death of her Husband, tho' the *Time of Payment* was to be two Months afterwards; and therefore, tho' that Part of the Condition is become * impoſſible by her Death, yet the other Part is not; for it ſhall be paid to her Executors. *Palm.* 213. *Wood* verſus *Bate.* *See Laughter's* Caſe. *See* Conditions. (E) per totum.

* W. Jon. 172. contra, *not bound to perform the other Part.*

5. By a late Statute, 'tis enacted, that the *Death of either Party between the Verdict and the Judgment, ſhall not be alledged for Error, ſo as the Judgment is entered within two Terms after the Verdict.* 17 *Car.* 2. *cap.* 8.

6. Error to reverſe a Judgment in Ejectment, and the Error in Fact was aſſigned, that the Plaintiff in Ejectment died before Judgment; the Attorney for the ſaid Plaintiff pleaded *in nullo eſt Erratum*, for that the Plaintiff was living at ſuch a Place; upon this they were at Iſſue, and it was found, that he was dead; it was inſiſted, that this Iſſue was not well joined, becauſe the Writ of Error being in Nature of a new Action, to which the Plaintiff muſt anſwer; it became impoſſible in this Caſe, becauſe he was dead, and therefore what was done by his Attorney was without any Warrant; but adjudged, that the Iſſue was well joined, and that the Judgment ſhall be reverſed for this Error thus found by the Jury, without a *Sci' fa'* to the Executors, and if they are grieved by the Attorney's appearing without a Warrant, they may have a Remedy by Action on the Caſe againſt him. *Sid.* 93. *Dove* verſus *Darcy.*

7. Judgment againſt the Defendant, and a *Fieri facias* iſſued out againſt his Goods, *&c.* but before the Writ was executed, the Defendant died Inteſtate, and afterwards Adminiſtration being granted to his Wife, the ſaid Writ was executed upon *his Goods* in her Hands, without ſuing forth any *Sci. fa.* againſt her, and adjudged good; becauſe the Property of the Goods was bound from the *Teſte of the Fi. fa.* ſo that a Sale made thereof *Bona fide* could not be avoided; and ſince the Inteſtate himſelf, had he been ſtill living, could have no Plea to this *Fi. fa.* 'tis not reaſonable, that his Adminiſtratrix ſhould have the Benefit of a Plea to a *Scire facias* after his Death; but this was againſt the Opinion of the Chief Juſtice *Vaughan.* 1 *Mod.* 188. *Farrow* verſus *Brooks.* *Poſtea* Sci' fa' (D) 12. *S. C.*

8. Debt brought by an Executrix, upon a Bond alledged to be made to her Teſtator: Upon *Non eſt factum* pleaded, it was found to be made to the Teſtator, and to *W. R.* who died before the Teſtator; and whether this was the Deed *modo & forma*, *&c.* was the Queſtion, and adjudged, that it was; for the Plaintiff might declare upon a Bond made to her Teſtator only, becauſe the Duty ſurvived to him by the Death of another; but if the Defendant had demanded *Oyer* of the Bond, it had been entered in * *hæc verba*, he might have demurred to the Declaration, and the Court *ex Officio* would have abated the Bill; but 'tis otherwiſe in a Plea; for where ſeveral are bound in a Bond, and an Action is brought againſt one, he muſt plead, that the Bond was made by himſelf and the other now living, and not named in the Writ, for the Court will not intend, that the Bond was ſealed by all that are named in it. *Allen* 41. *Holdwich* verſus *Chafe.*

* Allen 21 contr.

9. Judgment in Debt againſt *John Brooks*, and a *Fi. fa. Teſte* the laſt Day of Trinity-Term, and this was *de Bonis & Cattallis Johannis Brooks*; but before it was executed, he died, and *Eliz. Brooks* adminiſtred, and then the Writ was executed of his Goods in her Hands; it was moved for Reſtitution, for that a *Fi. fa.* is a Commiſſion which muſt be ſtrictly purſued; the Words are, to levy the Debt on the Goods of *John Brooks*, and they ceaſe to be his Goods when he is dead; the Execution ſhould be renewed by *Sci. fa.* againſt the Adminiſtratrix, to which ſhe might have pleaded; but adjudged, that the Property of the Gods are bound by the *Teſte of the Writ*; and ſince the Inteſtate himſelf, if he had been living, could have no Plea to this *Fi. fa.* the Adminiſtratrix ſhall not be indulged to have any Time to plead; but *Vaughan*, Ch. Juſt. was of another Opinion. 1 *Mod.* 182. *Farrer* verſus *Brooks.* *Antea* (A) 7. *S. C.* Scire facias (D) 12. *S. C.*

10. Not long after the making the Statute 17 *Car.* 2. an Action was brought againſt the Defendant, which was tried at the Summer Aſſiſes, and the Plaintiff had a Verdict, but the Defendant *died* before the firſt Day of *Michaelmas* Term following; afterwards the Plaintiff entered his Judgment in that Term, and then brought a *Scire facias* againſt the Executor of the Defendant, who pleaded, that the Teſtator owed him 100 *l.* on Bond, and farther pleaded, that the *Lord Arlington* had obtained a Judgment againſt the ſaid Teſtator for ſo much, *&c.* and that he the ſaid Executor had not Aſſets, *ultra* 40 *l.* which he retained in his own Hands to ſatisfy himſelf, and to diſcharge the ſaid Judgment; the Queſtion was, whether the Judgment entered after the Death of the Defendant, by Vertue of this Statute, ſhall be made a Judgment againſt him in his Life-time, and relate to the Verdict, for if ſo, then it muſt be paid before a Debt on Bond, and the Lord Chief Juſtice *Hale* was of Opinion, that by the help of this Statute it ſhall relate to the Verdict, and take Effect as a Judgment, from that Time; but *Juſtice Twiſden* was of another Opinion, that the Statute did not extend the Judgment farther than it was before at the Common Law, which is only a Judgment from the Time 'tis entered, and that the Intent thereof was, that it ſhould not be avoided for *Error*, upon the Death of either Party, but never to make it a Judgment againſt a dead Man, as if he was actually living, for that would be ſuch a Fiction as to defeat the Defendant of a juſt Debt on a Bond, which is a Debt of a ſuperior Nature to a Debt upon ſimple Contract, upon which this Judgment was had before it was entered. 1 *Saund.* 216. *Wheatly* verſus *Lane*. *Sid.* 397. *S. C.* 1 *Lev.* 231, 250, 255. *S. C.* Devaſtavit. (C) 9. *S. C.*

11. Upon a Motion to abate a Writ of Error on an Affidavit, that one of the Plaintiffs in the Writ was dead, the Court would not grant it, but ſaid, they might ſuggeſt it on the Roll, but it may be a Queſtion, if it could be done if the Party died after the laſt Continuance. *Sid.* 235. *Beacon* verſus *Sewell.*

12. Adjudged, that where a Writ of Error is brought in the Exchequer-Chamber, and the Defendant dies, the Writ is not abated, but 'tis if the Plaintiff dies, unleſs where there are more than one Plaintiff; for in ſuch Caſe, if one dies, it ſhall not abate; now, the Reaſon why it ſhall not abate upon the Death of the * Defendant in the Writ, is, becauſe he is not named in the Writ as Defendant, and no *Scire facias* lies againſt him, which ſeems plain where there are ſeveral Defendants, but not ſo clear where there is but one. *Sid.* 419. See *Vent.* 34.

* *Debt againſt two Sheriffs on an Eſcape, one dies, the Writ ſhall not abate.* Hardres 112. Young *v.* Woollaſton.

13. Error in the Exchequer-Chamber to reverſe a Judgment in *B. R.* the Writ was ſigned by the Chief Juſtice, but before the Record certified, he died; it was ruled, that if it was not certified within eight Days, the Plaintiff in the original Action might take out Execution; but if the Writ had not been ſigned by the Chief Juſtice, it had abated by his Death. *Sid.* 268. *Allen* v. *Shaw.*

14. Upon a Reference to the Secondary, the Caſe was, there was a Verdict, and before the Day in Bank the Plaintiff died, and afterwards no Judgment was *entered within two Terms*, but it was *ſigned* the ſecond Term, and afterwards entered; and the Queſtion was, whether this was aided by the Statute 17 *Car.* 2, *&c.* and adjudged, that the *Signing* it is an *Entring* it within the Statute, for immediately upon the *Signing*, and before the Entring it on the Roll, 'tis uſual to take out Execution and enter the Judgment afterwards. *Sid.* 385. *Helie* verſus *Baker.*

15. In Treſpaſs againſt four Defendants, who appeared, and after ſeveral Continuances, three of them pleaded, the Death of the Fourth after the laſt Continuance, *& petunt judicium de Brevi & quod Breve illud caſſetur*; and upon a Demurrer it was adjudged the Plea was ill, for it ſhould have concluded *& petunt judicium ſi Curia ulterius procedere vult*, becauſe in Fact the Writ was already abated by the Death of the fourth Defendant. 3 *Lev.* 120. *Hallowes* verſus *Lucy.*

16. Trover of a Ship and ſeveral Goods, the Defendant pleads in Bar *Actio non, &c.* for that the Plaintiff and one *N.* and *P.* were *joint Merchants* of the Ship and Goods, and that *N.* and *P.* made ſuch Perſons Executors, and died, and that the Executors had adminiſtered, and were not named, *&c.* and upon a Demurrer to this Plea the Plaintiff had Judgment, for this is not pleadable in Bar, but in * Abatement. 3 *Lev.* 290. *Kemp* verſus *Andrews.* * Allen 42.

17. In a Special Verdict in Ejectment, the Caſe was, (*viz.*) Articles of Marriage were made between the eldeſt Son of the Defendant, and *Martha*, the Daughter of *W. N.* by which the Defendant was to ſettle the Lands in Queſtion upon the Plaintiff, for his Life, and after his Deceaſe upon *Martha*, for her Jointure; provided, that the Plaintiff ſhould make a Leaſe thereof to the Defendant for ninety nine Years, *if he and Suſan his Wife ſhould ſo long live*; afterwards *Suſan died* before the Plaintiff made any Leaſe; and the Queſtion was, whether the Leaſe for ninety-nine Years, ſhould now be made, after her Death; and adjudged, that it ſhould not, yet in *Anderſon* 151. a Leaſe was made to Two for their Lives, *without Impeachment of Waſte during their Lives*; one died, adjudged, that this Privilege to be diſcharged of Waſte will hold to the Survivor, for 'tis reaſonable it ſhould have as large a Conſtruction as the Intereſt which both had in the Lands. 2 *Vent.* 74. *Bailes* verſus *Wenman.*

18. The Caſe was, the Defendant gave a Warrant of Attorney to confeſs Judgment for a juſt Debt due to the Plaintiff, and this was about eight of the Clock in the Morning, and about two Hours afterwards, and before the Secondary had ſigned the Judgment, the Debtor died, and now his Executor moved to ſet aſide the Judgment, but the Court held it to be well obtained. *Raym.* 18. *Andrews* verſus *Shovel.*

19. Judgment in Debt againſt Two, afterwards one of them died, and the Creditor brought a *Scire facias* againſt the Survivor, and recites the Death of the other, and prayed, that he (the Survivor 1 Lev. 30.

Survivor) might ſhew Cauſe why the Plaintiff ſhould not have Execution againſt him; the Defendant pleads, that he who was dead left Lands, and *an Heir* ſtill living, to whom the Lands deſcended, and demands Judgment, *&c.* and upon Demurrer to this Plea it was adjudged, that Execution ſhall be againſt the Survivor, for at Common Law, in ſuch Caſe, the Charge ſurvives, and ſo is *Sir William Herbert's* Caſe, *Hob.* 25. and the Statute of *Weſtm.* 2. which gives the *Scire facias* and *Elegit*, doth not take away the Privilege which the Plaintiff had at Common Law, but leaves him to his Choice, either to charge the Lands or the Perſon; if he Charges the Lands, then it doth not ſurvive, but if the Perſon, then it doth; therefore if the Plaintiff, upon this *Sci. facias* takes out an *Elegit*, the Defendant may have an *Audita querela*, or he may ſuggeſt the Death of the other Perſon upon the Return of the *Elegit*, and ſo have a *Superſedeas*. *Raym.* 26. *Edſar* verſus *Smart. Yelv.* 209. *contra.*

Sid. 259. 1 Lev. 165. 20. *Aſſumpſit* againſt two Executors, after Iſſue joined, one of the Defendants died, and the Plaintiff ſuggeſting on the Roll that he (the Defendant) was dead, proceeded to Trial againſt the other, and in Arreſt of Judgment it was inſiſted, that by the Death of one the Writ abates as to the other; 'tis true, in all Actions of *Treſpaſs* grounded upon a Wrong, the Death of one ſhall not abate the Writ, but if founded on the *Contract*, as *Nil debet*, or *Indebitatus Aſſumpſit*, there 'tis otherwiſe, and ſo is the Caſe in *Plowd. Com.* 186. *Woodward* verſus *Darnie*, upon the Authority of which Caſe Judgment was arreſted. *Raym.* 131. *Worrall* verſus *Brand.* See *Cro. Car.* 426. *Tiffen's* Caſe. See *Noy* 72. *Bannian* verſus *Watſon. Cro. Eliz.* 625. *S. C.*

21. In Debt againſt an Executor, he pleaded, that a joint Judgment was obtained againſt his Teſtator, and one *Eraſmus Harvey*, who is now alive, and that he had not Aſſets beyond that Judgment to ſatisfy the Debt; the Plaintiff demurred, but the Defendant had Judgment, becauſe the Charge ſurvived to him who was living, and the Executor is not liable whilſt the other is living. *Raym.* 153. *Harvey* verſus *Harvey.*

1 Lev. 277. 1 Mod. 6. Sid. 424. 22. *Scire facias* againſt an Executor, to ſhew Cauſe why he ſhould not have Execution upon a Judgment had againſt his Teſtator; the Defendant demands *Oyer* of the Record, by which it appeared, that the Plaintiff brought an *Aſſumpſit* againſt the Teſtator; and upon *Non Aſſumpſit* pleaded, there was a Trial had at the *Niſi prius, and between the Trial and the Day in Bank, the Teſtator died*, then the now Defendant pleaded a Debt due to himſelf by Bond from the Teſtator, for which he retained, *&c.* and had not Aſſets *ultra:* And upon Demurrer to this Plea it was adjudged, that by the Statute 17 *Car.* 2. *cap.* 8, the Death of the Teſtator was ſupplied, ſo as to make the Judgment obtained againſt him good, and to over-reach the Debt due to the Executor. *Raym.* 210. *Burnett* verſus *Holden.* See 8 *&* 9 *Will.* 3. *cap.* 11.

23. Debt upon Bond againſt *Valentine Joyner*, as Son and Heir of *Chriſtopher Joyner*, brought by *Sir Robert Viner* the Obligee; the Defendant craved *Oyer* of the Condition, which was, *That whereas the above-bounden Chriſtopher Joyner did* 4 *Decemb.* 1665, *leave with H. L. Servant to the above-named Sir Robert Viner, one Bill of Exchange of* 61 *l.* 14 *s. payable by Richard Fuller of London, Merchant, and upon leaving the ſaid Bill, the ſaid Chriſtopher Joyner had Credit in his Account with the ſaid Sir R. V. for the ſaid Sum, and whereas the ſaid H. L. doth aver, that the ſaid Sum of* 61 *l.* 14 *s. was not paid to the ſaid Sir R. V. or to any other Perſon for his Uſe: Now, the Condition of this Obligation is, that if the ſaid Chriſtopher Joyner ſhall not, before the* 10*th Day of November next, ſufficiently prove, that the ſaid Sum of* 61 *l.* 14 *s. was paid to the ſaid Sir R. V. then, if the ſaid Chriſtopher Joyner, his Heirs, Executors or Adminiſtrators,* ſhall pay *to the ſaid Sir R. V. or his Aſſigns, the ſaid* 64 *l.* 14 *s. and Intereſt, &c. upon the ſaid* 10*th of November, then the Obligation to be paid. Quibus lectis & auditis*, the Defendant pleaded, that after the Making the ſaid Bond, and before the ſaid 10*th of November*, (*viz.*) on the 20th of *May*, 24 *Car.* 2. the ſaid *Chriſtopher Joyner his Father died*; and upon Demurrer to this Plea, the Defendant had Judgment, for there is a Difference where the Condition of a Bond contains a Duty veſted in the Obligee, and where 'tis to do a collateral Act; for where a Duty is veſted, the Executors are bound to perform it, and the Obligor forfeits the Bond if he dies before 'tis performed, but where 'tis to do a collateral Act, as in the principal Caſe, 'tis otherwiſe. *Raym.* 415. *Vyner* verſus *Joyner.* See *Kingwell* verſus *Knapton.* Arbitrament. (A) 4, and *Cro. Eliz.* 10. 2 *Leon.* 155. *S. C.* and *Dyer* 262. *Arundell* verſus *Comb. S. P.*

24. *Trover* brought by *five Plaintiffs*, and before Verdict one of them dies, yet the other Four went to Trial, and ſuggeſting upon the Roll, that one of them was dead, the reſt prayed Judgment, and had it; and now the Defendant brought a Writ of Error, and aſſigned for Error, that the Party died before Verdict, ſo that it was given againſt a dead Man; adjudged, that every Man ought to recover according to the Right he hath at the Time of the Action brought; now, in this Caſe, tho' the Plaintiffs were Jointenants, and had a Capacity that the Whole might ſurvive to one, yet in Truth every one at the Time of the Action, had only a proportionable Right to a fifth Part, and therefore not to ſo much as they had after the Death of one of them after the Action brought; as to *Springs* verſus *Barrett.* 2 *Bulſt.* 262. The Reporter tells us the Reaſon of that Judgment was, becauſe by the Death of one the Action did ſurvive to the other; but it appears in *Read* and *Redman's* Caſe, that he was miſtaken in that Reaſon; and as to the Caſe, where *Treſpaſs* is brought *againſt ſeveral*, and one of them dies before Judgment, that differs from *Trover*, becauſe *Treſpaſs* is joint or ſeveral at the Pleaſure of the Plaintiff; and as to the Caſe of *Replevin*, *Cro. Eliz.* 574, tho' an Avowant is in Nature of a Plaintiff, yet he doth not bring the Action, and ſo not within the Rule before-mentioned, that the ſame Right muſt continue which was at the Bringing the Action, ſo the Judgment was reverſed. *Raym.* 463. *Wedgwood & al'* verſus *Baily.*

25. In Ejectment, the Defendant died the Day before the Aſſiſes began, and upon a Trial and full Evidence, there was a Verdict for the Plaintiff; and upon a Motion in Arreſt of Judgment it was adjudged, that the Death of either Party *before the Aſſiſes*, is not within the Statute; but if the Death is *after the Aſſiſes* began, that is remedied by the Statute, that in the principal Caſe 'tis in the Diſcretion of the Court to Arreſt the Judgment upon a Motion, or to put the Party to bring a Writ of Error; the latter of which was done, that the Point might be put in Iſſue and tried. 1 *Salk.* 8.

26. Debt upon Bond againſt an Adminiſtrator, who confeſſed Aſſets to the Value of 200 *l.* but pleaded, that *T. S.* had obtained a Judgment by Default againſt his Inteſtate (which is called an interlocutory Judgment) and afterwards the Inteſtate died, and then the Judgment was revived by *Scire facias* againſt the Defendant, as Adminiſtrator, and this was upon the Statute 8 *&* 9 *Will.* 3. *cap.* 10. which after an *interlocutory Judgment* gives a *Scire facias* againſt the Adminiſtrator in Caſe of the Inteſtate's *Death*, and the Defendant having no Cauſe to ſhew why Execution ſhould not be had, there was a Writ of Inquiry iſſued, and Damages to the Value of 300 *l.* and Judgment thereon for the Plaintiff, *quod recuperet damna præd.* againſt the ſaid Inteſtate, and averred, that he had not Aſſets *ultra*; and upon Demurrer to this Plea, it was agreed to be ill at Common Law, for by the Death of the Inteſtate the Action was abated, and Judgment could not be entered againſt him after he was dead; 'tis true, by the Statute 17 *Car.* 2. *cap.* 8, where the Defendant dies after the Verdict, and before the Judgment it ſhall be good againſt himſelf only, but by the Statute 8 *&* 9 *Will.* 3. the final Judgment ſhall be againſt the Executor or Adminiſtrator, and not againſt the Inteſtate only, and the *Scire facias* is to be againſt them, and this Statute expreſly mentions them for that Purpoſe. 1 *Salk.* 42. *Weſton* verſus *James.*

27. *Woodward* gave a Warrant of Attorney to confeſs a Judgment, and died within a Year after, (*viz.*) *In Hillary Vacation, and before the Eſſoin-Day of Eaſter-Term following*; the Attorney, *after the Death* of *W.* entered up the Judgment as of *Hillary-Term*, but brought in the Roll after *the Eſſoin-Day of Eaſter-Term*, which he ought to have done before; and upon a Motion to ſet aſide this Judgment, for that the Warrant of Attorney was revoked by the Death of *W.* it was adjudged, that tho' he died in the Vacation, yet the Attorney might enter the Judgment as of the precedent Term, and 'tis *a good Judgment at Common Law*, tho' 'tis not ſo upon the Statute of Frauds in reſpect to Purchaſers, for in ſuch Caſe 'tis only good from the Time of *Signing it*; now this being a *Judgment at Common Law*, as of *Hillary-Term*, by Conſequence it muſt be a Judgment entered when the Party was alive, and therefore good, if the Roll had been brought in *before the Eſſoin-Day of Eaſter-Term*, and made Part of the Bundle of *Hillary-Term*; for 'tis for that very Reaſon, that what is done in the Vacation is eſteemed as an Act of the preceding Term, ſo that this being a *poſt terminum* Roll ſhall not be received. 1 *Salk.* 87. *Oades* verſus *Woodward.*

28. Verdict againſt the Defendant at the *Niſi prius*, who died before the * *Day in Bank*, (*viz.*) before the next Term; and upon *Affidavit* of this Matter, it was moved to ſtay the Entry of the Judgment, and was ſtayed, for this prevents the Charge of a Writ of Error. *Sid.* 131. *Perſhall* verſus *Smith.* See *Stat.* 17 *Car.* 2. *cap.* 8.

* 1 Roll. Rep. 14. Lee *v.* Rowkley. S. P.

1 Roll. Rep. 51. Jordan's *Caſe.* *See* 4 Leon. 14. Blady *v.* Eſtwick.

29. Error of a Judgment in Treſpaſs in *C. B. againſt four Defendants*, after the Record certified in *B. R.* one of the Defendants died, then the Plaintiff took out a *Ca. ſa.* againſt all four; adjudged, that by the Death of one of them the Writ of Error was abated, that if the *Ca. ſa.* had been againſt three alone, without the Fourth, it had been Wrong, becauſe not warranted by the Judgment, that this Execution was erroneous, becauſe the Plaintiff ought not to ſue it, without ſuggeſting on Record the Death of the fourth Defendant; for till that was done, the Court is bound up by the Writ, that if this Matter had been ſuggeſted on the Record, the Plaintiff might have Execution without a *Sci. fa.* becauſe the Execution is neither a Charge or Benefit to any new Perſon; 'tis true, a Stranger, as an Executor or Adminiſtrator, who might have been the better or worſe for the Execution, muſt be made a Party to the Judgment by a *Sci. fa.* but that is not neceſſary where the Judgment is between the ſame Parties. 1 *Salk.* 319. *Pennoire* verſus *Brace.* 5 Mod. 338.

30. The Plaintiff had a Verdict in *Eaſter-Term*, but died before the Judgment was entered; adjudged, that it might be entered after his Death, ſo as it is within two Terms after the Verdict; 'tis true, the Statute of Frauds requires the Time of Signing the Judgment ſhould be entered on the Roll, which is only for the Benefit of Purchaſers, for if 'tis ſigned in the Vacation, the Judg- is entered as of the Term preceding. 1 *Salk.* 401. *Duke of Norfolk*'s Caſe. *Farr.* 39. *S. C.*

31. Where a Warrant of Attorney is given in the *Vacation*, to enter Judgment as of the *Term precedent*, his Death doth not determine that Warrant, becauſe he was alive when the Judgment was entered, and the Time of Entring it is not entered on the Roll, but in the Margin, and this is only for the Security of Purchaſers, but 'tis good againſt the Party without it; ſo where the Defendant makes Default, which if he had not done, the Plaintiff might have entered Judgment againſt him, and before actual Entry he dies, the Plaintiff may enter his Judgment as of the Term in which the Default was made: See *Shelley*'s Caſe, who died at four of the Clock in the Morning of that Day on which the Recovery was ſuffered; ſo where the Caption of a Fine is taken in Vacation, if the Writ is returnable the next Term, and the Party dies before that Term, 'tis determined; but if 'tis returnable the Term before, 'tis good. *Paſch.* 1 *Ann. Dr. Woodward*'s Caſe.

32. Adjudged, that if a Man give a Warrant of Attorney to confeſs Judgment the firſt Day of Term, and dies, it may be entered at any Time in that Term. *Mod. Caſes* 86.

33. Ruled by *Holt* Ch. Juſt. if one will enter a Judgment acknowled'd in Vacation, as of a precedent Term, he muſt enter it before the Eſſoin-Day of the next ſubſequent Term, and that if a Judgment is ſigned in *Hillary-Term*, and in the ſubſequent Vacation the Defendant ſells his Lands, and the Plaintiff enters his Judgment before the Eſſoins of *Eaſter-Term*, it ſhall affect thoſe Lands in the Hands of the Purchaſer; ſo if the Defendant die in the Vacation, and Judgment was had againſt him (whilſt living) in the precedent Term, and entered *after his Death*, before the Eſſoins of the next Term, 'tis good by Relation. *Mod. Caſes* 191. *Hodges* verſus *Templer*.

34. Ruled by *Holt* Ch. Juſt. that where a Plaintiff is alive at a Continuance-Day, they will give Judgment, but if he is dead, the Defendant muſt plead it *Puis Darrein Continuance*, and make Oath of the Truth of his Plea, otherwiſe the Court will not take Notice that he is dead; for if he dies before the firſt Day of the Term, the Court will proceed, unleſs the Defendant pleads it *Puis darrein Continuance*; but if he was living on the firſt Day of the Term, the Judgment ſhall *relate* to that Day. *Mod. Caſes* 225. In the Caſe of *Fox* and *Tilly*.

35. *Indebitatus Aſſumpſit* by *four Plaintiffs*, one of them died before Judgment, the other recovered, and the Defendant brought a Writ of Error in *B. R.* and the Queſtion was, whether the Action was abated by the Death of *one of the Plaintiffs: Et per Curiam*, Actions grounded on Torts will ſurvive, but not upon Contracts; 'tis true, where two Jointenants *are Defendants*, the Death of one will not abate the Writ, becauſe the Action is joint and ſeveral againſt them; but where Two or more *are Plaintiffs*, and to recover a perſonal Thing, there the Death or Releaſe of One ſhall abate the Action as to the reſt, tho' 'tis otherwiſe where they *are Defendants*, and are to diſcharge themſelves of a Perſonalty; and therefore where an *Audita querela* is brought by Two, the Death of one ſhall not abate the Writ, becauſe the Action is by Way of Diſcharge, the Judgment in the principal Caſe was reverſed. 3 *Mod.* 248. *Capell* verſus *Saltonſtall*.

Debt.

Where it will lie on the Privity of Contract, and in other Caſes, and for Rent. (A)

In what Caſes an Action of Debt will not lie. (B)

Where an Action of Debt muſt be brought in the *Detinet*. (C)

Where it muſt be brought in the *Debet* and *Detinet*. (D)

Of Actions of Debt on Penal Statutes. (E)

Pleadings in Debt, good, and not good. (F)

(A)

Where it will lie on the Privity of Contract, &c. and in other Caſes, and for Rent arrear. See *Rent*. (B) per totum.

1. DEBT againſt *an Adminiſtrator*, wherein the Plaintiff declared upon a Bill in theſe Words, (*viz.*) *Be it known to all Men, &c. that I* W. G. (who was the Inteſtate) *have received* 20 *l. of* W. R. (who was the Plaintiff) *to bear the Adventure to* Roan, *and there to beſtow it in* French *Prunes, and to ſee them ſhipped*, &c. which he had not done; adjudged, that an Action of Debt did lie on this Bill, for an Account would not againſt the Adminiſtrator, becauſe he is not Privy to it, and if there had been no Bill, yet he *who delivered the Money* may have either an Action of Debt or Account againſt him to whom it was delivered; he cannot have *Detinue for Money*, becauſe one Shilling cannot be known from another. *Trin.* 28 *H.* 8. *Dyer* 20, 21.

2. An Abbot and his Convent granted for themſelves and their Succeſſors, to *W. R.* and his Heirs, to find one of his Monks to ſay Morning and Evening Service every Holy Day in ſuch a Chapel, and that as often as he ſhould fail, they would forfeit 5 *l.* adjudged, that *W. R.* and his Heirs may have an Action of Debt for every Default, but they could not have a Writ of Annuity, becauſe it was a caſual Thing, for it might happen that there would never be any Default. 28 *H.* 8. *Dyer* 24. See *pl.* 19, 24.

Cro. Eliz. 633. S. C. 3 Rep. 24. *cited.* *See* Litt. Rep. 53.

3. Leaſe for Years, rendring Rent, the Leſſee *aſſigned* Part of the Lands for the whole Term to another, and the Leſſor granted the Reverſion in Fee to the Plaintiff, who brought an Action of Debt againſt the firſt Leſſee; and becauſe he had only aſſigned his Intereſt in Part of the Lands demiſed, and continued himſelf in the Poſſeſſion of the Reſidue, it was adjudged, that the Action of Debt would lie, for there was not only *Privity of Contract*, but *Privity of Eſtate and Contract* likewiſe between him and the Grantee of the Reverſion. 41 *Eliz. Dyer Broom* verſus *Hoare*. See *pl.* 23.

4. Leaſe for Years of an Houſe; the Leſſor entered and made a Feoffment; adjudged, that the Feoffee might have an Action of Debt for the Rent arrear, tho' there was no Privity of Contract between him and the Leſſee, for the Rent muſt follow the Reverſion; and 'tis not *extinct* in this Caſe, but only ſuſpended for a Time, (*viz.*) till 'tis revived by the Re-entry of the Leſſee. *Dyer* 212.

5. Debt upon an Obligation, which upon *Oyer* appeared to be a Statute; but becauſe the Seal of the Mayor, and not of the Cogniſor, was only affixed, it had been adjudged between the ſame Parties, that it was not a Statute, and therefore Debt was now brought, as upon an Obligation at Common Law; it was objected, that the Action would not lie, for it being void as to the Statute, it cannot be good as to an Obligation; but adjudged, that the Action of Debt would lie, becauſe the Words *obligari & teneri* make it an Obligation, which is confirmed by the Delivery of the Obligor. *Paſch.* 37 *Eliz. Cro. Eliz.* 355. *Hollingworth* verſus *Aſcue. Poſtea* Recogniſance. (A) 1. *S. C.*

6. Debt upon a Bill ſealed, wherein the Defendant acknowledged, that he had received 7 *l.* of the Plaintiff to buy ſeveral Goods (naming them) for the Uſe of the Plaintiff; the Defendant demurred to the Declaration, becauſe the Plaintiff ſhou'd have brought an Action of Account, and not of Debt; but adjudged, that he had Election to have the one or the other. *Mich.* 4 *Eliz. Cro. Eliz.* 647. *The Earl of Lincoln* verſus *Topcliſſe.*

7. Adjudged, that if the Plaintiff hath Judgment in an Action of Debt on a Bond, and no Execution taken out, he may bring another Action upon the ſame Bond; but 'tis otherwiſe upon a Contract. *Trin.* 30 *Eliz. Owen* 37. *Viſcount Bindon's* Caſe.

8. The Plaintiff delivered *Money* to the Defendant to be kept for ſome Time, and then to be redelivered to him again, which the Defendant refuſing to do, the Plaintiff brought an Action of Debt againſt him; and upon a Demurrer to the Declaration, it was objected, that an Action of Debt would not lie, but an *Account* was the proper Action; adjudged, that this Action would lie upon this Difference, (*viz.*) where a *Horſe*, or any other Goods, is delivered to be redelivered, there *Detinue* lies, becauſe the Thing is known, and the Property is not altered by the Delivery; but 'tis otherwiſe where *Money* is delivered, the ſame cannot be known; therefore the Property is altered, and Debt. *Mich.* 42 *Eliz. Owen* 86. *Bretton* verſus *Barnett.*

9. Debt upon Bond conditioned, that if the Obligor paid 100 *l.* to *W. R.* within three Months after the death of *W. F.* then the Bond to be void; the Plaintiff ſet forth, that *W. F.* died the 30*th of Septemb.* 30 *Eliz.* and the Action was brought in *Michaelmas* Term following, which being within a Month after the Death of *W. F.* when the Defendant had three Months, by the Condition of the Bond, to pay the Money, it appeared by the Plaintiff's own Shewing, that he had no Cauſe of Action; but adjudged, that the Action was well brought; for where a Man is bound in a Bond, 'tis a Duty preſently in the Obligor, and the Condition is in Nature of a Defeaſance. *Hill.* 30 *Eliz.* 1 *Leon.* 186. *Woodſhaw* verſus *Fulmerſtone.*

10. Leaſe for Years, *from Michaelmas* next, rendring Rent; the Leſſee entered at *Michaelmas*, which was before the Commencement of the Leaſe, for that was to begin *from Michaelmas*; 'tis true, he is a Diſſeiſor, yet an Action of Debt will lie againſt him for the Rent arrear, by Reaſon of the Privity of Contract between him and the Leſſor. *Cro. Eliz.* 169. *Alexander* v. *Dyer.* 2 Leon. 99. S. C. *See* Lit. Rep. 17.

11. Leaſe for Years, rendring Rent, and in an Action of Debt brought againſt the Leſſee for Rent arrear, the Leſſor declared, that he demiſed ſuch Land *apud L.* excepting one Acre, *lying and being in the Pariſh of H.* in the ſaid County, *Habendum from Lady-Day laſt paſt*, by Vertue whereof the Leſſee entered, and held the ſame *from Lady-Day, &c.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff had not named *any Town* where the Lands lie; for the Words *lying and being in H.* relate only to that one Acre which was excepted; beſides, he alledged, that the Defendant held the Lands *from Lady-Day* laſt paſt, and that he entered on *Lady-Day*, which was before the Commencement of his Leaſe; ſo that he cannot be in by Vertue of the Leaſe, as the Plaintiff had declared, for he is a Diſſeiſor; but the Plaintiff had Judgment, for it ſhall be intended, that the Defendant was in Poſſeſſion, by ſome Agreement between them and the Leſſor, before the Leaſe commenced. *Cro. Eliz.* 905. *Waller* verſus *Campion.*

12. Debt, *&c.* in which the Plaintiff declared, that the Defendant, in Conſideration of 100 *l.* paid to him by the Father of the Plaintiff, had granted to his ſaid Father an yearly Rent of 60 *l.* iſſuing out of the Manor of *D. for ſixty Years*, and that his Father had deviſed the ſaid Rent to him; the Defendant pleaded the Statute of Uſury, and it was found againſt him; then he moved in Arreſt of Judgment, that an Action of Debt would not lie, but a Writ of Annuity; but adjudged, that the Action did lie; for there is a Difference where a *Rent for Years* is granted originally, as in this Caſe it was, and where a Rent is granted in Fee, and the Grantee thereof maketh a Leaſe for Years of the Rent, there an Action of Debt will not lie, ſo long as the Term continueth; but 'tis otherwiſe in the Principal Caſe. *Trin.* 49 *Eliz. Cro. Eliz.* 895. *Bendlos* verſus *Phillips.*

13. The Defendant ſealed a Bill in theſe Words, (*viz.*) *Memorandum, I have received of E. T. to the Uſe of my Maſter W. R. the Sum of* 40 l. *to be paid at Michaelmas following*, and the Plaintiff brought an Action of Debt upon this Bill, ſetting it forth *verbatim*; the Defendant demurred to the Declaration, for that he received it as a Servant to the Uſe of his Maſter, and therefore the Action ought to have been brought againſt him; but adjudged, that tho' the firſt Part of the Bill mentions the Receipt for the Uſe of the Maſter, yet the Clauſe of Payment doth

not reſtrain it to the Maſter, but 'tis generally *to be paid*, which binds him who ſeals it. *Mich.* 6 *Jac. Yelv.* 137. *Talbot* verſus *Godbolt.*

14. The Debtor ſigned a Bill to his Creditor, for the Payment of 20 *l.* on four ſeveral Days, *viz.* 5 *l.* on each of the ſaid Days, and at the End of the Bill he *covenanted and granted* with the Creditor, and his Executors, that if he failed in any of the ſaid Payments, he would pay the Reſidue which ſhould then be unpaid, *&c.* he did not pay the firſt 5 *l.* and before the ſecond became due, the Plaintiff brought an Action of Debt for the whole 20 *l.* and it was objected, that an Action of Debt would not lie, but Covenant; but adjudged, that Debt would lie, for if a Man *Covenants* to pay Money on ſuch a Day, Debt will lie, *a fortiori*, where he not only *Covenants*, but *grants*, as in his Caſe, to pay it. *Mich.* 33. *Eliz.* 1 *Leon.* 208. *Mich.* 11 *Jac. Godb.* 217. *Chawner* verſus *Bowes. S. P.*

Moor 351. Cro. Eliz. 556.

15. An Action of Debt was brought againſt the *Leſſee* for Rent due *after the Aſſignment of the Leaſe*; and adjudged, that it did lie; and here the Court diſtinguiſhed between Privities, (*viz.*) that there were Privies in Reſpect of *Eſtate* only; as between the Grantee of a Reverſion, and the Leſſee, and between the Leſſor and the Aſſignee of the Leſſee; that there were alſo Privies in Reſpect of the Contract only, as between the Leſſor and Leſſee, which is Perſonal, and always remained between them, tho' the Privity of the Eſtate was removed by the Act of the Leſſee himſelf, (*viz.*) by his Aſſignment of the Leaſe, and by Reaſon of that Privity of Contract Debt will lie againſt him, after the Aſſignment for Rent arrear. 3 *Rep.* 22. *Walker's* Caſe. *See* (B) *pl.* 4. *In Cro. Eliz.* 715. *Walker's* Caſe was denied to be Law, in *Sid.* 266. it was agreed to be Law; *in Latch.* 260. it is ſaid, that it never was adjudged.

16. Leſſee for five Years, rendring Rent *yearly* at *Michaelmas*, or within ten Days afterwards *within the Term*; the five Years expired, and then the Leſſor brought an Action of Debt for two Years Rent, due at *Michaelmas*, which was the laſt Day of the Leaſe; and upon *Nil debet* pleaded, the Plaintiff had a Verdict; but it was moved in Arreſt of Judgment, that he had no Remedy for this Rent; becauſe after the laſt Day of the Leaſe was expired, it could not be a Rent within the Word *Yearly*; and it being to be paid *within ten Days after Michaelmas*, *within the Term*, it could be no Rent by Vertue of the *Reſervation*; and if ſo, an Action of Debt would not lie; but adjudged, that this Action did lie, for tho' the Leaſe was ended, yet the Duty, in Reſpect of the Rent, ſtill remained, by Reaſon of that Privity of Contract between the Leſſor and Leſſee. 2 *Cro.* 227, 233. *Barwick* verſus *Foſter.* 1 *Bulſt.* 1. *S. C. Yelv.* 167. *S. C.*

17. Leaſe of *Lands in Middleſex*; the Leſſee aſſigned the Term, then the Leſſor died, and his Adminiſtrator brought an Action of Debt *in London* againſt the Aſſignee for the Rent arrear; adjudged, that an Action of Debt upon the Privity of Contract, may be brought any where; but where 'tis brought upon the Privity in Law, it muſt be laid in the County where the Lands are. *Paſch.* 2 *Car. Latch* 197. *Smith* verſus *Wyatt, and Mich.* 2. *Car. Latch* 271. *Baily* verſus *Bag. S. P. Poſtea* Trial. (F) 6. *S. P.*

18. Leaſe to commence *on a Day to come*, rendring Rent, and in an Action of Debt brought for the Rent, the Plaintiff ſet forth the Leaſe, *Virtute cujus* the Defendant entered; it was objected, that this Declaration was not good, becauſe the Plaintiff did not ſhew when the Defendant entered; for the Leaſe being made to commence hereafter, it ſhall be ſtrongly *intended* againſt him, that he entered before the Leaſe began; but adjudged, that could never be *intended*, becauſe it is ſet forth *virtute cujus* he entered, and he cannot enter by Vertue of the Leaſe till after it commenceth; beſides, this Action of Debt differs from an Ejectment, as to this Matter; becauſe an Ejectment cannot be maintained, but upon the Poſſeſſion of the Leſſee, but an Action of Debt will lie againſt him upon the Privity of Contract. *Paſch.* 2 *Car. Latch* 196. *Green* verſus *Moody.*

2 Roll. Rep. 440.

19. *Debt, &c.* in which the Plaintiff declared, that *W. R.* delivered 100 *l.* to the Defendant, *to be paid* to the Plaintiff; it was objected, that this Action did not lie, becauſe there was no Manner of Contract between the Plaintiff and Defendant; it was agreed, if Money is delivered to one to *deliver* to *T. B.* or to his Uſe, there *T. B.* ſhall not have an Action of Debt, but Account; but when 'tis delivered to one *to pay* to another, there it ſhall be intended in Satisfaction of a Debt; and in ſuch Caſe either an Action of Debt or Account will lie. *Trin.* 22 *Jac.* 2 *Cro.* 689 *Harris* verſus *Bevoire.*

20. Caſe, *&c.* upon a Promiſe to pay ſuch a Sum of Money in Conſideration, that the Plaintiff had licenſed and permitted the Defendant *quietly to enjoy ſuch* Lands: After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this amounted to a Leaſe, and therefore an Action of Debt ought to have been brought, and not an Action on the Caſe, without an *expreſs Promiſe*; 'tis true, upon ſuch a Promiſe to pay *Rent*, an Action on the Caſe will lie, becauſe the Promiſe might be the Ground of the Leaſe; but this being after a Verdict, it ſhall be intended that there was an *expreſs Promiſe*; ſo the Plaintiff had Judgment. *Hardr.* 366. *Trevor* verſus *Roberts.*

21. Grantee of a Rent-Charge in Fee; the Rent was arrear, the Grantee levied a Fine to the Uſe of himſelf and his Wife in Tail, and afterwards diſtrained for the Rent arrear, before the Fine levied, all which was pleaded in Bar to the Avowry for this Rent; and upon Demurrer it was inſiſted, that the Diſtreſs was not well taken, becauſe the Fine levied had made an Alteration of the Eſtate; and the Conuſor having created a new Eſtate to himſelf, by his own Act, had diſpenſed and releaſed the Rent arrear, whilſt he had the old Eſtate: *Sed per Curiam*, the the Diſtreſs is well taken, which was never yet denied ſince the Statute of Uſes; and it would be very inconvenient, if it ſhould be otherwiſe, becauſe Fines are now levied upon moſt Marriage

Settlements; tis true, at Common Law Privity is neceſſary to maintain a Diſtreſs upon an Avowry, which could not be without an Attornment of the Tenant; but in this Caſe an Attornment is not neceſſary, and ſo no Privity deſtroyed; as it was in *Ognell's* Caſe. As to the new Eſtates created by this Fine, they are only fictitious, for the Poſſeſſion is the ſame as before the Fine levied, and the new Eſtates come to the old Poſſeſſion, without any Attornment; becauſe the Cogniſor was always ſeiſed, and the Cogniſee at no Time; for there was no Tranſmutation of the Poſſeſſion by this Fine, but for the Benefit of the Cogniſor. *T. Jon.* 2. *Witherhead* v. *Harriſon.* *See* Lawſon *v.* Cook. (B) 10.

22. In Debt for Rent, the Caſe was, Leſſee for Years aſſigned a Moiety of the Land *for the whole Term of Years*, and the Leſſor brought an Action of Debt againſt the Aſſignee for a Moiety of the Rent, and had a Verdict; it was objected in Arreſt of Judgment, that the Privity of Eſtate, and of Contract likewiſe, was intirely in the Leſſee, and by Conſequence the Aſſignee not chargeable with a Moiety of the Rent; but adjudged, that the Aſſignee having the *whole Eſtate* in the Moiety, he hath a ſufficient Privity of Eſtate chargeable to the Leſſor for a Moiety of the Rent. 2 *Lev.* 231. *Gammon* verſus *Vernon.* *See pl.* 3.

23. In Debt for 5 *l.* upon a Bill Penal ſigned by the Defendant, wherein he promiſed *and agreed* to pay to the Plaintiff yearly 5 *l. for five Years*, by half yearly Payments, for the Maintenance of his (the Defendant's) Daughter *Elizabeth Freeman*, and that he had maintained her for one Year, ending the 23*d* of June, *&c.* The Defendant pleads, that five Years are not expired; and upon Demurrer to this Plea it was adjudged ill, for tho it was objected, that the Action would not lie till the * five Years were paſt; yet conſtant Experience is, that where a Covenant is to pay a certain Sum, the Party may have an Action of Debt or Covenant for the Money; and the Principal Caſe is not like a Bill for a Debt, but 'tis a Covenant to pay at ſeveral Days, for which Covenant will lie upon a Breach at any of the Days; as on a Promiſe to pay at ſeveral Days, an Action will lie for Non-payment at each Day; ſo is *Cro. Car.* 254. *Peck* verſus *Ambler*; the Plaintiff had Judgment. 3 *Lev.* 383. *March* verſus *Freeman.* *Hardr.* 178. *Nowell's* Caſe, *Covenant lies, but not Debt.* * *See* pl. 2, 19. *and* (B) pl. 8.

24. In an Action of Debt on a Bond for 34 *l.* the Defendant pleaded in Bar an Acquittance under the Hand and Seal of the Plaintiff for 5 *l.* 6 *s.* and 3 *d.* Part of the Debt, and a frivolous Plea, as to the reſt, and upon Demurrer it was argued for the Defendant, that this Acquittance for Part was a Bar to the Whole; but the Court inclined, that it was not, but only a Bar for ſo much as was received, and that the Plaintiff muſt bring the Action for the Whole. 2 *Vent.* 135. *Colley* verſus *Heliar.* *See Speke* verſus *Richards.*

25. Debt upon Bond conditioned for Performance of Marriage Articles, between the Defendant and one *Rebecca Morſe*, a Widow, who had ſeven Sons, in which the Defendant covenanted with the Plaintiff, and with her and them, naming them all, reciting, that *Robert Morſe*, the Father of *Joſeph*, and ſo naming all the *other ſix*, had by his Will bequeathed to each of them, the aforeſaid *Joſeph* (and here *Nathaniel*, one of the other ſix, was not named) the Sum of 50 *l.* that he (the Defendant) would pay to the aforeſaid *Joſeph*, and the other ſix, naming them, *ſeparales legationes, &c.* and pleads, that he had paid to *Joſeph*, and five more, naming them, the ſeveral Sums of 50 *l.* and upon Demurrer to this Plea, becauſe he did not ſhew, that 50 *l.* was paid to *Nathaniel*, when he had expreſly covenanted to pay it to him and the other ſix; it was adjudged, that the Plea was good, becauſe in the reciting the Will, there is nothing mentioned to be deviſed to *Nathaniel*, and he having covenanted to pay *legationes prædict'*, is obliged only to pay thoſe Legacies which appear to be deviſed, and no more. 2 *Vent.* 140. *George* verſus *Butcher.*

26. Debt upon a Charter-Party, brought by the Maſter of a Ship againſt the Merchant, wherein there was mutual Agreements between them, and the Plaintiff declared, that in Conſideration of the Agreements on his Part to be performed, he bound himſelf to the Merchant (the Defendant) in the Penalty of 150 *l.* and to the Performance of the Agreement on the Part of the Merchant, *obligaſſet ſe dicto magiſtro*, in the like Penalty of 150 *l. &c.* the Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; it was objected, that the Declaration was ill, becauſe the Plaintiff did not expreſly alledge, that the Defendant was bound; for where he ſets forth the Agreement on the Part of the Merchant (the Defendant) he ſays *obligaſſet ſe*, it ſhould have been *ipſe prædict' Mercator obligaſſet ſe*; and of that Opinion were three Judges, but *Juſtice Ventris contra*; becauſe no other than the Merchant can be intended to be bound, for 'tis *obligaſſet ſe Magiſtro.* 2 *Vent.* 196. *Haſelwood* verſus *Mansfield.*

27. Debt upon a Bill Penal, by which the Defendant was obliged to pay 10 *s. on the* 11*th of June*, and 10 *s. more on the* 10*th of July* following, and ſo 10 *s. every three Weeks*, till a certain Sum was paid, under the Penalty of 7 *l.* and the Plaintiff ſet forth, that the Defendant *did not pay the ſaid Sum, or any Part* thereof, *unde actio accrevit*, for the 7 *l.* the Defendant pleaded, that he had paid 10 *s.* on the 11th Day of *June*, *& hoc paratus eſt verificare*; the Plaintiff replied, that he did not, and concluded to the Country; and upon a Demurrer the Plea was held ill, and ſo was the Declaration; for the Plaintiff ſhould have ſet forth a Failure in Payment of one of the Sums, which had been ſufficient to entitle him to the Penalty; but by alledging, that he did not pay the *ſaid Sum, or any Part* thereof, this is double; which is very true, but 'tis cured by the Defendant's pleading over, and he cannot except againſt this Doubleneſs upon a general Demurrer. 2 *Vent.* 198, 222. *Humfries* verſus *Bettily.* 1 *Roll. Rep.* 112, *Sanders* verſus *Crowley. S. P.*

28. In Debt for Rent, the Plaintiff declared, that *Francis Fenn* and *John Tregonwell* did demiſe to the Defendant certain Lands for 21 Years, rendring 20 *l. per Ann.* to *Frances* during her Life,

Life, and after her Deceaſe to *John*, his Executors and Adminiſtrators, *&c.* that *Frances* died, and that *John* being *poſſeſſed of the Reverſion of the Premiſſes for the Term of Years then and yet to come, made his Will*, and the Plaintiff Executrix, and ſo ſhe became poſſeſſed of the Reverſion, *&c.* The Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; but Judgment was given againſt her upon the Inſufficiency of her Declaration; for ſhe did not ſet forth, that *John* at the Time of the Leaſe made to *Frances and John*, was poſſeſſed of the Lands *pro tempore Annorum adtunc & adhuc ventur'*, but only, that he was *poſſeſſed of the Reverſion*, and that might be by creating ſuch an Eſtate ſince, and the Rent might not belong to the *Reverſion*. 2 *Vent.* 262. *Tregonwell Vid.* verſus *Sherwin*.

1 Lev. 194. 29. Debt upon a Counter-Bond, dated 18 *Martii*, conditioned, that whereas the Plaintiff, at the Requeſt of the Defendant, ſtood bound to *T. Cook* for the Payment of 103 *l.* 10 *s.* *upon the firſt Day of May* next, if therefore the Defendant ſhould ſave the Plaintiff harmleſs, then, *&c.* the Defendant pleaded, that he had ſaved the Plaintiff harmleſs; the Plaintiff replied, that before the Date of the ſaid Bond, (*viz.*) *on the firſt Day of October*, the Plaintiff, at the Requeſt of the Defendant, became bound to the ſaid *T. Cook* in 200 *l. conditioned to pay* 103 *l.* 10 *s.* *at a certain Day then paſt*, which Bond the ſaid *Cook* put in Suit *pro eo quod* the Money was not paid at the Day, and ſo the Defendant had not ſaved the Plaintiff harmleſs; the Defendant rejoined, that he had no Notice that the Plaintiff was damnified, and that if he had, then he would have ſaved the Plaintiff harmleſs; and upon a Demurrer to this Rejoinder, it was argued, that it was a *Departure* from the Plea; for in the one the Defendant pleaded, that he had ſaved the Plaintiff harmleſs, and in the other he pleaded, he would have ſaved him harmleſs, if he had Notice that he (the Plaintiff) was damnified, which implies, that he did not ſave him harmleſs; and all the Court was of that Opinion; then an Exception was taken on the Part of the Defendant to the Form of the Replication; for that it was *pro eo quod* that the Money was not paid, which is not a poſitive Allegation of the Non-payment; as where in a *Quare Impedit*, the Biſhop pleaded, *pro eo quod* the Plaintiff's Clerk did not produce his Letters miſſive, he refuſed to admit him; this was adjudged ill, and that was the Caſe of *Pelmes* verſus *Biſhop of Peterborough*; ſo where in Treſpaſs the Defendant pleaded *Quia* the Plaintiff ſtopped the Way with Gates, he (the Defendant) broke them down; this was held ill for the ſame Reaſon, and that was *Cro. Eliz.* 441. *the Caſe of Gooday* verſus *Michaell. Dyer* 257. *S. P.* but Judgment was given * againſt the Plaintiff upon the Matter in Law, which was thus: That he had aſſigned no Breach of this Condition, which was, that he ſtood bound to *Cook* for the Payment of 103 *l.* 10 *s.* *on the firſt Day of May*, and in the Replication, he alledged, that he ſtood bound to *Cook in* 200 *l.* conditioned for the Payment of 103 *l.* 10 *s.* *on a certain Day then paſt*, and this was by Bond *on the firſt Day of October*, which was ſix Months after the Date of the Bond on which the Plaintiff had declared; ſo that the Bond in the Declaration varied from the Bond in the Replication, in the Day of Making; for one was made on the 8th of *March*, and the other on the firſt Day of *October*, ſix Months after; and they vary likewiſe in the Sum, for in the one, the Plaintiff ſtood bound to *Cook* for the Payment of 103 *l.* 10 *s.* and in the other, is bound in the Penalty of 200 *l.* for the Payment of 103 *l.* 10 *s.* they vary likewiſe in the Day of Payment; for the one is to pay the Money on the firſt Day of *May*, and the other was to be paid *quendam diem jam præteritum*, and 'twas not averred, that the Bond mentioned in the Replication was entered into for the proper Debt of the Defendant; and if ſo, then, tho' the Condition of the Bond is to ſave the Plaintiff harmleſs from all Actions of *Cook*, it will be unreaſonable to conſtrue it, to extend to ſuch Actions as *Cook* may have againſt the Plaintiff upon a Bond which he gave to him afterwards for his own Debt, but only to ſuch Actions which he might have for any Cauſe ariſing before the Date of the Bond on which he had declared. 1 *Saund.* 116. *Cutler* verſus *Southerne*.

* *And for the Plaintiff* per Levinz.

30. Debt upon Bond, the Defendant pleaded, that *after the Bond made*, (viz.) on the ſame Day on which it was dated, the Plaintiff made a *Defeaſance*, by which he promiſed, that if before ſuch a Day he did not produce Witneſſes to prove, that the Money mentioned in the Condition was a true Debt, and that the Defendant before the making the Bond, had promiſed to pay it, then the Bond ſhould be void, and averred, that the Plaintiff did not produce any Witneſſes, *&c.* and upon Demurrer to this Plea, Judgment was given for the Plaintiff, becauſe the Defendant had pleaded a *Defeaſance made after the making the Bond*, and ſuch a Defeaſance cannot make the Bond void; for it ought to be made at the ſame Time, or *eodem inſtante* the Bond was made; but *Saunders* tells us, the Law is clear to the contrary, (*viz.*) that a Bond, or a Judgment, or a Statute, may be ſet aſide by a *Defeaſance* made afterwards, for thoſe are Things executory; 'tis true, where a Thing is veſted or executed, the Condition muſt be contained in the ſame Deed, or in another ſealed at the ſame Time, otherwiſe 'tis void; ſo 'tis in a Feoffment, for there the Eſtate in the Land is executed in the Feoffee; But Bonds, Judgments, are executory in their Nature, and therefore they may be diſcharged by a *Defeaſance*, which is a conditional Releaſe. 2 *Saund.* 47. *Fowell* verſus *Forreſt*.

31. Debt by the Plaintiff *Otway* againſt *Holdip*, the Executor of one *Dowſe*, upon a Bill Penal entered into by the ſaid *Dowſe*, by which he acknowledged himſelf to be indebted to the Plaintiff in 68 *l.* which he obliged himſelf to pay *as ſoon as ſeveral Bills of Coſts, which the ſaid Dowſe had expended in the Proſecution of ſeveral Suits at Law for R. R. and M. R. ſhould be ſettled by two Attornies, indifferently to be choſen between the Plaintiff and him*, the Plaintiff allowing *to the ſaid Dowſe a third Part of the ſaid Bills ſo ſettled*; and the Plaintiff *Proteſtando*, that he was always ready to perform every Thing on his Part, and *Proteſtando* that there was not any Thing due

to *Dowſe* the Teſtator, for Coſts by him expended in Proſecution of any Suits for *R. R.* or *M. R.* he pleads, that neither the ſaid *Dowſe* in his Life-time, nor the Defendant ſince his Death, *had produced any Bills of Coſts* expended in the Proſecution of the ſaid Suits, *&c.* to be ſettled according to the Tenor of the ſaid Bill, *per quod actio accrevit* to the Plaintiff, to have the ſaid 68 *l. &c.* The Plaintiff had Judgment by Default in the Common Pleas, and now a Writ of Error was brought in *B. R.* and the Error aſſigned was in the Declaration, for that the Plaintiff had not ſufficiently entituled himſelf to an Action for the Money upon this Bill; becauſe it was not to be paid to him *till the Bills of Coſts were ſettled by two Attornies indifferently to be choſen by the Plaintiff Otway, and the Teſtator Dowſe*; 'tis true, *Otway* avers, that *Dowſe* produced no Bills; but that is not to the Purpoſe, for he was not bound to produce any, but only to the two Attornies to be choſen to examine and ſettle them; therefore he ought to have averred, that two Attornies were choſen, or that he choſe one, and deſired *Dowſe* to chuſe another, which he refuſed, and that *Dowſe* did not produce any Bills of Coſts to them; that it appeared to the Court, that the Default was in *Dowſe*, but by this Record it doth not appear, but that the Money is ſtill payable, becauſe 'tis to be paid upon the ſettling of the Bills of Coſts by two Attornies; and therefore 'tis not due to the Plaintiff, according to the Tenour of the Bill, as he had declared; and for this Cauſe the Judgment was reverſed. 2 *Saund.* 106. *Holdip, Executor of Dowſe*, verſus *Otway.*

32. Debt upon Bond dated 1 *May* 19 *Car.* 2. conditioned, that whereas the Lord *Arlington*, by a Writing under his Hand and Seal bearing Date 30 *April'* 1667. had appointed *Tho. Jenkyn* to be Deputy Poſt-maſter of the Stage of *Oxford*, to execute that Office from the 24*th of* June *next, for the Term of ſix Months following:* Now, if he the ſaid *Tho. Jenkin, &c.* do and ſhall, *for all the Time he ſhall continue Deputy Poſt-maſter of the ſaid Stage*, well and truly perform all the Duties belonging to the ſaid Office, and the Rules and Orders ſpecified in a Schedule to the ſaid Bond annexed, one of which was, at the End of every Month to pay all ſuch Money which he had received out of the Profits of the ſaid Deputation, into the Poſt-Office in *London, &c.* then the Bond to be void; the Defendant pleaded Performance generally; the Plaintiff replied, that on the *laſt Day of* Septem- 22 *Car.* 2. to which Time the ſaid *Tho. Jenkyn* continued Poſt-maſter, he had received for Letters and Pacquets, *&c.* 184 *l.* 2 *s.* which he did not then, and hitherto hath not paid, *&c.* and upon Demurrer, it was objected, that this Replication was ill, becauſe the Plaintiff had ſet forth, that *Tho. Jenkyn* had received ſo much Money on the 30*th Day of* September 22 *Car.* 2. which is more than *two Years* after the Expiration of the *ſix Months*, in which he was appointed to be Deputy Poſtmaſter, by the Condition of this Bond, by which it ſeemed plain, that the Defendant intended to ſtand bound no longer than for thoſe ſix Months; 'tis true, the ſubſequent Words are indefinite, (*viz.*) *during all the Time he ſhall continue* Deputy Poſt-maſter; but yet this ought to be conſtrued only as relating to the ſix Months mentioned in the Condition, and the rather, becauſe *Jenkyn* could no longer continue in the Office without a new Deputation; and if it ſhould be conſtrued otherwiſe, then, inſtead of being bound for ſix Months, the Defendant would ſtand bound during the Life of *Jenkyn*; therefore the Breach ought to be aſſigned, for not paying the Money received within the ſaid *ſix Months*; and ſo it was adjudged. 2 *Saund* 413. *Lord Arlington* verſus *Merrick.*

33. Debt upon Bond, the Defendant pleads, *Non eſt factum*, and afterwards *relicta verificatione cognovit actionem*; and Judgment was entered for the Plaintiff, and the Defendant *in miſericordia*; and upon a Writ of Error brought, that was aſſigned for Error, for it ſhould be *capiatur*; there was no Judgment given, for the Books are both Ways. *Raym.* 195. *Mortlock* verſus *Charleton. See Beecher's* Caſe. *See* 2 *Cro.* 64. *Daridge* verſus *Clerke. See Mod. Rep.* 73. *See* 2 *Roll. Rep.* 45. *Gerrard* verſus *Warren. See Dyer* 67. *pl.* 19. *See Raym.* 202. *Powell* verſus *Row*; no Judgment in this laſt Caſe, tho' the Point was the ſame.

34. Debt upon Bond of 600 *l.* conditioned, that *whereas a Marriage was already had between the abovenamed* William Lee *and* Mary *the Daughter of the above-bounden* Francis Ambler: *If therefore the Heirs*, &c. *of the ſaid* Francis *ſhall pay unto the ſaid* Wm. Lee, *or his Aſſigns, the Sum of* 300 l. *within two Months next after the Death of the ſaid* Francis, *if at her Death the ſaid* Mary, *or any Iſſue of her Body by* Wm. Lee, *ſhall be then Living*, then, *&c.* The Defendant pleaded, that 1 *Junii* 29 *Car.* 2. the ſaid *Wm. Lee* died Inteſtate, living the ſaid *Frances* and that ſhe died 15 *Feb.* 31 *Car.* 2. but that *Mary* the Wife of *Wm. Lee* died before her; that at the Death of the ſaid *Frances*, or at any Time *within two* Months after there was no Executor or Adminiſtrator of the ſaid *Wm. Lee*, or any Perſon in his Behalf appointed to receive the ſaid 300 *l.* nor to whom to pay the Money, *&c.* and that Adminiſtration of his Goods was not granted within one Year after the Death of *Frances, &c.* and upon Demurrer to this Plea, the Plaintiff had Judgment, becauſe the Money being a Duty veſted in the Obligee, the Defendant ought to have pleaded, that he was ready to pay the Money, and ſtill is ready. *Raym.* 416. *Lee Adminiſtratrix* verſus *Garret Executor.*

35. Debt upon Bond brought againſt *John Dover*, who craved *Oyer* of the Condition, which was, *That whereas a Marriage was had between the Plaintiff, and* Anne *the Daughter of the ſaid* John Dover, *who promiſed to pay* 600 l. *as her Marriage Portion, and had paid* 200 *l. of it to the Husband: Now if he paid yearly and every Year*, to the Husband on *St. John Baptiſt's Day, and* St. Thomas's *Day, the Intereſt of the other* 300 l. viz. 18 l. *by equal Portions*, then *he ſhall retain the ſaid Principal Sum of* 300 *l. for the Uſe of the Wife, till the Husband ſhall make her an equivalent Jointure, &c.* then he pleads, that he paid the Husband 9 *l. on* St. John Baptiſt's *Day, next after the Date of the Bond, and* 9 l. *more on* St. Thomas's *Day following*, according to the Form of the Condition, and that the Husband, (the Plaintiff) had not yet ſettled a Jointure, *&c.* and upon Demurrer to this Plea, it was objected, that it was ill, becauſe the Defendant did not ſet forth, that he had paid

paid the Intereſt of 300 *l.* *after the firſt Year*; for upon the whole Condition of this Bond, it appears, that 500 *l.* was to be paid as a Portion with the Wife, and that the Defendant ſhould pay Intereſt for 300 *l.* *yearly and every Year*, which muſt neceſſarily be beyond one Year; beſides, the Defendant was to retain this 300 *l.* *Principal Money* till a Settlement was made, which Words, *Principal Money*, implied, that he muſt pay Intereſt, for Principal and Intereſt are relatives; Judgment for the Plaintiff. *Raym.* 420. *Leeſon* verſus *Dover*.

36. Debt upon Bond given to *T. P.* conditioned to pay Money to *R. W.* for his own Uſe; the Defendant pleaded, that he tendered the Money to *R. W.* and this was adjudged a good Plea, becauſe *R. W.* was in a Manner Privy to the Bond; and ſo is 1 *Inſt.* 209. a. *Cro. Eliz.* 754. *Huith* verſus *Philips*. See *Roskelley* verſus *Godolphin*.

37. *Indebitatus Aſſumpſit* for 200 *l.* the Jury find, that the King granted the Office of Comptroller of the Cuſtoms in *Exceſter* to Two *durante beneplacito*, that one of them died, and then the King granted the ſaid Office to the Plaintiff, but that the Defendant, by Pretence of Survivorſhip, had received the Profits for ſeven Years, *&c.* it was objected, that a general *Indebitatus Aſſumpſit* would not lie for Want of Privity, and for that there was no Contract, and in all Actions of Debt there muſt be a Contract, or *quaſi ex contractu*, but here the Defendant received the Profits againſt the Will of the Plaintiff, ſo that it was far from a Contract, but it was really a Tort, and the Plaintiff might have brought an Aſſize, *&c.* or an Action on the Caſe for diſturbing him in the Office: *Sed per Curiam*, * an *Indebitatus Aſſumpſit* will lie, for where one receives my Rent or Money againſt my Will, I may charge him as Bailiff or Receiver, and tho' 'tis a Tort, yet an *Indebitatus* will lie, becauſe by the Receipt of the Money the Law creates a Promiſe, and the Action is not grounded on the Tort, but on the Receipt. 2 *Mod.* 260. *Arris* verſus *Stukely*.

*T. Jones 127. Howard *v.* Wood. S. P.

38. In Debt upon Bond, the Defendant demanded *Oyer* of the Condition, which was to perform *Covenants in an Indenture*; but the Plaintiff in ſetting it forth omitted an *Indorſement* on the Backſide of it, which was made before the Deed was executed; then the Defendant, after *Oyer*, pleaded Performance; the Plaintiff replied and ſet forth the *Indorſement*, and the Defendant demurred and prayed Judgment, becauſe of the *Variance*; adjudged, that ſince the Defendant was a Party to the Deed, he ought to have ſet it forth himſelf by his Counterpart, and then to plead; and if he have none, then upon Oath made, the Court will order the Plaintiff to give one, and then the likewiſe the Defendant plead Performance of all; now, ſince in this Caſe the Plaintiff was not obliged to give *Oyer* of the Deed, he ſhall be at no Peril in ſetting it forth, nor is he concluded to ſay, that there is more contained in the Indenture. 2 *Salk.* 498. *Cook* verſus *Remmington*.

Mod. Caſes 297.

39. In Debt againſt the Hundred of *I.* upon the Statute of Hue and Cry, the Defendant pleaded, that *the Robbers were taken*, the Plaintiff replied, that they *were not taken*; and upon a Demurrer, a *Reſpondeas Ouſter* was awarded, and now it being in the ſame Term, the Defendant craved *Oyer* of the Writ, and that being ſet forth, he pleaded the general Iſſue; adjudged, that the Defendant could not have *Oyer* of the Writ, becauſe 'tis never granted to plead *in Bar* to the Writ, but only to plead *in Abatement*, and that the Defendant had already done by Pleading *in Abatement*, that the *Robbers were taken*. 2 *Salk.* 498. *Longavall* verſus *Hundred of Iſleworth*.

Mod. Caſes 27.

40. Adjudged, that where a Man is obliged to make a Leaſe or Bond, *&c.* if he is ſued for not doing it, he muſt ſet it forth *in hæc verba*, that the Court may judge whether 'tis a good Deed, or not; but if he is only bound to produce or ſhew a Deed already made, there 'tis ſufficient to ſay, that he did produce it. 2 *Salk.* 498. *Armitt* verſus *Bream*.

41. *In Debt*, the Plaintiff declared on a Deed, by which the Defendant covenanted to pay to the Plaintiff 35 *l.* *per* Hundred for every hundred Load of Wood in ſuch a Place, and that he delivered ſo many Hundred, *and one half Hundred*, which came to 182 *l.* 10 *s.* and upon Demurrer to this Declaration it was adjudged, that the Demand for *the half Hundred is for more than can be due* upon this Contract, but yet a *Remittitur* may be entered, and Judgment may be taken upon this Demurrer for no more than he ought to recover; 'tis true, where the Sum demanded depends on the Deed, and on nothing elſe *extrinſical*, as in Caſe of Debt or Covenant, *to pay* 20 *l.* *or any Sum certain*, if the Plaintiff demand more, there can be no *Remittitur*, becauſe the Variance is inconſiſtent with the Deed, upon which the Duty demanded entirely depends; but 'tis otherwiſe where the *Demand is more or leſs by Matter extrinſick*, as in this Caſe, for there, if more is demanded than is due, the Variance is not inconſiſtent with the Deed, and the Plaintiff at the Trial ſhall recover no more than what he proves to be due, and may enter a *Remittitur* as to the reſt. 2 *Salk.* 658. *Incledon* verſus *Cripps*.

Dyer 65. Yelv. 66. Hob. 178.

42. Debt upon Bond, in which the Plaintiff declared, that on ſuch a Day the Defendant became indebted to him (the Plaintiff) *per ſcriptum ſuum obligatorium*, omitting the *Date* of the Bond, or ſaying that it was ſealed or delivered, and adjudged well enough; but if it had been *de placito quod reddat ei* ſo much Monies, omitting *quas ei debet & injuſte detinet*, it had been ill. *Mod. Caſes* 306. *Woodcock* verſus *Morgan*.

(B)

Where it will not lie.

1 Brownl. 56.

1. LEſſee for Years, rendring Rent at the four moſt uſual Feaſts in the Year; the Leſſor afterwards conveyed the Reverſion to the Plaintiff, and before any Rent became due, the Leſſee

ſee aſſigned the whole Term to *W. R.* who entered, and the Plaintiff brought an Action of Debt againſt him for Rent due after the Aſſignment; adjudged, that the Action would not lie, 'tis true, the Leſſor himſelf might bring the Action, tho' the Leſſee had aſſigned the Term to another, and this is by Reaſon of the Privity of Contract, to which both of them were Parties, but the Grantee of the Reverſion ſhall not have that Privilege, becauſe he is a Stranger to the Contract, and therefore there being only a Privity of Eſtate between him and *W. R.* who had the Lands when the Rent became due, the Action will lie againſt him, but not againſt the Leſſee. *Mich. 36 Eliz. Poph.* 55. *Humble* verſus *Glover. Cro. Eliz.* 328. *S. C. Moor* 351. *S. P. See* Aſſigns: (E) *per totum.*

2. The Father covenanted with *W. R.* to put his Son Apprentice with *M. M.* or otherwiſe, or elſe his Executors ſhould pay to *W. R.* 20 *l.* he did not put his Son Apprentice, *&c.* but died, and in an *Action of Debt* brought againſt his Executor for the 20 *l.* it was adjudged that it did not lie, for it cannot be a Debt in the Executor where it was none in the Teſtator; beſides, the firſt Part of the Agreement is in Nature of a Covenant, and the ſecond Part muſt be of the ſame Nature. *Paſch. 33 Eliz. Cro. Eliz.* 232. *Perrott* verſus *Auſtin.*

3. Leſſee for Years aſſigned all his Intereſt and died, ſo where the Executor of a Leſſee for Years aſſigns all his Intereſt, in both theſe Caſes an Action of Debt will not lie for Rent due after the Aſſignment; becauſe by the Death of the Tenant for Years, the perſonal Privity of Contract between him and the Leſſor is gone, and then it remains a real Contract, and runs with the Land out of which the Rent iſſueth, and the Perſon is not Debtor, but in reſpect of the Land. *Cro. Eliz.* 555. *Overton* verſus *Syddall.*

Popli. 120. Gouldsb. 120. 3 Rep. 24; *cited.* Sid. 226, *cited.* 1 Lev. 127. *cited.*

4. Leſſee for Years, rendring Rent, died, and his Adminiſtrator aſſigned the Reſidue of the Term before any Rent became due, of which the Leſſor had Notice, and *accepted the Rent of the Aſſignee due after the Aſſignment*; afterwards more Rent became due, for which the Leſſor brought an Action of Debt againſt the *Adminiſtrator*; adjudged, that it did not lie againſt him for Rent due after the Aſſignment, becauſe the Privity of Contract was determined by the Death of the Leſſee. *Cro. Eliz.* 715. *Marrow* verſus *Turpin.* See *Walker's* Caſe. (A) *pl.* 15.

Moor 600. 2 And. 133. S. C.

5. Leſſee for Years aſſigned his Leaſe to one, and the Leſſor conveyed the Reverſion to another; adjudged, that the *Vendee of the Reverſion* ſhall not have an Action of Debt againſt the Leſſee, becauſe there is no Manner of Privity of Contract between them, but the Leſſor himſelf might have an Action of Debt againſt him for Rent arrear, and due after the Aſſignment. *Cro. Eliz. Ungle* verſus *Glover.*

6. *Leſſee for Life* made a Leaſe for Years, rendring Rent, and afterwards he ſurrendered his *Leaſe for Life* to the Leſſor, *upon a certain Condition* between them, then the Leſſee for Years took a new Leaſe of the Leſſor, and afterwards the *Leſſee for Life performed the Condition*, and put out the Leſſee who had taken this new Leaſe, and brought an Action of Debt againſt him for the Rent reſerved upon the old Leaſe; adjudged, that the Action would not lie, becauſe the Leaſe upon which it was reſerved, was gone, (*viz.*) by his Taking a new Leaſe of the Leſſor, which in Law is a Surrender of the old one. *Cro. Eliz.* 264. *Brewſter* verſus *Parrott.*

7. Error to reverſe a Judgment in Debt, which was brought upon a *Conceſſit ſolvere, &c. pro diverſis pecuniarum ſummis*; adjudged, that an Action of Debt would not lie in that Caſe, becauſe of the Incertainty, probably it might in *London* by the Cuſtom; but an Action on the Caſe may be brought, where the Defendant, in Conſideration of ſeveral Sums of Money paid to him, *conceſſit ſolvere, &c. Trin. 21 Jac. Godbolt* 336. *Owfeild* verſus *Steart. Style* 199. *Hodges* verſus *Jones. S. P.* the Action was againſt an Executor.

8. Where a Man ſells Goods to be paid by 20 *l. per Annum* for five Years, an Action of Debt will not lie till thoſe Years are expired; but where a Leaſe is made for five Years, rendring Rent 20 *l. per Annum*, there the Years are ſeveral, and the Leſſor ſhall have an Action of Debt for the Rent every Year. 4 *Rep.* 82. In *Ford's* Caſe.

9. Leaſe for Years of Lands in *Somerſetſhire*, rendring Rent at a certain Place in *London*, the Leſſor granted the Reverſion to another, who brought an Action of Debt in *London* for Rent due after the Grant; adjudged, that the Privity of Contract being deſtroyed by the Grant of the Reverſion, and the Attornment of the Leſſee, the Rent muſt now follow the Land, and not the Perſon, and that the Grantee of the Reverſion being entituled to it by Reaſon of the Land, he muſt bring the Action in the County where the Lands are. *Cro. Car.* 133. *Bird* verſus *Cudworth.*

10. In ſecond Deliverance, *&c.* the Caſe was, the Grantee of a Rent-charge *in Fee*, diſtrained for Rent arrear, and afterwards granted the Rent in Fee to another; the Queſtion was, whether he ought to *avow or juſtify* the Taking the Cattle, and that depended on another Queſtion, (*viz.*) whether the * Arrears of Rent were not gone by this Grant, tho' the Diſtreſs was taken before the Grant made; it was argued, that the Arrears were gone, for the Grantor cannot have an Action of Debt for them, and he cannot avow, becauſe the Inheritance is gone by the Grant, which was his own Act; one Judge was of Opinion, that the Defendant might avow for this Rent, becauſe the Diſtreſs was lawfully taken, and that this differs from *Andrew Ogneli's* Caſe, becauſe in that Caſe no Diſtreſs was taken by the Executor of the Grantee of the Rent-charge, before the Owner of the Land had made a Feoffment in Fee thereof to another, by which Feoffment the Privity of Contract was gone, and the Diſtreſs follows the Rent; but in this Caſe the Avowant hath a Pledge for the Arrears, which is the Diſtreſs, and the Return of the Cattle, if 'tis found for him; but all the Court agreed, if he could not avow, he might juſtify. *March* 103. *Lawſon* v. *Cook.*

* *See* Antea (A) pl. 21.

11. *T. S.* being in Poſſeſſion of Land, promiſed to make a Leaſe of it to the Plaintiff, and took a Sum of Money of him for a *Fine* for ſuch Leaſe, but before he made any Leaſe he was turned out of Poſſeſſion by another, who had the Title; thereupon he to whom the Promiſe was made, and who had paid the *Fine*, exhibited a Bill in the Court of the Marches in *Wales*, to be relieved againſt *T. S.* who prayed a Prohibition, for that it was not within their Juriſdiction, becauſe the Plaintiff might have an Action of Debt at Common Law for the Money which the ſaid *T. S.* had received for the Fine; but adjudged, that an Action of Debt would not lie, becauſe he did not deliver the Money to *T. S.* that he might redeliver it to the Plaintiff; but upon a Promiſe to make a Leaſe, and he having failed in his Promiſe, an Action on the Caſe lies againſt him, in which he ſhall recover, not only ſo much as he paid for the Fine, but the Damages likewiſe which he ſuſtained upon the Non-performance of the Contract, and this differs from * *Core* and *Woody*'s Caſe, for there was a Privity between the Parties to employ the Money delivered in buying Prunes. *Palm.* 364. *Briggs*'s Caſe.

* Dyer 20.

12. *Indebitatus Aſſumpſit* for Rent arrear, and reſerved on a Leaſe for Years; after a Verdict for the Plaintiff, upon *Non Aſſumpſit* pleaded, it was adjudged, that this Action did not lie for Rent, but an Action of Debt. *Allen* 29. *Munday* verſus *Baily*.

13. Debt, *&c.* in which the Plaintiff declared, that in Conſideration, at the Requeſt of the Defendant, *he had ſold* certain Goods to *W. R.* he the ſaid Defendant did promiſe to pay, *&c.* after a Verdict for the Plaintiff, a Writ of Error was brought, and the Error aſſigned was, that an Action of Debt would not lie in this Caſe, for the Goods being ſold *before the Promiſe made*, the Money due for the ſame, by Conſequence, muſt be a Duty *before the Promiſe*, and therefore an Action of Debt could not be founded upon it, but the Remedy had been by an Action on the Caſe; and this was held a good Cauſe of Error. *Paſch.* 22 *Car. Ward* verſus *Coggin*, *Style* 6.

14. Error of a Judgment in *B. R.* in an Action of Debt on a Bond, conditioned to pay to the Plaintiff and his Wife, or to one of them, 100 *l. per Annum*, by quarterly Payments, for ſeven Years, to commence from *Chriſtmas* next enſuing the Date of the Bond; then the Plaintiff ſet forth, that upon the 25th Day of *September* next, before the Action brought, the Plaintiff and his Wife were living, and that 100 *l. was then due for four quarterly Payments*; there was a Judgment in *B. R.* by Default, but it was reverſed, *&c.* becauſe the Bond being dated 26 *Octob.* 35 *Car.* 2. and the Action being brought in *Michaelmas-Term*, 1 *Jac.* 2. there was *above four Quarters* then due, and the Plaintiff had declared for four Quarters only, and did not ſhew for which. 1 *Lutw.* 456. *Darby* verſus *Piltarſe*.

(C)

Where it ſhall be brought in the Detinet. See *Eſcape.* (H) 4. *Value.* (A) 2.

Moor 666. Yelv. 9. S. C.

1. THE Leſſor made two Leaſes, one for Life, the other for ninety-nine Years, if the Leſſee ſhould ſo long live, which Leaſe was to commence after the Determination of the Eſtate for Life; and if the Leſſee for Years ſhould die within that Term, then, that the Land ſhould *remain to his Executors or Aſſigns, for twenty-one Years* after his Death and the Death of the Leſſee for Life; afterwards the Leſſee for ninety-nine Years made an Under-leaſe for twenty-one Years to *W. R.* rendring Rent, and having ſurvived the Tenant for Life, he died Inteſtate, then his Adminiſtrator brought an Action of Debt for Rent in the *Detinet* only, againſt *W. R.* the Under-leſſee; and adjudged, that the Action was well brought, becauſe he derived a Title from the Inteſtate (*i. e.*) from the Contract which he made with the Under-leſſee. *Cro. Eliz.* 840. *Sparke* v. *Sparke*. *Owen* 125. *Noy* 32. *S. P. Antea* Aſſigns. (D) 1. *S. C. Poſtea* Purchaſe. (B) 2. *S. C.*

2 Cro. 685. S. C. Hob. 264. 2 Roll. Rep. 132. Hutt. 79.

2. 'Tis generally true, that where an *Executor or Adminiſtrator is Plaintiff*, the Action muſt be brought in the *Detinet* only, tho' the Duty doth accrue *in his own Time*; and the Reaſon is, becauſe what he recovers ſhall be Aſſets in his Hands to ſatisfy the Debts of the Teſtator, *&c.* whereas, if he ſhould bring the Action in the *Debet*, that very Word ſuppoſes a Property in himſelf, which he cannot have as Executor, for 'tis only a *Duty* to him, and therefore he ought to demand the Thing as ſuch, and if he demand it in the *Debet* and *Detinet*, 'tis Wrong. 2 *Cro.* 545. *Reynell* verſus *Lancaſtle*. *Hob.* 264, 272. *S. C. Poſtea* Eſcape. (H) 4. *S. C.*

Winch 80.

3. 'Tis true, there are ſome Caſes where the Action hath been brought by Executors in the *Debet* and *Detinet*, and held good, as for Inſtance, an Action of Debt was brought for 300 *l.* wherein the Plaintiff declared, that he by Indenture, *&c. by the Name of* W. R. *Executor of* R. B. did demiſe to the Defendant certain Lands for three Years, rendring Rent, which Lands he had by an * Extent for a Debt recovered by his Teſtator, and for the Rent arrear he brought the Action; the Defendant demurred to the Declaration, for that the Action was brought in the *Debet* and *Detinet* for Rent due upon a Leaſe of Lands which the Plaintiff had *as Executor* to another; but adjudged, that the Action was well brought in the *Debet* and *Detinet*, becauſe it was brought by the Executor upon a Contract made by himſelf; for tho' he is named Executor in the Leaſe, yet the Rent was reſerved upon his Contract, and he ſhall have Debt for it as if he had been ſeiſed in his own Right. *Paſch.* 12 *Jac.* 2 *Cro.* 685. *Holman* verſus *Chute*.

* *Extended in his own Time.* Winch 80.

4. So where the Teſtator was poſſeſſed of Lands for a certain *Term of Years*, rendring Rent to him, and died, and the *Reſidue of the Term* was immediately veſted in his * Executor, who brought an Action of Debt in the *Debet & Detinet* for Rent incurred *in his Time*; and adjudged good, becauſe the Reſidue of the Term being in him, upon the Death of the Teſtator, it was Aſſets in his Hands to the Value of the ſaid Term; but it had been otherwiſe, if the Action had been brought for a *Choſe of Action*, becauſe in ſuch Caſe the Thing in Demand is not Aſſets till recovered by a Judgment in Law, and in the Executors Hands; therefore in that Caſe he muſt bring the Action in the *Detinet* only. *T. Jones* 169. *Trattle* verſus *King*. 2 *Cro.* 411. *S. P.* *Palm.* 117. 2 *Cro.* 549. *Maule* verſus *Moody*, *S. P.* 2 *Roll. Rep.* 132. *S. C.* *Palm.* 116. *S. C.* *See poſtea* (D) *pl.* 6.

* *There is a Difference between Things in Action, and Chattels in Poſſeſſion; in the one Caſe the Term being in the Executor immediately on the Death of the Teſtator, 'tis Aſſets.*

Writ muſt be in the Detinet, ***and it ſhall not be Aſſets till 'tis recovered; but in the other Caſe, the Reverſion of the***

5. So where an Action of Debt is brought againſt an Executor, for Money due *in the Life-Time of the Teſtator*, it muſt be brought in the *Detinet* only, and this is the ſafeſt Way; for where Debt was brought againſt an Executor, for Rent incurred *after the Death of the Teſtator*, reſerved upon a Leaſe made to him by the Leſſor, who was now Plaintiff in the Action, and had a Verdict; but it was moved in Arreſt of Judgment, by *Hale*, that the Action was brought in the *Debet* only, when it ought to be brought in the *Debet* and *Detinet*; becauſe in this Caſe nothing ſhall be Aſſets in the Hands of the Executor, but the *Surplus of the yearly Value of the Land above the Rent reſerved*, and that the Reſt of the Profits were received by him as *Tertenant*, and therefore he ought to be charged as ſuch, not in the *Detinet* only, for that implies, that he is charged upon the Privity of Contract of his Teſtator, and ſo he detains that Surplus from the Leſſor; but *Debet* all the reſt of the Profits, as well as *Detinet* the Surplus: Notwithſtanding this Objection, Judgment was given for the Plaintiff; for tho' it hath often been a Queſtion, whether an Executor might be charged in the *Debet* and *Detinet*? yet, it was never yet doubted but he might be charged in the *Detinet* only; becauſe the Inconveniency of bringing the Action againſt him in the *Detinet*, is only to the Plaintiff himſelf, for by this Means he hath waived all the Advantage of Demanding any Thing out of the Executors own Eſtate, which he might have done, if he had brought the Action in the *Debet* and *Detinet*; but having brought it in *Detinet* only, he can now charge him no farther than the Teſtator's Eſtate will anſwer. *Allen* 42. *Royſtin* verſus *Corderoy*.

6. The Modern Authorities agree the Law to be the ſame in this Caſe; as where the Leſſor made a Leaſe for Years, rendring Rent, and afterwards he died Inteſtate, and his Adminiſtrator brought an Action of Debt for Rent incurred *in the Life-Time of the Inteſtate*; but becauſe he declared in the *Debet & Detinet*, it was held ill. *Sid.* 224, 379. *Fruen* verſus *Porter*; but tho' 'tis a Fault, 'tis cured by a Verdict. 1 Lev. 250.

7. And as this Action muſt be brought *by an Executor in the Detinet only*, ſo when 'tis *brought againſt him* in ſome Caſes, the Plaintiff muſt declare only in the *Detinet*; as where Leſſee for Years made his Executor, and died, and afterwards *the Executor aſſigned the Term* to another, and then an Action of Debt was brought againſt the Executor for Rent, which incurred *after the Aſſignment*, and it was brought in the *Detinet* only, as it ought, becauſe it was founded on the Contract made between the Leſſee himſelf and the Leſſor, which Leſſee was the Teſtator; but if the Action had been brought againſt the *Aſſignee*, and not againſt the Executor, or if he had not aſſigned the Term, then it muſt be brought in the *Debet & Detinet*; but if the Leſſee himſelf, and not his Executor, had aſſigned the Term, in ſuch Caſe the Executor muſt be charged in the *Detinet* only, as long as he hath Aſſets; and ſo is *Walker*'s Caſe. *Sid.* 266. *Hellier* verſus *Casbard*.

8. The Plaintiff, as Executor of one *E. B.* brought an Action againſt *F.* in the *Detinet*, and obtained Judgment for 600 *l.* and the Debtor being in Execution in the King's Bench, eſcaped, whereupon the Plaintiff brought an Action of Debt againſt the Marſhal for this Eſcape, and declared in the *Debet and Detinet*, and had Judgment by *Nil dicit*; but it was reverſed upon a Writ of Error in the Exchequer-Chamber; becauſe the Plaintiff, as Executor, had recovered in the *Detinet* in the firſt Action, and the Action for the Eſcape being grounded on that, Record ought to be brought in the *Detinet* only. 1 *Lutw.* 893. *Glover* verſus *Kendal*. *Cro. Eliz.* 326. *Hitchcocks* verſus *Skinner*, *S. P.* *Savill* 130. *S. C.* *See Carew* verſus *Broughton*. *Lane* 79.

(D)

Where it muſt be brought in the Debet and Detinet. See *Heir.* (F) per Totum.

1. THERE is ſome Difference where an Action of Debt is brought *againſt an Executor*, upon a Bond of his Teſtator, and where 'tis brought againſt him upon his Contract, as for Rent reſerved upon a Leaſe; for in the firſt Caſe, where the Obligee brings the Action, he may declare againſt the Executor in the *Detinet* only; but if the Leſſor brings the Action, there are contrary Opinions in that Caſe, becauſe of the Inconveniencies on both Sides; for if upon

the Death of a Leſſee for Years, who had covenanted to pay Rent, the Executor could not waive the Term, and it ſhould happen, that the Rent is more than the yearly Value of the Lands, and the Teſtator ſhould leave no Aſſets, it would be hard to charge his Executor in the *Debet*, to make him anſwer the Rent out of his own Eſtate; and on the other Side, if he ſhould be charged in the *Detinet* only, then, if the Leſſor ſhould ſue the Executor of the Leſſee for Rent, he might plead *Adminiſtravit*, and pay Debts upon Specialties by and with the Profits of the Land, and ſo defeat the Leſſor of his Rent.

1 Bulſt. 22. S. C. Cro. Eliz. 711. S. C. Moor 566. S. C. Palm. 116. S. C.

2. To remedy which Inconveniency, it was reſolved, firſt in *Hargrave's* Caſe, that the Action ſhould be brought againſt the Executor in the *Debet and Detinet*, and that the Land ſhall never be intended to be of a greater Value than the Rent reſerved; the Caſe was thus, (*viz.*) the Leſſee covenanted to pay Rent, and afterwards died Inteſtate, his Adminiſtrator was ſued in the *Debet* and *Detinet* for Rent, which became due Part of it in the Time of the Inteſtate, and *Part in his own Time*; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment by the Adminiſtrator, that the Action ought to be brought againſt him in the *Detinet* only; becauſe he did not take the Profits of the Lands, out of which the Rent was iſſuing, in his own Right, as the Word *Debet* imports, but in Right of the Inteſtate; ſo that he may properly be ſaid *detinere* the Rent, having not paid it, but not *debere*; but adjudged, that the Action was well brought againſt him in the *Debet & Detinet*, becauſe *Part of the Rent became due in his own Time.* 5 *Rep.* 31. *Body* verſus *Hargrave.*

* *It was for a Fault in the* Ve. fa. Palm. 116.

3. 'Tis true, in *Hargrave's* Caſe the Judgment was reverſed in the Exchequer-Chamber, becauſe the Action was brought in the * *Debet and Detinet*, when it ought to have been in the *Detinet* only, becauſe the Charge againſt the Adminiſtrator was only upon the Contract of his Inteſtate; yet but twelve Years afterwards there was the like Judgment as in *Hargrave's* Caſe, and in the very like Caſe, (*viz.*) Debt was brought againſt an Adminiſtrator in the *Debet* and *Detinet for Rent incurred after the Death of the Inteſtate*; the Defendant pleaded *Nil debet*, upon which they were at Iſſue, and the Plaintiff had a Verdict; but the Defendant moved in Arreſt of Judgment, that the Action ought to be brought in the *Detinet* only, becauſe it was brought againſt him as Adminiſtrator, and not in his own Right, or for his own Debt; but the Judgment was affirmed. 2 *Cro.* 238. *Lord Rich* verſus *Frank.* 1 *Bulſt.* 22. *S. C. Cro. Car.* 225. *Smith* verſus *Norfolk. Style* 49, 52, 61, 79. *S. P. Caly* verſus *Joſlin. Allen* 34. *S. P.* 1 *Mod.* 185. *S P.*

4. Leaſe for Years, rendring Rent; the Leſſee made his Executor, and died, and he being poſſeſſed of the Reſidue of the Term, the Rent became arrear *in his Time*, and the Leſſor brought an Action of Debt againſt him in the *Debet* and *Detinet*, and upon *Nil debet* pleaded, had a Verdict; it was moved in Arreſt of Judgment, that the Action ought to have been in the *Detinet*; adjudged, that 'tis no Diſadvantage to the Executor to have it brought againſt him in the *Debet and Detinet*, and that the Plaintiff hath his Election to bring it either Way. *Roys* verſus *Mees*, *Style* 97. *See antea* (C) *pl.* 5.

Allen 34.

5. Debt againſt an Executor, for Rent due *in the Time of the Teſtator*; the Plaintiff had a Verdict, and it was objected in Arreſt of Judgment, that the Action was brought in the *Debet* and *Detinet*, when it ought to have been in the *Detinet* only; for an Executor may be ſaid *detinere*, but not *debere*, becauſe it was the Debt of his Teſtator; the Court inclined, that it was well brought in the *Debet* and *Detinet*. *Mich.* 25 *Car. Style* 52. *Vandicot's* Caſe, and 61. *Caly* verſus *Jocelin. S. P.*

6. Debt by an Adminiſtrator againſt a Sheriff for an Eſcape in the Life-time of the Inteſtate; the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Action was brought in the *Debet* and *Detinet*, when it ought to be in the *Detinet* only; becauſe the Adminiſtrator doth not recover in this Action to his own Uſe. *Style* 232. *Martin* verſus *Hendley.*

1 Vent. 238. Sid. 240, 266. 1 Saund. 238.

7. Debt for Rent againſt an Executor, and this was brought in the *Debet and Detinet*, but the Action was laid in *London*, and the Plaintiff declared on a Leaſe made of Lands in *Oxfordſhire*, by Vertue of which Leaſe the Leſſee entered, *&c.* and afterwards died; and that the Defendant as Executor, *&c.* entered; and upon Demurrer to this Declaration, the Defendant had Judgment; for tho' he was ſued *as Executor*, yet he is charged as *Aſſignee* in the *Debet and Detinet, upon the Privity of Eſtate*, and not upon the *Privity of Contract*; and therefore the Action ought to be brought in that County where the Lands are. 2 *Lev.* 80. *Cormell* verſus *Liſſet.*

8. Debt againſt an Adminiſtrator, for Rent due *in the Time of the Inteſtate*, and for which the Plaintiff declared in the *Detinet*, and for 64 *l.* due *in his own Time*, he declared in the *Debet and Detinet*; and upon Demurrer to the Declaration, adjudged, that the Action did not lie in the *Detinet* for Part, and in the *Debet* and *Detinet* for the other Part, becauſe it requires ſeveral Judgments, (*viz.*) in the one Caſe, *de Bonis Teſtatoris*, and in the other *de Bonis propriis.* 3 *Lev.* 74. *Salter* verſus *Cobbold.*

(E)

On Penal Statutes.

1. DEBT upon the Statute 5 *Eliz. cap.* 9. of Perjury; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that by the Statute 18 *Eliz.* no Suit ſhall be brought upon a Penal Law, but by Information or Original; but adjudged, that this Action was well brought, for by that Statute 'tis provided, that where any Action is given *to the Party grieved*, he may ſue as before the making that Statute; and by the Statute 5 *Eliz.* the Action is given to the Party grieved, and not to him who will ſue generally. *Mich.* 38 *Eliz. Cro. Eliz.* 434. *Johnſon* verſus *Pay. Style* 381. *Hill* verſus *Dechaire. S. P.*

2. Debt upon the Statute 1 *Jac.* 1. *cap.* 23. by the Farmers of the Cuſtoms, for 12 d. in the Pound for importing Goods, and unloading them, the Cuſtoms not being paid; the Defendants had compounded with the King for the Forfeiture, and this they pleaded in Bar to the Action brought by the Farmers; and upon Demurrer to the Plea, the Farmers had Judgment, becauſe the 12 *d.* in the Pound, was a Chattel veſted in them upon the Importation of the Goods; that 'tis a caſual Chattel, and the Forfeiture was only to enforce the Security for paying the Duty. 1 *Roll. Rep.* 382, *Salter* verſus *Malpert. See Cro. Eliz.* 797. 1 *Leon.* 208.

3. Debt againſt a Parſon upon the Statute 21 *H.* 8. the Writ was *Præcipe* B. B. *quod reddat nobis & W. R. qui tam pro nobis quam pro ſeipſo ſequitur* 110 *l. quas nobis & præfat'* W. R. *debet*, and the Plaintiff declared againſt him for taking a Farm of ſix Acres of Land, and holding the ſame ſix Months, *per quod actio accrevit* for 60 *l.* and for taking another Farm of other Lands, and holding the ſame five Months *per quod actio accrevit, &c.* for 50 *l.* the Defendant pleaded, that he *non debet to the aforeſaid* W. R. *qui tam, &c.* the ſaid 110 *l.* nor any Part thereof *in forma quo, &c.* upon which they were at Iſſue, and the Jury found, that the Defendant did owe 30 *l.* and as to the reſt *non debet*; and it was objected in Arreſt of Judgment, that the Verdict was incertain, becauſe it did not ſhew for which Farm, and for which Months the 30 *l.* was owing; but becauſe the Demand was for 110 *l.* generally, and Iſſue was joined thereon, that Exception was diſallowed; then it was objected, that the Plea did not anſwer the Writ and Declaration; for that was *non debet* W. R. *qui tam, &c.* when it ſhould be *non debet dicto Domino Regi & præfat'* W. R. *qui tam, &c.* and this was adjudged a good Exception, and not helped by any Statute of *Jeofails*, for thoſe do not extend to Penal Statutes. *Paſch.* 18 *Jac. Scot* verſus *Laws. Hob.* 327.

(F)

Pleadings in Debt good, and not good. See *Bonds.* (N) per Totum.

1. DEBT upon a Bond, the Defendant pleaded, that the Defendant did *Covenant* with him not to put the Bond in Suit *before Michaelmas*, which was not yet come, and concluded his Plea in Bar to the Action; and upon Demurrer the Plaintiff had Judgment; for 'tis only a *Covenant*, and ſhall not enure as a *Releaſe*, and therefore it cannot be pleaded in Bar, but the Defendant may take his Remedy upon the Covenant; 'tis true, if the Covenant had been not to put the Bond in Suit at all, this might have amounted to a Releaſe. *Mich.* 37 *Eliz. Cro. Eliz.* 352. *Dowſe* verſus *Jefferies.* 1 And. 307.

2. Debt, *&c.* upon this Bill, (viz.) *Be it known*, &c. *that I* R. W. *of* W. &c. *do acknowlege my ſelf to be indebted to* K. S. *in* 200 *l. for the Payment whereof, I, my Heirs and Aſſigns, do Licenſe the ſaid* K. S. *to have the Uſe of the Bailywick of* D. &c. *until, &c.* The Defendant pleaded in Bar, that the Plaintiff had uſed the ſaid Bailiwick, *&c.* adjudged an ill Plea, for an Action will lie upon this Bill without uſing a Bailiwick. *M.* 30 *Eliz. Goldsb.* 73. *Goor* verſus *Wingfield.* 4 Leon. 208.

3. In an Action of Debt, the Defendant pleaded, that the Plaintiff had *attached in London* a Debt due to him, the Defendant, from *W. R.* and had Judgment to recover; adjudged, that this was a good Plea in Bar to the Action, for ſo much as the Plaintiff had recovered upon this Attachment. *Moor* 598. *Moy* verſus *Middleton.*

4. Debt upon a ſingle Bill, the Defendant pleaded, that he delivered the Writing to the Plaintiff as an Eſcrow, upon Condition, that if the Plaintiff delivered to the Defendant a Horſe, before ſuch a Day, then it ſhould be his Deed, otherwiſe not; and upon Demurrer this was held an ill Plea, becauſe it was delivered to the Party himſelf, when it ought to be delivered to a third Perſon. *Moor* 642. *Williams* verſus *Green. Dyer.* 34. *S. P.*

5. Debt upon a penal Bill, the Defendant pleaded, that *he delivered the Bill to the Plaintiff*, upon Condition, that if he ſhould procure a Particular of ſuch Lands, *&c.* then it ſhould not be his Bill, but ſhould be redelivered to him; but if he did not procure the Particular, then it ſhould be his Bill; the Plaintiff replied, that it was his Bill, whereupon they were at Iſſue, and the Plaintiff had a Verdict; and upon a Writ of Error in the Exchequer-Chamber, it was aſſigned for Error, that a Special Delivery to the Plaintiff himſelf, could not be upon a Condition; and if ſo, then the Plea is ill, and the Plaintiff ſhould have demurred to it, and not taken Iſſue upon a Thing which

was confeſſed, for the Defendant confeſſed it to be his Deed, but upon ſuch a Condition; however the Judgment was affirmed, for the Defendant ſhall not aſſign an Error in his own Plea; and tho' the Iſſue was found for a Thing which was confeſſed, that ſhall be Surpluſage, and the Court may give Judgment on the Verdict or the Plea; and ſome of the Judges were of Opinion, that the Delivery was good, tho' to the Plaintiff himſelf, as an Eſcrow. *Moor* 696. *Wilcoks* verſus *Hewſon.*

3 Bulſt. 244. S. C. *by the Name of* Meletine *v.* Hall.

6. Debt, *&c.* in which the Plaintiff declared upon two Bonds, one whereof was to pay 100 *l.* and the other was to pay 110 *l.* and the Action was brought generally for 200 *l.* on theſe Bonds and Satisfaction was acknowledged for the 10 *l.* after a Verdict and Judgment for Plaintiff, and a Writ of Error brought, the Error aſſigned was, that it did not appear on which of the Bonds the Plaintiff did acknowledge Satisfaction of this 10 *l.* but the Judgment was affirmed, becauſe the Plaintiff might lawfully put both Bonds in Suit, and therefore he might acknowledge Satisfaction of Part generally, without ſhewing of which it is. 1 *Roll. Rep.* 423. *Hall* verſus *Malyn. Meletine* verſus *Hall.*

7. Debt, *&c.* in which the Plaintiff declared, that the Defendant 8 *Maii* 4 *Car. conceſſit ſe tenere* to the Plaintiff, 280 *l.* to be paid upon Requeſt, *& profert hic in Curia ſcriptum præd' quod debitum præd' in forma præd' teſtatur*; the Defendant pleaded Payment, upon which they were at Iſſue, and there was a Verdict and Judgment for the Plaintiff; and now a Writ of Error was brought, and the Error aſſigned was, that the Plaintiff had declared, that the Defendant *conceſſit ſe tenere*, but did not ſay *per ſcriptum obligatorium conceſſit*, which is the uſual Form in an Action of Debt upon a Bond; ſo that this Declaration being Faulty in Subſtance be made good, either by the Plea of the Defendant, or by the Verdict; but adjudged, that the Plaintiff having concluded his Declaration with a *profert hic in Curia ſcriptum prædictum*, tho' no Writing was mentioned before, and the Defendant having pleaded Payment of the Debt, which muſt be the Debt mentioned *in ſcripto prædicto*, it muſt be intended a Bond, with a Condition; and it appearing that it was a juſt Debt, and due to the Plaintiff, the Judgment was affirmed. *Hill.* 6 *Car. Courtney* verſus *Greenvell. Cro. Car.* 101.

8. Debt upon a Bond dated 24 *June* 9 *Car.* the Defendant pleaded, that the Plaintiff 22 *Feb.* 10 *Car. releaſed to him* all Actions and Demands which he had, *&c.* The Plaintiff demanded *Oyer* of the Releaſe, which appeared to be of all Actions to the *Day of the Date* thereof; and for this Miſpriſion the Plea was adjudged ill. *Mich.* 11 *Car. Cro. Car.* 308. *Digby* verſus *White.*

9. Debt againſt an Executor upon a Penal Bill made by his Teſtator for 18 *l.* for the Payment of 9 *l.* on ſuch a Day, and the Plaintiff declared, that the Defendant had not paid the Penalty; upon *Plene Adminiſtravit* pleaded, the Plaintiff had a Verdict; but the Judgment was arreſted, becauſe he had declared, that the Penalty was not paid, it ſhould have been, that the 9 *l.* was not paid. 1 *Lutw.* 612. *Rud* verſus *Lowen.*

10. Debt, *&c.* conditioned for Payment of 1500 *l. &c.* the Defendant pleaded, that on ſuch a Day, *&c.* he paid 800 *l.* Part of the Debt (which in Truth was after the Bond forfeited) and as for the Reſidue, that he had given another Bond to the Plaintiff in Diſcharge of the firſt Bond; the Plaintiff as to the firſt Part of the Plea took Iſſue, and to the other Part he demurred, and had Judgment upon both Points; becauſe Payment after the Day, and giving a new Bond after the Day, is no good Plea. *Palm.* 287. *Marſhall* verſus *Freake.*

11. Debt upon Bond, wherein the Plaintiff declared, that the Defendant *per ſcriptum ſuum obligatorium* became bound; the Defendant pleads, that he was in Priſon, and that *ſcriptum prædict'* was obtained by Dureſs, which was found againſt him, and Judgment accordingly; and upon Error it was aſſigned for Error, that the Declaration was ill, becauſe the Plaintiff did not alledge, that it was *ſigillo* (of the Defendant) *ſigillat'*; but adjudged, that the Deed was confeſſed by the Plea. 1 *Vent.* 70. *Green* verſus *Cubit. Cro. Car.* 571. *S. P.*

12. In an Action of Debt upon a Bill Penal, Payment is no Plea, ſo adjudged in *Nichols*'s Caſe. 8 *Rep.* See *Kettleby* verſus *Hales. S. P.*

13. Debt upon Bond, conditioned, that the Obligee ſhall enjoy certain Tithes demiſed to him during his Term, paying 3 *l. per Annum* Rent: The Defendant pleaded, that the Plaintiff did not pay the Rent; adjudged an ill Plea; it ſhould have been, that the Plaintiff enjoyed the Tithes to ſuch a Day, at which Time ſo much Rent was due, which he did not pay. 4 *Leon.* 94. *Foles* verſus *Griffins.*

14. Debt on the Statute 32 *H.* 8. *cap.* 5. for the *Arrears* of an Annuity deviſed by the Laſt Will of *T. S.* to the Wife of the Plaintiff, for her Life, ſhe being dead before the Action brought againſt the Defendant, as Adminiſtrator of the Occupier of the Lands out of which this Annuity was to iſſue; the Defendant pleaded *Nil Detinet*; and upon a Demurrer to this Plea it was objected, that it was ill, becauſe this Action is founded on *a Will in Writing*, which is equivalent to a Deed, and *Nil Detinet* is not a good Plea to an Action of Debt founded on a Deed or Specialty; but adjudged a good Plea in the principal Caſe, becauſe a Will is not a Deed; 'tis true, 'tis as effectual to paſs an Eſtate as a Deed, yet 'tis not a Deed in its Nature, becauſe Sealing and Delivery is eſſential to a Deed, but not to a Will, therefore *Nil Detinet* is a good Plea to an Action of Debt founded on a Will. *Hardres* 333. *Wilſon*'s Caſe.

15. Debt upon Bond, conditioned, that the Defendant *and his Wife* ſhould appear ſuch a Day at the Palace Court, *&c.* The Defendant, upon *Oyer*, pleaded, that he did appear on the Day *prout patet per Recordum*, and that he was not married at the Time of the Bond given, nor ever after; and upon Demurrer this was adjudged an ill Plea, becauſe he is eſtopped to ſay, that he had no Wife; it had been otherwiſe where the Condition is general, as to enfeoff *W. R. of all his Lands* in

D. for in ſuch Caſe he may plead he had no Lands there. *Allen* 13. *Paine* verſus *Shellthrope.* See *Dyer* 50, 196.

16. Debt upon Bond, the Defendant pleaded, that the Bond was made in another County than where it was alledged in the Declaration, and prayed, that the Attorney might be examined by Vertue of the Statute *6 Ric.* 2. *cap.* 2. The Plaintiff demurred, and the Defendant joined in Demurrer; adjudged, that the Plea was ill, and not warranted by the Statute, for that is, that the Original ſhall not be laid in one County, and the Declaration upon a Bond made in another County, for if ſo, the Writ ſhall abate. *Allen* 17. *Shalmer* verſus *Slingsby.*

17. Debt upon Bond, conditioned, that *whereas the Plaintiff had carried ſo many Thouſand of Billets*, and had delivered them at *D.* in the County of, *&c.* for the Uſe of the Defendant, amounting (at ſo much *per* Thouſand) to 100 *l.* if therefore the Defendant ſhould pay the ſaid 100 *l.* at ſuch a Time and Place, then the Bond to be void, *&c.* the Defendant pleaded, that the Plaintiff *did not carry ſo many thouſand of Billets to* D. as the Plaintiff had declared; and upon Demurrer to this Plea it was adjudged ill, becauſe the Recital of the Fact in the Condition of the Bond was an *Eſtoppel* to the Defendant to plead the contrary. *Paſch.* 24 *Car. Style* 103. *Hart* verſus *Buckminſter.* Allen 52.

18. Debt upon Bond for Payment of Money, but no Place of Payment was mentioned in the Condition; the Defendant pleaded, that the Plaintiff was beyond Sea on the Day when the Money ſhould be paid, and did not ſay that he *was ready to pay* it, and upon Demurrer to this Plea it was held ill. *Sid.* 30. *Hobſon* verſus *Rudge.*

19. Debt upon Bond, conditioned for Performance of *Covenants*; the Defendant pleaded, that there were no Covenants in the Indenture, *&c.* and upon Demurrer to this Plea the Plaintiff had Judgment, for if there were no Covenants, then the Bond is ſingle. 1 *Lev.* 3. *Hudland* verſus *Povey.*

20. Debt upon Bond, conditioned to make all the Linen which the Plaintiff ſhall wear during his Life, and aſſigned the Breach, that he deſired the Defendant to make him ſuch Linen for his neceſſary Wearing, *&c.* which ſhe had not done; and upon Demurrer to this Declaration, it was inſiſted for the Defendant, that ſhe ought not to make the Linen, unleſs the Plaintiff had provided the Cloth; adjudged, that the Contracts of Parties are to be conſtrued according to the ſubject Matter; as if a Taylor Promiſes to make a Suit of Clothes for me, I am to find the Materials, becauſe 'tis uſual; but if a Shoemaker Promiſes to make a Pair of Shoes, he is to find the Leather, becauſe that is likewiſe uſual; but in the principal Caſe 'tis not ſet forth, that the Defendant was a Seamſtreſs, and a Perſon which uſeth to find Cloth for making Linen. 1 *Lev.* 93. *Gates* verſus *Thornhill.*

21. Debt upon Bond, conditioned to perform ſeveral Things therein mentioned, the Defendant pleaded Performance of all; and upon Demurrer it was adjudged ill, becauſe the Particulars being mentioned in the Condition, he ought to plead diſtinctly to each; but if it had been to perform all Covenants in an Indenture, then a Plea had been good, if they had been all in the Affirmative. 1 *Lev.* 303. *Wimbleton* verſus *Holdip.*

22. Debt upon Bond, conditioned, that if a Ship going ſuch a Voyage, ſhould return, *&c. the Perils of the Sea excepted*, then the Defendant ſhould pay ſo much, but if *ſhe be loſt*, then to pay nothing; the Defendant pleaded, that the Ship proceeded in the Voyage, *but was loſt*; and upon Demurrer to this Plea, it was objected, that the Defendant ſhould have * alledged ſhe was loſt *per pericula maris*, for it might be by his own Negligence; but adjudged, that the Plea being in the very Words of the Condition, 'tis good. 2 *Lev.* 7. *Watton* verſus *Waddington.*

* *By a Bill Penal the Defendant acknowledged, that he* Debet 20 s. *and bound himſelf in* 40 s. *to pay the* 20 s. *on a Day certain; adjudged, upon Demurrer, that the Plaintiff ought to aver, that the Defendant had not paid the* 20 s. Cro. Car. 515. Danes *v.* Brett.

23. In Debt for Rent reſerved upon a Leaſe indented, the Defendant pleaded *Nil habuit in Tenementis tempore dimiſſionis*; and upon Demurrer this was adjudged an ill Plea. 3 *Lev.* 147. *Heath* verſus *Vermuden.*

24. Debt on Bond, conditioned to pay a Sum of Money *at H.* on ſuch a Day, *&c.* The Defendant pleaded Payment *at the Day, ſecundum effectum Conditionis præd'*; and upon a ſpecial Demurrer, for that the Defendant did not ſet forth *where he paid it*, ſo that no *Venue* could be had thereof, the Plaintiff had Judgment for that very Reaſon, tho' it was inſiſted for the Defendant, that the Condition of the Bond being to pay it at *H.* and the Defendant having pleaded, that he paid it *ſecundum effectum Conditionis, &c.* it muſt neceſſarily be implied, that he paid it at *H.* 3 *Lev.* 245. *Norris* verſus *Spicer.* *See* Bonds. (N) *pl.* 12, 15, 22. *S. P.*

25. Debt on a Bond, *&c.* in an inferior Court; the Defendant *cognovit actionem*, and *petit quod inquiratur per Patriam de debito, &c.* and upon a Writ of Error in *B. R.* this Manner of Pleading came in Queſtion there; and it was held good by the Cuſtom of the Place, that there is ſuch a Cuſtom in *Briſtol*, and that this Pleading prevents a Chancery Suit, for the Defendant may have paid the whole Debt, excepting 5 *l.* or ſome ſmall Matter. 1 *Mod.* 96. See *Cro. Eliz.* 894. 2 *And.* 251. *Moor* 603. 2 *Cro.* 357. 1 *Roll. Rep.* 193. *S. P.*

26. Debt upon Bond, the Defendant pleaded, that it was delivered to one *W. R.* a third Perſon, as an Eſcrow, *to be the Defendant's Deed* to the Plaintiff, upon his vacating ſuch a Judgment, which was not done, *& ſic non eſt factum*, and concludes to the Country, without adding *& præd.* the Plaintiff *ſimiliter*; the Plaintiff replied, that it was delivered as an Eſcrow to be delivered to him upon his Payment of 20 *s.* towards the Vacating the Judgment, *abſque hoc*, that it was delivered as an Eſcrow * *to be the Defendant's Deed*, upon vacating the Judgment, upon which they were at Iſſue, and the Evidence was, that it was *to be the Defendant's Deed*, upon the 1 Salk. 274.

* *See* Saville 71.

the Plaintiff's Vacating the Judgment; adjudged, that there is no Difference between delivering a Deed as an Eſcrow *to be the Defendant's Deed*, upon the Plaintiff's doing ſuch a Thing, and to be delivered to the Plaintiff *as the Defendant's Deed*, upon the Plaintiff's doing the Thing; for in both Caſes 'tis not the Defendant's Deed till the ſecond Delivery; for if *W. R.* deliver a Writing to *B. B.* as his Deed, to be delivered by him to *R. C.* upon his doing ſuch a Thing, 'tis the Deed of *W. R. ab initio*, but in Truſt for *R. C.* upon the Contingency of his doing the Thing: But *per Holt* Ch. Juſt. theſe ſpecial *Non eſt factums* in Caſes of Eſcrows or Raſures, *&c.* are impertinent, becauſe by ſuch Pleas the Defendant brings the Proof upon himſelf, whereas, if he had pleaded *Non eſt factum* generally, he turns the Proof of every Thing neceſſary to make it his Deed, upon the Plaintiff himſelf; and it was agreed by all, that a Deed cannot be delivered as an Eſcrow to the Party himſelf. *Mod. Caſes* 217. *Buſhell* verſus *Paſmore*.

Deceit. See **Action on the Caſe.** (D) per totum.

Declaration.

Where good, and not good, in Matters of Form, and otherwiſe. (A)

Where a bad Declaration is made good by the Plea, Replication, *&c.* (B)

(A)

Where good, and not good, in Matters of Form, and otherwiſe. See *Dower.* (D) 6.

1. WHere the Plaintiff declares on a Statute, he muſt recite it truly, and 'tis certainly erroneous to miſrecite it, tho' as to the Subſtance of the Declaration the Plaintiff might have omitted to recite it at all; and the Reaſon is, becauſe in all Declarations there muſt be *Certainty and Truth*, the one, that the Defendant may know what he is to anſwer, the other ought to be joined to that, which is certain; for if it appear to the Court, that the Matter is falſe, the Plaintiff will be at a certain Prejudice. *Plow. Com.* 84. In *Partridge* and *Strange's* Caſe. *See* Double Plea. (A) 1. *S. C.*

2. In Treſpaſs, *&c.* the Plaintiff declared, that the Defendant *ſimul cum quodam* W. R. *clauſum fregit*, after a Verdict for the Plaintiff, it was moved to ſtay the Judgment, becauſe it appears by the Plaintiff's own Shewing, that the Action ought to be brought againſt another as well as the Defendant, which other was not named in the Writ, but the Plaintiff had Judgment; thereupon the Defendant brought a Writ of Error in the Exchequer-Chamber, and the ſame Matter being aſſigned for Error, it was adjudged erroneous; but it being only Matter of Form, and not of Subſtance, it was helped by the Statute 18 *Eliz.* of Jeofails. 1 *Leon.* 41. *Henley* verſus *Broad. Poſtea* Joinder in Action. (C) 1. *S. C.*

3. Treſpaſs, *&c. Quare clauſum fregit & piſces ſuos cepit*, without ſetting forth the *Number or Nature of the Fiſh*; upon Not guilty pleaded, the Plaintiff had a Verdict, but adjudged, that the Verdict would not make a bad Declaration good, and here the Omiſſion, as aforeſaid, had made the Declaration ill, it being Matter of Subſtance, and not remedied by the Statute 18 *Eliz.* of Jeofails. 5 *Rep.* 85. *Playter's* Caſe. See *Poſtea pl.* 20. *S. P.*

**A Toft is a Piece of Land where an Houſe hath ſtood.*

4. *Warrantia Chartæ, &c.* of *two Meſſuages* and twenty Acres of Land, wherein the Plaintiff Counts, that the Defendant made a Feoffment to him of the *ſaid Meſſuages* and twenty Acres of Land, *per nomen unius * Tofti & duo Virgatæ terræ*; it was objected againſt this Declaration, becauſe that which came after the *per nomen* did not warrant it; but it was adjudged good, becauſe there might be but one *Toft* at the Time of the Purchaſe, and the two Meſſuages might be afterwards built. *Paſch.* 40 *Eliz. Cro. Eliz.* 611.

1 Roll. Rep. 55. *T. Jones 197. Cholmley *verſus* Morton.

5. In Treſpaſs, the Plaintiff declared *quod cum* the Defendant did Aſſault and Beat him; adjudged not good, becauſe * *Quod cum* is only a Recital, 'tis not a poſitive Affirmation of the Fact. 2 *Bulſt.* 215. *Sherland* verſus *Heaton. Antea* Covenant. (M) 4. *contra. Mich.* 37 *Eliz. Cro. Eliz.* 507. *Briggs* verſus *Sheriff. S. P.* 2 *Bulſt. Sherive* verſus *Bridgman. S. P.* S. P. T. Jones 218. S. P. *after a Verdict in Treſpaſs.* Sheen *verſus* Maſon.

1 Roll. Rep. 13.

6. In an Action of Debt upon the Statute 2 *Ed.* 6. for not ſetting out Tithes, the Husband declared, that he was *poſſeſſed* of Tithes in Right of his Wife, and averred her Life, but did not ſhew *how* he had the ſame, or that the *Grant was by Deed*; and this being objected againſt the Declaration, yet it was held good; for to ſay generally, that he is *Poſſeſſor*, *Occupier*, *Farmer*, or *Proprietor*, is good, and whether the Grant was by Deed, or not, that is but an *Inducement to the Action.* 2 *Bulſt.* 228. *Babington* verſus *Matthews*. *See* Pleas. (G) 3.

7. *Aſſumpſit, &c.* in which the Plaintiff declared, that he having ſold and delivered certain Wares to *W. R.* at the Requeſt of the Defendant, he promiſed, that in Conſideration the Plaintiff would *Truſt* the ſaid *W. R.* for the Wares, not exceeding the Value of 100 *l.* he would pay for the ſame when he ſhould be required, and the Plaintiff alledged in Fact, that *ſuperinde fiduciam dedit* to the ſaid *W. R.* and that he delivered the Goods to him, which did not exceed 100 *l.* after a Verdict for the Plaintiff, it was objected, that the Declaration was not good, it being very incertain, for having alledged, that *fidem dedit ſuperinde*, that might be as well before as after the Promiſe made, and by Intendment may be taken either Way; beſides, he ought to have alledged, that *W. R.* who was the principal Creditor, had not paid for the Wares, for if he had, then this Action would not lie againſt the Defendant; but adjudged, that the Word *Superinde* muſt relate to the Promiſe, and that if *W. R.* had paid the Money, the Defendant ought to have ſhewed it. 2 *Bulſt.* 74. *Crask* verſus *Johnſon.*

8. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he would marry the Defendant's Niece, he promiſed to give with her in Marriage, as before he had agreed to give with her in Marriage to *W. R.* and alledged, that the Defendant had agreed (but did not ſay with whom) to give to *W. R.* 1000 *l.* if he would marry his ſaid Niece; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but it was objected, that the Declaration was ill, becauſe the Plaintiff did not alledge *with whom the Defendant agreed* to give 1000 *l.* to *W. R.* but adjudged, that ſuch Agreement is but collateral, and no more than an *Inducement* to the Promiſe, which is the principal Cauſe of the Action, and Inducements need not be ſo certainly alledged in Declarations as thoſe Things which are the Foundation of the Action, for 'tis ſufficient to alledge Inducements generally; and if the Defendant would have pleaded in this Caſe, that *he did not agree* to give *W. R.* 1000 *l.* then the Plaintiff by his Replication might have made his Declaration very certain, but 'tis good enough without ſuch Certainty in the Beginning. *Yelv.* 17. *Alſop* verſus *Sytwell.*

9. The Plaintiff in his Declaration ſet forth a Cuſtom in the *Manor of Risborough*, that every one who had Common in *Risborough prædict'*, *&c.* and then declared againſt the Defendant for erecting an Houſe in a certain Place called *Risborough Common*, but did not alledge, that the *Common* was within the *Manor of Risborough*, yet adjudged good, becauſe there was but one *Risborough* named, and therefore it muſt be neceſſarily intended *Manerium de Risborough. Paſch.* 10 *Jac. Godb.* 252. *Claydon* verſus *Sir Jer. Horſey.*

10. Debt upon the Statute 2 *Ed.* 6. for not ſetting out Tithes, wherein the Plaintiff declared, that the Defendant was *Occupier* of 128 Acres of Meadow in *Radley* and *Thorp*, and that the *Abbot of Abingdon* was ſeiſed of the ſaid Tithes growing, *&c.* on the ſaid Lands, who ſurrendered them to *H.* 8. and afterwards they came to Queen *Elizabeth*, who in the 36th Year of her Reign, *demiſed them to the Plaintiff for Life*, and that the Defendant cut down the Graſs and made it into Hay, and carried it away, without ſetting out the Tithes, and that the Tithes ſo carried away were of the Value of twenty Marks: The Defendant demanded *Oyer* of the Letters Patents, which were, (*viz.*) *That the Queen demiſed all thoſe Tithes upon a certain Parcel of Land called* Bremere, *in the Pariſh of* Radley, &c. *and in another Place called* Barton Bremere, *which were late Parcel of the Poſſeſſions of the Monaſtery of* Abingdon, *excepting all the Tithes in* Radley, *in the Tenure of* W. R. &c. Upon a Demurrer to this Declaration it was objected, that the Plaintiff had not entituled himſelf to the Tithes, becauſe he did not *aver*, that the Lands on which theſe Tithes did grow were the Lands mentioned in the Letters Patents, nor that they were growing on the Lands not excepted in the Grant; but adjudged, that the Declaration was good, for the Plaintiff declared, that the Queen demiſed *Decimas prædict'*, which is a ſufficient Allegation and Averment in it ſelf, that they did ariſe out of the Lands in the Grant, and 'tis a good Implication, that they were not excepted. *Trin.* 7 *Jac.* 2 *Cro.* 679. *Sir William Stonehouſe* verſus *Sir Tho. Read.* 2 Roll. Rep. 376.

11. Caſe, *&c.* in which the Plaintiff had Judgment in *B. R.* and upon a Writ of Error in the Exchequer-Chamber brought by the Defendant, the Error aſſigned was, that the Plaintiff declared, in Conſideration he had truſted the Defendant for his Diet, he promiſed to pay 10 *l.* on ſuch a Day, but did not ſay to whom: *Sed per Curiam*, it ſhall be intended to be paid to the Plaintiff; the Judgment was affirmed. 1 *Roll. Rep.* 58. *Chappell* verſus *Woodham.*

12. *Aſſumpſit, &c.* wherein the Plaintiff declared, that *W. R.* promiſed *he would give* him as good a Portion as he ſhould give to any of his Children (the Plaintiff having married his Daughter) and alledged in Fact, that *W. R. gave to ſuch a Child ſo much* (but did not ſay when he gave it) and that he did not leave the Plaintiff ſo much; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, but it was objected in Arreſt of Judgment, that the Declaration was ill, becauſe *the Plaintiff did not ſet forth the Time when* W. R. *gave ſo much to his Child*, and it may be that he gave it before he made the Promiſe to the Plaintiff, and then the Promiſe *Quod daret* did not extend to it, and it ſhall never be *intended*, that he made the Promiſe *after* he had given this Portion to another Child; therefore the Time when he gave it ought to be certainly expreſſed in the Declaration. *Mich.* 2 *Car. Latch* 203. *Almot* verſus *Pickton.*

13. After a Verdict for the Plaintiff in *Aſſumpſit*, it was moved in Arreſt of Judgment, that the Declararation was ill, becauſe he had declared *De quinque Carucat'* of Woad, *Anglice*, Cart-Loads, when *Caruca* doth not ſignify a Load, but a Plough, and ſometimes a Quantity of Land called a Plough-land, which is 100 Acres; the Caſe was not adjudged. *Mich.* 2 *Car. Latch* 216. *Walter* verſus *Farmer.*

14. *Aſſumpſit, &c.* in which the Plaintiff declared, that whereas the *Defendant's Husband was indebted* to him in 42 *l.* and made her Executrix, and died, and ſhe having proved the Will, the Plaintiff told her, that he would ſue her for the Money; thereupon ſhe, in Conſideration that the Plaintiff would forbear till ſuch a Day, promiſed to pay, *&c.* and averred Forbearance. and that ſhe had not paid; after a Verdict for the Plaintiff, it was objected, that the Declaration was ill, becauſe the Plaintiff did not ſhew *how, or for what* the Defendant's Husband was indebted to him; but adjudged, becauſe the *Debt* in this Caſe was but an *Inducement* to the Action, which was founded upon the Promiſe of Forbearance, ſo that it was not the Promiſe that made the Debt. *Hill.* 2 *Car. Latch* 219. *Phutter* verſus *Gander.*

Allen 20. 15. In an Action on the Caſe, the Plaintiff declared, that the Defendant would not permit him to take *unam acram Ligni*; it was objected, that this Declaration was not good, for it ſhould have been *unam acram Boſci*; but the Plaintiff had Judgment, becauſe Damages were only to be recovered, and theſe Words are uſed only as Inducements to deſcribe the Thing for which the Damages are to be recovered. *Style* 19. *Long* verſus *Bennett.*

16. Caſe for ſcandalous Words, after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff charged the Defendant only with Speaking the Words, but did not ſay *dixit de querente*, and the Word *Dixit* was not at all in the Declaration, and for this Cauſe it was held ill. *Mich.* 23 *Car. Style* 70.

17. Debt upon a Charter-Party brought by the Maſter of a Ship againſt the Merchant, wherein, amongſt other Things, the Plaintiff ſet forth, that for the Performance of the Agreement on the Part of the *Merchant*, *Obligaſſet ſe* to the ſaid Maſter; upon a *Demurrer* to this Declaration the Defendant had Judgment, becauſe the Plaintiff did not ſet forth, that *ipſe præd. mercator' obligaſſet ſe*, but this was againſt the Opinion of Juſtice *Ventris*, who reports this Caſe. 2 *Vent.* 196.

18. In Replevin, the Defendant made Cogniſance as Bailiff of *Eliz. Coſſen*, ſetting forth a Conveyance made to her by *Nicholas Coſſen*, which was thus, (*viz.*) This Indenture made between *N. C.* of the one Part, and *E. C.* of the other Part, witneſſeth, that whereas the ſaid *E. C.* hath ſurrendered into the Hands of the ſaid *Nicholas*, one Indenture of Annuity, *&c.* as by the ſame it appearth, *Hath given and Granted*, leaving out the Name of the *Grantor*, *Nicholas Coſſen*, in the granting Part; but adjudged, that the Deed being made between *Nicholas* of the one Part, and *Elizabeth* of the other Part, it muſt be *intended* that *Nicholas* granted. 2 *Vent.* 141.

19. Debt, *&c.* for 553 *l.* ſetting forth an Indenture, *&c.* by which *Teſtatum exiſtit*, that the Defendant covenanted to pay ſo much Money, *&c.* upon a Plea of *Non eſt factum*, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Plaintiff ought not to have declared upon a *Teſtatum exiſtit*, which is never allowed in an Action of Debt, tho' 'tis in Covenant; but adjudged, that there is a Difference where an Action of Debt is brought upon a Covenant to pay Money, and where 'tis brought upon a Demiſe, reſerving Rent, for in the firſt Caſe 'tis good by Way of *Teſtatum exiſtit*, but not in the laſt. 2 *Lev.* 75. 1 *Lutw.* 533. in *Boſwall* verſus *Rawſtorne's* Caſe. *See* Variance. (G) 3. *S. C.*

20. Treſpaſs, *&c. Quare clauſum fregit & Arbores ſuccidit ad Valenciam, &c.* upon Demurrer, the Plaintiff had Judgment as to the Breaking his Cloſe, but as to the Cutting the Trees the Declaration was ill, becauſe he did not ſet forth *what Trees* they were. 1 *Vent.* 53. *Thomlinſon* verſus *Hunter.* See *Antea pl.* 3. *S. P.*

1 Vent. 135. 21. After a Verdict for the Plaintiff in Trover, it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Converſion was laid on *a certain Day* in *Eaſter-Term*, and the Declaration was *general, as of Eaſter-Term* (and not on a Day certain, as *Memorandum quod tali die*) and then it muſt relate to the *firſt Day of the Term*; if ſo, then the Action is brought before the Cauſe of Action accrewed, for it was brought on the firſt Day of the Term, and the Converſion, which is the Cauſe of Action, was laid after the * Term began; but adjudged, that 'tis well enough if the Bill was filed after the Cauſe of Action accrewed, for till then there is no Action depending, and the Filing the Bill is on a Day certain. 2 *Lev.* 13. *Tatlow* verſus *Bateman* 176. *Dobſon* verſus *Bill. S. P. Jones* 87. *S. C.*

* *See* Lidcott *v.* Backnell.

22. In an Action of Debt wherein the King was Plaintiff, the Declaration was, *Memorandum, &c. quod coram Domino Rege venit Dominus Rex, &c.* The Defendant pleaded, that the King had no ſuperior within his Realm; and upon Demurrer it was objected, that it ſhould be in the Name of the Attorney General, *unde Attornatus Generalis pro Domino Rege dicit*, but adjudged good. 2 *Lev.* 82. *The King* verſus *Gregory.*

23. Caſe, *&c.* wherein the Plaintiff declared, that he was poſſeſſed *de quadam pecia paſturæ*, containing by Eſtimation eight Acres, and that the Defendant was poſſeſſed of a Cloſe *& de quadam pecia paſturæ*, and that of Right the Plaintiff ought to have a Way from ſuch a Street thro' the Defendant's Cloſe to his own *Piece of Paſture*, but was diſturbed by digging a Ditch croſs the Way; the Plaintiff had a Verdict, but it was moved in Arreſt of Judgment, that *pecia paſturæ* was very incertain, and for that Cauſe the Judgment was arreſted. 1 *Lutw.* 45. *Jones* verſus *Hammond.*

24. Caſe, *&c.* by an Infant Adminiſtrator, the Action was brought in the Common Pleas, and the Plaintiff declared by his next Friend, *Queritur* againſt *C. W.* an Attorney, for Money due to his Inteſtate; and upon Demurrer to this Declaration the Defendant had Judgment, becauſe all Actions in that Court, are either by *original Writ*, or by *Bill*, or by *Attachment of Privilege*, and this is neither of theſe Ways, for 'tis *Queritur*, when it ſhould be, that the Defendant *attachiatus fuit* to anſwer. 1 *Lutw.* 227. *Dimock* verſus *Wetherall.*

25. Caſe,

25. Caſe, *&c.* upon a *Bill of Exchange*, wherein the Plaintiff ſet forth the Cuſtom in *London* amongſt Merchants, and others dwelling there, that if any Merchant ſhould draw a Bill of Exchange directed to another, requiring him to pay a Sum of Money, and if that Perſon did *accept* the Bill, then he became liable to pay the Money *ſecundum acceptationem præd'*, that one *King* drew a *Bill at Sandwich* upon the Defendant, to pay 8 *l.* to the Plaintiff, and that the Defendant *accepted the Bill*, but had not paid the Money; upon Demurrer to this Declaration the Defendant had Judgment, becauſe there being *no Time* mentioned in the Bill it ſelf when the Money was to be paid, nor the Plaintiff having ſet forth, that the Defendant accepted it to pay at Sight, or at any certain Time, it doth not appear, that the *Time of Payment was paſt* before the Action brought. 1 *Lutw.* 231. *Ewers* verſus *Benchkin.*

26. Caſe, *&c.* upon a Special Agreement, wherein the Plaintiff declared, that it was agreed between him and the Defendant, that the Plaintiff ſhould make a legal Conveyance to him of an Houſe, *&c.* and that the Defendant ſhould pay to the Plaintiff 135 *l.* then he lays mutual Promiſes *Cumq; etiam*, in Conſideration that he (the Plaintiff) had executed a Leaſe and Releaſe, *& vendidiſſet eidem Joſepho* (the Defendant) the ſaid Houſe *ſuper ſe Aſſumpſit* to pay the Money, *&c.* upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, *&c.* and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſet forth, that the Defendant *ſuper ſe Aſſumpſit*; but adjudged, that thoſe Words *Cumq; etiam* coupled the ſecond Promiſe to the firſt, where it was rightly ſet forth, that the Defendant *ſuper ſe Aſſumpſit*; beſides, this was after a Verdict, which cures *Want of Form.* 1 *Lutw.* 233. *Stanhope* verſus *Butler.*

27. Caſe for Words by Attachment of Privilege, the Defendant demurred ſpecially to the Declaration for Want of *Pledges*, and the Plaintiff joined in Demurrer; and it was inſiſted for him, that this is only Form, and that Pledges might be found at any Time pending the Action, which is very true, but not after a Joinder in Demurrer; in this Caſe the Declaration was mended, and Pledges entered upon Payment of Coſts. 3 *Lev.* 39. *Hardy* verſus *Gilding.* See *Wolfe* verſus *Hales.*

28. *Aſſumpſit, &c.* for that the Defendant *6 Maii* 1695, promiſed to pay 7 *s. per* Week for 120 Weeks Diet then paſt, and that the Plaintiff *Poſtea 6 Maii* 1695, having found Diet for the Defendant for 120 Weeks then paſt, he promiſed to pay as much as it was worth, and avers, that it was worth 7 *s. per* Week; upon *Non Aſſumpſit* pleaded, the Plaintiff had a Verdict, it was objected in Arreſt of Judgment, that here are two Counts in this Declaration for Things of the ſame Kind, and not averred to be different, as it ought, ſo that the Defendant is twice charged for the ſame Thing; but adjudged good after a Verdict, for without Neceſſity the Court will not intend them to be the ſame. 1 *Salk.* 213. *Weſt* verſus *Troles.*

29. In Covenant againſt an Apprentice, the Plaintiff aſſigned for Breach, that the Defendant before the Time of his Apprenticeſhip expired, *& durante tempore quo ſervivit*, departed from his (the Plaintiff's Service; and upon Demurrer to this Declaration, the Defendant had Judgment, for it ſhould have been *Servire debuit*, like Treſpaſs for taking and carrying away his Timber and Brick *lying upon his Land, towards the Building* a Houſe *de novo ædificat'*, adjudged repugnant and inſenſible, for theſe could not be Materials *towards the Building* a Houſe which was already built. 1 *Salk.* 213. *Nevill* verſus *Soper*, and *Lawley* verſus *Arnold. Ibid.*

30. Where a Perſon is in Cuſtody of the *Marſhall, &c.* the Plaintiff would charge him either with an Action or in Execution, (*if in Term-time*) he muſt file a Bill againſt him, and deliver a Declaration to the Turn-key, and upon this he ſhall lie two Terms before he be diſcharged, even upon common Bail: But if *in Vacation*, then the Plaintiff muſt go to the Marſhal's Book in the Office, and make an Entry, *quod* (the Defendant) *remaneat in Cuſtodia ad ſectam* W. R. but then he muſt be in actual Cuſtody. 1 *Salk.* 213. *Tilſden* verſus *Palfriman.* Mod Caſes 253.

31. Leaſe of Tithes for three Years, rendring Rent at *Michaelmas* and *Lady-Day*, the Action of Debt was brought for Rent arrear for two Years; upon *Nil debet* pleaded, it was objected in Arreſt of Judgment, that this Declaration was incertain, for the Rent being reſerved to be paid on two Feaſts, the Plaintiff ought to ſhew at which of thoſe Feaſts it was due: *Sed per Curiam*, this is helped by the Verdict, but it had been ill upon a Demurrer. 3 *Mod.* 70. *Pye* v. *Brereton.*

(B)

Where a bad Declaration is made good by the Plea, Replication, &c.

See *Entry.* (B) 8.

1. IN an Action of Debt upon a Bond, the Plaintiff muſt alledge a Place where the Bond was made, becauſe the Jury muſt come from that Place, and if this is omitted the Declaration is ill, but if the Defendant pleads, that the Bond was made by Dureſs *at L.* that makes the Declaration good. *Trin.* 28 *H.* 8. *Dyer* 15, and *Mich.* 29 *H.* 8. *Dyer* 39. *S. P.*

2. Leaſe for Years of an Houſe and Lands, in which the Leſſor covenanted, that he was then lawfully ſeiſed of an Eſtate in Fee, *&c.* and in an Action of Covenant brought, the Plaintiff alledged in Fact, that at the Time of the Leaſe made, the Leſſor was not ſeiſed in Fee; the Defendant pleaded *Non eſt factum*, and it was found againſt him; and he moved in Arreſt of Judgment, that the *Breach was too general* aſſigned, for he ought to ſhew who was ſeiſed in Fee, if the Defendant was not; but adjudged, that if the Declaration had been for that Reaſon not

good, yet it was now made good by the Defendant's Pleading *Non eſt factum*, for he allows the Covenant was broken if it had been his Deed. 2 *Cro.* 369. *Muſcott* verſus *Ballatt.*

2 Mod. 42. Rozall *v.* Lampen. 3. Adjudged, that where a Declaration is bad, and the Defendant demurs, the Plaintiff may ſet it right in a ſecond Action, but if the Defendant take no Advantage of it, but pleads in Bar, and the Plaintiff takes Iſſue, and the Right is found for the Defendant, in ſuch Caſe the Plaintiff is eſtopped by the Verdict from bringing a new Action, and ſo he is, if he had demurred to the Plea in Bar, becauſe if the Fact is well pleaded, 'tis confeſſed by the Demurrer. 1 *Mod.* 20, 207. *Lepping* verſus *Kedgwin.*

Deeds.

Of the Delivery of a Deed. (A)
Of the Dates of Deeds and Commencement thereof, and of the laſt Words in Deeds, and of Deeds-Poll. (B)
Deeds void and not void, by Raſure or Interlineation. (C)
Of Pleadings in Deeds, and where *profert hic in Curia* is neceſſary, where not. (D)

(A)

Of the Delivery of a Deed. See *Seal.* (E) per totum.

1. A Deed conſiſts of three Parts, (*viz.*) Writing, Sealing, and Delivery, and it comprehends a Contract or Bargain between the Parties, of theſe there are two Sorts; a Deed indented, which conſiſts of two Parts, and a Deed-Poll, formerly called *Charta de una parte*, which is a plain Deed without any indenting, and 'tis ſealed only by one Party, becauſe there is no Occaſion for a Counterpart, as where a Man ſells his Eſtate; but even in ſuch Caſe the Deeds are uſually indented, tho' there is no Occaſion for a Counterpart.

2. Debt upon Bond againſt an Heir, who pleaded, that his Anceſtor did by Deed covenant with *W. R.* and *R. R.* to ſtand ſeiſed to the Uſe of himſelf for Life, and afterwards to the Uſe of the Defendant and his Heirs, and ſo he had nothing by Deſcent; the Plaintiff replied, that he did not make ſuch Covenant, upon which they were at Iſſue, and it was found, that the Anceſtor did covenant to ſtand ſeiſed as the Defendant had ſet forth in his Plea, but it was to the Uſe of himſelf *and his Wife* for their Lives, *&c.* Remainder *ut ſupra*, and that *he delivered the Deed* to *W. O.* as his Deed, to the Uſe of the ſaid *W. R.* and *R. R. if the ſaid* W. R. *would* agree to it and take the Charge upon him, if not, then the Deed to be void, and they found that *W. R.* died before he agreed to it; adjudged, that tho' he did not agree to it, yet it was the Deed of the Anceſtor, becauſe he delivered it as his Deed; 'tis true, it was upon Condition, that *W. R.* agreed to it, but that muſt be ſubſequent to the Delivery, and becauſe 'tis repugnant to the Deed the Condition ſhall be void. *Trin.* 31 *Eliz.* 1 *Leon.* 152. *Degory* verſus *Roes.* *Moor* 300. *S. C. contra*, that it was not the Deed of the Father, becauſe the Condition to *W. R.* was precedent to the very Eſſence of the Deed.

3. In Replevin, the Defendant made Conuſance as Bailiff to the Maſter and Fellows of *Emanuel* College, for a Rent granted to them in Fee; the Plaintiff replied *Non conceſſit*, upon which they were at Iſſue, and the Jury found that it was granted, and that the Grantor *delivered the Deed to a Stranger, to their Uſe*, and that they ſealed the Counterpart; adjudged, that a Stranger who had no Letter of Attorney might receive the Deed to their Uſe, and that their Sealing the Counterpart was a ſufficient Agreement to it. *Trin.* 40 *Eliz.* *Cro. Eliz.* 862. *Cooper* verſus *Goodriche.*

2 And. 36, 42. 4. The Grantor covenanted with the Grantee to aſſure to him ſuch Lands, and the Grantee covenanted by the ſame Deed to pay him 400 *l.* the Grantee firſt delivered the Deed to the Grantor, and afterwards he delivered it to the Grantee; in an Action brought it was objected, that by the Redelivery of the ſame Deed, it had loſt its Force; but adjudged a good Deed to both Parties, for there was a Writing, Sealing, and Delivery. *Trin.* 38 *Eliz.* *Cro. Eliz.* 483. *Croſſe* verſus *Powell.*

5. Leſſee for Years aſſigned his Term, and ſealed the Deed of Aſſignment in the Preſence of ſeveral Witneſſes, and of the Aſſignee himſelf, and the Deed was read at the ſame Time, but not delivered actually to the Aſſignee, for he went away and left it behind him; adjudged, that the Aſſignment was good, becauſe the Parties had done all Things requiſite to make it ſo, except the actual Delivery; but the Aſſignee having left the Deed behind him, and not countermanded, it ſhall be ſaid to be a Delivery to him in Law. *Trin.* 24 *Eliz.* *Cro. Eliz.* 7. *Shelton*'s Caſe.

6. In a Writ of Annuity, the Defendant pleaded, that he delivered the Deed as an *Eſcrow*, to be his Deed, upon a Condition to be performed by the Plaintiff, otherwiſe not, and that the Condition was not performed; this was adjudged an ill Plea, becauſe a Deed cannot be delivered

to the Party himſelf as an Eſcrow. *Mich.* 39 *Eliz. Cro. Eliz.* 520. *Whiddon*'s Caſe, and 835, *Hawkſland* verſus *Gatchell. S. P.*

7. In Ejectment of Lands in *Middleſex*, the Caſe was, the Leſſor being then in *Lincolnſhire*, and out of Poſſeſſion, made a Leaſe of the Lands, and delivered it to one who had a Letter of Attorney to the Uſe of the Plaintiff; the Attorney entered according to his Warrant, and delivered the Deed to the Plaintiff upon the very Land; adjudged, that the Leaſe was void, becauſe it was delivered to an Attorney in *Lincolnſhire* when he had nothing in the Land, and the firſt Delivery being void, the ſecond ſhall be ſo likewiſe, tho' made upon the Land; becauſe, tho' the firſt is void to paſs any Thing, yet 'tis his Deed by the Delivery, therefore the ſecond Delivery of it muſt be void. *Trin.* 34 *Eliz. Cro. Eliz.* 483. *Stepney* verſus *Elliott.*

8. The Obligor entered into a Bond, which he ſealed and delivered, *bearing Date* 1 *Maii*, the Obligee made a Releaſe, which was *dated* 3 *March*, being two Months before *the Date of the Bond*, but the Releaſe was not delivered till the *firſt of June*, which was a Month after the Date of the Bond, by which he releaſed to the Obligor all Actions, from the Beginning of the World, *until the Date of the Releaſe*; adjudged, that the Bond was not releaſed, which ſhews, that it was not a Releaſe when it was dated, but when it was delivered. *Paſch.* 25 *Eliz. Cro. Eliz.* 14. *Sir William Drury*'s Caſe.

9. Deed *dated* 26 *May*, 25 *Eliz. habendum* for three Years *from henceforth*, but it was not *delivered till the* 20*th of June following*; adjudged, that the Words *from henceforth*, are as much as to ſay *from the Delivery*, or from the Day of Making, *&c.* for 'tis not a Deed till 'tis *delivered*; and in this Caſe the Day of the Delivery, which was the 20*th of June*, ſhall be taken incluſive, as Part of the Term demiſed, but if it had been *a Die confectionis*, or *a die Datus*, there the Day it ſelf is no Part of the Demiſe, but ſhall be excluſive of it. *Mich.* 28 *Eliz.* 5 *Rep.* 1. *Cleyton*'s Caſe. *Mich.* 5 *Eliz.* * *Dyer* 218, 288. *Popham*'s Caſe. *Paſch.* 34 *Eliz. Franklyn* verſus *Holland. S. P. pl.* 10. *S. C.* See (B) *pl.* 11, 14. * 4 Leon. 4. S. C.

10. In Replevin, *&c.* the Defendant made Conuſance as Bailiff to the *Lord Howard*, ſetting forth, that *H.* was ſeiſed of the Manor of *D.* in Fee, and by Deed ſealed and *delivered*, 4 *Nov.* 29 *H.* 8. *and enrolled*; he ſold the ſame to the Lord *Audley*, who had Iſſue only one Daughter, married to *Thomas* Duke of *Norfolk*, who had Iſſue *Thomas Lord Howard, &c.* the Plaintiff in Bar to the Conuſance pleaded, that the ſaid Deed *was delivered* on the 4th of *Nov.* 30 *H.* 8. and that between the Date and Delivery, (*viz.*) on the 12th of *October*, the ſaid *H.* made a Leaſe of the ſaid Manor to *W. R.* for ninety-nine Years, and ſo conveyed the Term to himſelf, and traverſed, that *H.* ſold the ſaid Manor to the Lord *Audley*, before the ſaid Leaſe made to *W. R.* to this Replication the Defendant demurred; and it was inſiſted for him, that the Plaintiff ſhall not be allowed to alledge *another Delivery of* the Deed than what it imports, eſpecially ſince 'tis *enrolled and made a Record*, becauſe every Record imports a Truth in it ſelf, and therefore an *Averment* ſhall not be allowed againſt it, as to aver, that a Recognizance was acknowledged on another Day than when it is dated; 'tis true, a Man may aver againſt the Operation of a Record, but not againſt the Matter and Subſtance of the Record it ſelf, and the Court inclined to that Opinion. *Hill.* 31 *Eliz.* 1 *Leon.* 183. *Holland* verſus *Franklyn.* 2 Leon. 121.

11. Debt upon a Bill ſealed for the Payment of 42 *l.* when he ſhould be required; the Defendant pleaded *Non eſt factum*, upon which they were at Iſſue, and it appeared upon the Evidence, that the Bill was written in a Book, and that the Defendant put his Hand and *Seal* to the ſame Leaf on which it was written; adjudged, this was good, tho' there was no Evidence of the Delivery. *Trin.* 40 *Eliz. Cro. Eliz.* 613. *Fox* verſus *Wright.*

12. In Covenant, the Plaintiff declared on an Indenture *dated* 9 *Octob.* 38 *Eliz.* that he having hired a Ship of the Defendant for a Voyage to *Dantzick*, with Corn, it was agreed, that the Ship ſhould be laden with Corn; and in Conſideration that the Plaintiff had agreed, that the Defendant ſhould have one Half of the Corn, *quod tunc fuit* laden in the ſaid Ship, the Defendant promiſed to pay the other Half of the Money to the Plaintiff for the Corn, *quod tunc fuit* loaded in the ſaid Ship; and the Plaintiff alledged, that on the 9th of *October*, 38 *Eliz.* which was the Day on which the Indenture *was dated*, the Ship was loaded with ſixty Laſts of Corn, and for Non-performance of the Agreement this Action was brought; the Defendant pleaded, that the Indenture was *ſealed and delivered* the 28th of *Octob.* 38 *Eliz. & quod adtunc* there was not any Corn loaded in her, and traverſed *the Delivery* of the Deed 9 *Octobris*, or at any Time after, before the 28th of *October*; and upon Demurrer to this Plea it was adjudged againſt the Plaintiff, for he having declared on a Deed, *dated* 9 *Octob. &c.* it ſhall be intended to be *delivered on that Day*, and at no other Time; and if he ſhould afterwards confeſs it to be *delivered* at any other Time than when it was *dated*, it would be a Departure from his Declaration, and the Word *Tunc* muſt refer to the Eſſence of the Deed *by the Delivery* and not to the Date; now, tho' the Deed might be *dated on the 9th Day of October*, yet the Plaintiff by his Demurrer having admitted, that it was *not delivered* before the 18th Day of *October*, it muſt have the Effect as a Deed at that Time, and not before, ſo that if any Corn was loaded in this Ship on the *Day of the Date* of the Deed, the Defendant could not be charged with it, becauſe it was not a Deed till the *Delivery*, which in this Caſe was nine Days after the Date. *Mich.* 8 *Jac.* 2 *Cro.* 263. *Offley* verſus *Hix.*

13. In Debt upon a Bill for the Payment of 6 *l.* 13 *s.* 4 *d.* after theſe Words, *In Witneſs whereof*, this Clauſe was added, provided nevertheleſs, that the ſaid 6 *l.* 13 *s.* 4 *d.* is not to be paid till *W. R.* hath recovered in a Suit now depending between him and the Plaintiff, on a Bond of 200 *l.* con-

conditioned to ſave him harmleſs, *&c. or hath made an End of the Suit*, and then concludes, Given, *&c.* on the Day and Year aforeſaid; the Defendant pleaded in Bar, that *no End was made of the Suit* on the Bond for 200 *l.* nor any Recovery had, but that the ſame was ſtill depending; the Plaintiff replied, *that an End was made of the Suit by a Compoſition for* 20 *l.* given and accepted in full Satisfaction for the ſame; the Defendant rejoins, that no ſuch End was made of the Suit upon which they were at Iſſue, and it was found for the Plaintiff; but it was moved in Arreſt of Judgment, that tho' the Fact was found for him, (*viz.*) *That the Suit was ended* by Compoſition of 20 *l.* given and accepted in full Satisfaction of the Suit, yet the Law which ariſes upon that Fact was plain againſt him, becauſe the Giving 20 *l.* cannot be a Satisfaction for 200 *l.* which is very true; but in this Caſe the 20 *l.* was not given in Satisfaction of 200 *l.* but in Diſcharge of the Suit upon the Bond; adjudged likewiſe, that tho' this *Proviſo* comes after the Words, *In Witneſs whereof, &c.* yet 'tis Parcel of the Bill, for thoſe Words are not neceſſary to conclude it, becauſe the Bill would have been good, if they had been omitted. *Mich.* 1 *Car.* 3 *Bulſt.* 300. *Thompſon* verſus *Butcher*. Pleas. (B) 1. *S. C.*

14. In Ejectment, the Plaintiff declared on a Leaſe made to him by one *W. R.* dated 1 *Jan.* 15 *Jac.* and ſealed and *delivered* 12 *Jan.* following, to hold from *Chriſtmas* laſt paſt for two Years; the Jury found the Leaſe and a *Letter of Attorney* to deliver it, (*viz.*) that the Leſſor was ſeiſed in Fee of the Lands, and being ſo ſeiſed, he executed the Leaſe, but did not *deliver* it as his Deed to the Plaintiff on the 15*th Day of January*, but by a *Letter of Attorney* bearing Date on that Day, he gave full Power to *M. M.* his Attorney, to enter on the Lands in his Name, by Vertue whereof he entered, and immediately afterwards delivered the Leaſe to the Plaintiff as the Deed of the Leſſor; it was objected, that this Declaration was ill, for the Plaintiff declared on a Leaſe made to him by *W. R.* which, if ſo, then the Letter of Attorney had been idle and to no Purpoſe; but adjudged good, and that it was the Leaſe of the Leſſor. *Trin.* 16 *Jac.* 1 *Brownl.* 128. *Hill* verſus *Scales*.

15. Debt for 25 *l.* in which the Plaintiff declared, that by Deed it was agreed between him and the Defendant, that the grey Nag of the Defendant, by ſuch a Day, ſhould be rid from *Hyde-Park Corner* to the firſt Houſe in *Reading* in three Hours, on which 50 *l.* was betted on each Side, and on the Forfeiture of 25 *l.* and averred, that the Horſe was not rid, *&c.* The Defendant craved *Oyer* of the Deed, which was thus, *It is agreed, that a grey Nag*, &c. In Witneſs whereof *We have hereunto ſet our Hands and Seals*; there was a Plea and Replication, and impertinent Rejoinder, and thereupon a Demurrer; and it was inſiſted for the Defendant, that he being not named in this Deed, otherwiſe than by ſetting his Hand and Seal to it, he was no Party to it ſo as an Action might be brought againſt him upon it; but adjudged, that where the Deed runs in the firſt Perſon, as *We have hereunto ſet our Hands and Seals*, there the bare Signing and Sealing makes them both Parties, and by Conſequence an Action would lie, and that the Defendant ſhould have rid the Horſe within the Time limited, otherwiſe he muſt pay the 25 *l.* Forfeiture. 1 *Salk.* 214. *Nurſe* verſus *Frampton*. See 3 *Cro.* 56.

16. In Ejectment, the Plaintiff made a Title under ſeveral Deeds, and the Jury found againſt them all; and upon a Motion the Court ordered them to be kept by the Officer, in Order to a Proſecution for Forgery; but upon Application to the Court of Chancery, from whence the Iſſue was directed, a new Trial was granted, and thereupon the Plaintiff moved to have his Deeds out of Court, which was granted, becauſe the Deeds themſelves were never in Iſſue directly; 'tis true, it might have been otherwiſe upon *Non eſt factum* pleaded, and the Iſſue had been upon that. 1 *Salk.* 215. *Fitch* verſus *Well*. See *Wymark*'s Caſe.

17. An Action was founded upon a ſpecial Contract, by Parol of which the Plaintiff had a Note, which he intended to produce in Evidence to prove the Contract; and upon a Motion made by the Defendant to have a Copy of it, the Court would not grant it. 1 *Salk* 215. *Hill* verſus *Aland*.

(B)

Of Dates of Deeds, and Commencements thereof, and of the laſt Words in Deeds, and of Deeds-Poll.

See *Bonds*. (F) per totum. *Dates* per totum. *Leaſes*. (D) 8. *Time*. (A) 1, 23, 28.

1. THE Leſſor made two Leaſes of two Parcels of Land to two Perſons for thirty-one Years, both the ſaid Leaſes to commence at one and the ſame Time; afterwards, reciting both the ſaid Leaſes, he made a new Leaſe of both the ſaid Parcels to another, by which, after the Expiration of the ſaid thirty-one Years, he granted to him all the ſaid Lands, *Habendum a die confectionis of that Leaſe* (the ſaid Term of thirty-one being ended) for and during, and to the End and Term of thirty-one Years next enſuing; adjudged, that this ſecond Leaſe ſhould take Effect after the thirty-one Years were ended, and not before; 'tis true, in the *Habendum* 'tis to take Effect *a die confectionis* of the Leaſe, but that is only a farther Declaration of what was before expreſſed in the Premiſſes, that he ſhould have the Lands after the Expiration of thirty-one Years, and not before. *Mich.* 9 *Eliz. Dyer* 261.

2. Our antient Deeds had no other Dates than the *Month and Year* in which they were made, they never mentioned the *Day of the Month*, and this was to ſignify, that the Deed was not made

in haſte, or within the Compaſs of a Day, but upon more mature Deliberation; and even at this Day the Date is not eſſential to a Deed, for if it Wants a Date, or have a falſe and impoſſible Date, yet the Deed is good. *Hill.* 26 *Eliz. Goddard's* Caſe. *Style* 97. *Kenniſton* v. *Jones. S. P.*

3. Leſſee for 100 Years made a Leaſe for forty Years to *L. E.* if he ſhould ſo long live, and afterwards to his Son for twenty-three Years, *from the Date of the ſecond Leaſe, after the Death of L. E.* adjudged, that this Leaſe ſhall commence, not from the Date, but from the Death of *L. E.* becauſe by the firſt Words of Limitation 'tis a good Leaſe, and it ſhall not be made void by any ſubſequent and inſenſible Words. *Godb.* 166. *Seaman's* Caſe.

4. Leaſe for twenty-one Years, if the Leſſee ſo long lived and continued in the Service of the Leſſor; he died, adjudged, that the Leaſe ſhall continue, for there was no Negligence in the Leſſee to ſerve, but it was the Act of God, that he could not ſerve any longer. *Cro. Eliz.* 643. *Mich.* 40 *Eliz. Warnford* verſus *Giles.*

5. In Replevin, *&c.* for Taking his Cattle; the Defendant avowed, for that he was ſeiſed for Life of the ſixth Part of the *Locus in quo, &c.* and ſo juſtifies the Taking Damage-feaſant; the Plaintiff replied, that before the Taking, *&c.* one *Gabriel Hawley* was ſeiſed of another ſixth Part, *&c.* and demiſed it to him (the Plaintiff) *for ninety-nine Years from the Sealing and Delivery* of the Deed, by Reaſon whereof he entered and put in his Cattle; the Defendant maintained his Avowry, and traverſed the Leaſe made to the Plaintiff, *prout, &c.* upon which they were at Iſſue, and the Jury found, that the ſaid *Gabriel Hawley* demiſed the ſixth Part, *&c.* to the Defendant *for a Year*, and before that was expired he made a Leaſe thereof to the Plaintiff for ninety-nine Years; the Queſtion was, whether this was a good Leaſe for ninety-nine Years, as the Plaintiff in his Replication had ſet forth; it was objected, that it could not, becauſe there was a Term for one Year then in Being, during which Term the Leſſor could not demiſe it for ninety-nine Years *from the Sealing and Delivery of the Deed*, becauſe he had no Intereſt in the Place where, *&c.* during that Year: *Sed per Curiam*, this is a Leaſe for ninety-nine Years from the Sealing and Delivery, tho' not in Point of Intereſt but in Computation, and as this Caſe was, 'tis not material whether the Year was expired, or not, becauſe the Cattle were taken afterwards, and then he had Power to put them in, which is the *Subſtance* of the Matter in Queſtion. 1 *And.* 118. *Gewert* v. *Sidenham.*

6. In Replevin, *&c.* the Defendant avowed for 9*s.* Rent; the Plaintiff replied, and ſet forth a Deed of Feoffment made of the ſame Lands before the Statute *Quia emptores terrarum*, which was made in the 18th Year of *Ed.* 1. by which Deed there was only ſix Shillings and eight Pence reſerved, and demanded Judgment, if the Defendant ſhall be received to demand more; this Deed was without any Date. *Mich.* 9 *Jac.* 2 *Brownl.* 107. See *Poſtea pl.* 11.

7. Adjudged, that what is written in a Deed, after *In Witneſs whereof, &c.* is as well Part of that Deed as what is written before. *Moor* 3.

8. By the Statute 27 *H.* 8. *cap.* 16. 'tis enacted, that Lands ſhall not paſs by a Deed of Bargain and Sale, unleſs 'tis enrolled within ſix Months *after the Date* of the Deed; the Deed was enrolled on the laſt Day of the ſix Months, excluſive of the Day of the Date, and adjudged good, for the Day of the Date ſhall not be accounted any Part of the ſix Months limited by the Statute, for the Date and the Day of the Date is all one, becauſe the Date is all that Day on which the Deed was dated. *Moor* 40.

9. The Queen granted the Manor of, *&c.* to the Defendant *habendum a die confectionis* of the Patent, during the *Life* of *I. I.* adjudged, this was a void Grant, becauſe a *Freehold* was granted, and that cannot ſtay and be in Suſpenſe till the Day after the Grant thereof. *Moor* 393. In *Berwick's* Caſe.

10. Leaſe to Two, *habendum* to them *a die datus* of the Leaſe for their Lives, with a Letter of Attorney to make Livery; the Queſtion was, whether this was a good Leaſe, becauſe it was to commence at a Day to come, and adjudged, that it was good, if Livery was made after the Day of the Date. *Moor* 636. *Mellow* verſus *May.*

11. A Leaſe was dated 1 *Jan. habendum a die datus*, and in Ejectment the Plaintiff declared upon a Leaſe made 1 *Jan.* which muſt be Wrong, if *Cleyton's* Caſe is Law, becauſe there it was held, that by the *Habendum a die datus*, the Leaſe cannot commence on the very Day it is dated, but on the Day after the Date; but notwithſtanding that Caſe, the Plaintiff had Judgment in this Caſe, for the Court held, that *a Datu*, and *a die Datus*, are not the ſame as it was held in *Cleyton's* Caſe, but that *a Datu* muſt be taken from the Delivery, but *a die Datus* from the Day on which it was dated. 2 *Cro.* 135. *Osborne* verſus *Rider.* See (A) *pl.* 9, and *Antea pl.* 6.

12. Leſſee for Life made a Leaſe for Years, and afterwards purchaſed the Reverſion, and died within the Term; adjudged, that the Leaſe for Years was determined, and that the Heir in Reverſion might enter; but if a Man made a Leaſe for Years where he had nothing, and then purchaſeth the Reverſion, and dieth, the Heir ſhall be eſtopped to avoid it. *Hetley* 91. *Rothwell's* Caſe.

13. In Debt againſt an Executrix, the Plaintiff declared upon a Leaſe made to her Teſtator, *dated* 25 *Martii*, &c. *Habendum a die Datus* for ſeven Years, *&c.* Upon *Nil debet* pleaded, the Jury found, that the Plaintiff by Indenture *dated* 25 *March*, and delivered on the ſame Day demiſed the Lands to the Teſtator, *Habendum*, &c. *a die Datus from henceforth*, next following, for ſeven Years; and upon this Verdict the Queſtion was, whether the Leaſe ſhall commence from the *Making* it, which was on the 25*th of March*, or from the *Day of Date*; for if the Term was to commence from the Making it, then the Plaintiff had miſtaken the Leaſe, becauſe he declared on a Leaſe to commence *a die Datus*; it was inſiſted, that it was to commence *a die Datus*, and not

not from the Making, becauſe the Words *from henceforth* relate to the *Day of the Date*, and ſo to the Commencement in Point of Intereſt, and not in Point of Computation, for that is excluded; otherwiſe this Leaſe would commence in Point of Intereſt on one Day, and in Point of Computation upon another Day; and if ſo, then the Rent being reſerved, payable yearly on the *25th of March*, for ſeven Years, the Term would End on the *25th of March*, and then the Rent would be payable a Day after the End of the Term in the laſt Year: But adjudged againſt the Plaintiff, (*viz.*) that he had miſtaken this Leaſe; for a Leaſe *Habendum from henceforth*, includes the Day on which it was dated, but *Habendum a die Datus* excludes it, ſo that this Term ſhall begin in Computation on the 25th of *March*, and in Intereſt on the 26th of *March*, but if it had been *Habendum from the Day of the Date from henceforth* for ſeven Years, then the Plaintiff had declared Right. *Allen* 75. *Corniſh* verſus *Cawſey*.

14. The Plaintiff declared on a Leaſe made 12 *Decemb. Habendum a primo die*, the Jury found that it was dated 1 *Decemb. Habendum from henceforth*, but delivered 12 *December*; adjudged, that *from the Date* and *from henceforth* are the ſame, becauſe 'tis a Computation of Time paſt, and both ſhall be pleaded to commence from the *Day of the Date*; but if it had been *Habendum a die Datus*, the Ejectment cannot be alledged the ſame Date; contrary if it had been *from henceforth*. 2 *Cro.* 258. *Lewellin* verſus *Williams*, and 135. *Osborn* verſus *Ryder*, and 3 *Bulſt.* 177, 203. * *Bacon* verſus *Waller*. See (A) *pl.* 8.

* 1 Roll. Rep. 387.

15. Leaſe for Years made 5 *May*, 10 *Jac. habendum from the Feaſt of Annunciation laſt paſt*; and the Jury found a Leaſe made 5 *May*, 10 *Jac. habendum de feſto Annunciationis tunc præterito*, for twenty-one Years, *proxime ſequen'* Dat' Indenturæ præd'; adjudged, that this was not the ſame Leaſe. *Hob.* 19. *Moor* verſus *Muſgrave*. *Style* 118. *Corniſh* verſus *Cawſie*. *S. P.*

16. Feoffment in Fee to *L. E.* and his Heirs, in Truſt, that they ſhould make a Leaſe for Years, *&c.* to begin *at* the Feaſt of *St. Philip and Jacob*, and they made a Leaſe to begin *from* the Feaſt, *&c.* adjudged, this was a good Leaſe, according to the Agreement. *Watts* verſus *Dix*. *Style* 188, 205.

17. Error to reverſe a Judgment in *C. B.* in Ejectment, wherein the Caſe upon the Pleadings was: *Jſ.* Queen *Elizabeth* being ſeiſed in Fee, *Anno* 42 *of her Reign*, made a Leaſe of the Lands in Queſtion to *I. M.* for thirty Years, reſerving Rent, the Inheritance was afterwards conveyed in Truſt for the Queen-Mother, who, *Anno* 14 *Car.* 1. made a Leaſe to *Francis Godolphin*, reciting, that whereas Queen *Elizabeth*, *Anno* 32 *of her Reign* (when it was *Anno* 42) demiſed to *I. M.* (but did not ſay for how many Years) now ſhe demiſed it to the ſaid *Francis Godolphin* for twenty-one Years, to commence after the End of the Term granted by Queen *Elizabeth*; they find that no Leaſe was made by Queen *Elizabeth*, *Anno* 32 of her Reign; now, whether it ſhould begin from the Making, or expect till the Leaſe *Anno* 42 ſhould be expired, was the Queſtion; and adjudged, that it ſhould begin from the Making, for every Leaſe for Years muſt have a certain and expreſs Beginning, or muſt refer to ſomething which may make it certain; now this Leaſe to *Godolphin* refers to a Leaſe that never was, ſo it muſt begin preſently; 'tis the ſame Thing as if a Leaſe ſhould be made to begin the 30th of *February*, ſuch Leaſe muſt begin preſently. 1 *Vent.* 83. *Foot* verſus *Berkley*. 1 *Lev.* 234. *S. C. Sid.* 460. *S. C.* See *Cro. Car. Miller* verſus *Johns*. *S. P. Dyer* 116. *S. P.* 1 *And.* 3, *Leonard Mount*'s Caſe.

18. Debt on a Bond, in which the Plaintiff declared, that the Defendant, on *March* 10, 34 *Car.* 2. by Bond *dated* 10 *Octob.* 33 *Car.* 2. *Sed primo deliberat'* 10 *March*, became bound; the Defendant pleads, that on the ſaid *tenth Day of October*, when the Bond bears Date, there was no ſuch Perſon in Being as the Plaintiff; and upon Demurrer to this Plea it was adjudged, that where the Plaintiff *declares on a Date*, &c. he cannot afterwards ſay, that it was *primo deliberat'* on another Day, becauſe this would be a Departure; for every Deed is ſuppoſed to be made on the ſame Day that it is dated: But where the *Date is miſtaken*, the Party may ſet forth, that by a Deed dated on ſuch a Day, *ſed primo deliberat'* on another Day, the Party became bound; and ſo is *Dyer* 307. a. and 3 *Cro.* 773, 890, and *Dyer* 315. a. to be underſtood. 3 *Lev.* 348. *Stone* verſus *Bale*. See 2 *Rep.* 4. b.

19. Debt upon Bond, conditioned for Performance of Covenants in a Leaſe, one of which was, that the Plaintiff *ſhould quietly enjoy*, and the Breach aſſigned was, that he *did not quietly enjoy*, &c. The Defendant pleaded, that the Leaſe was made *Habendum* from *Michaelmas* 1661, to *Michaelmas* 1668, and that paying Rent, *&c. half yearly* he ſhould quietly enjoy, and then ſhews, that he did not pay the laſt half Year's Rent, ending at *Michaelmas* 1668; and upon Demurrer to this Plea, for that the Leaſe was, *habendum* from *Michaelmas* to *Michaelmas*, *&c.* there was not an entire half Year due, becauſe *Michaelmas-day* was excluded; but adjudged, that 'tis true, in pleading *Uſque tale feſtum* will exclude the Day, but in *Reſervations* the Conſtruction ſhall be governed by the Intention of the Parties. 1 *Vent.* 292. *Pigott* verſus *Bridge*. See *Cro. Eliz. Umble* verſus *Fiſher*.

20. Debt upon a Charter-Party, by which *Bentley*, Maſter, and Part-Owner, with the Conſent of *Cooker* the other Part-Owner, let the Ship to the Defendant *Child*, for a Voyage, for which he covenanted to pay *Bentley* ſo much as Maſter, and alſo covenanted with *Bentley*, *necnon cum prædicto Cooker*, to pay him the ſaid *Cooker* 300 *l.* for which he brought this Action; the Defendant *Child* demands *Oyer* of the Deed, which was thus, *This Indenture of Charter-Party, Witneſſeth, that* Bentley, *the Maſter and Part-Owner, with the Conſent of* Cooker, *the other Part-Owner*, hath let the Ship, *&c.* and then follow the Covenants; the Defendant pleads, that only *Bentley and he were Parties to this Deed*, and ſealed and delivered the ſame, and that the Plaintiff *Cooker* was no

Party to it; and upon Demurrer to this Plea, the Plaintiff had Judgment, becauſe this was not a Deed between Parties, (*viz.*) between *T. B.* of the one Part, and *W. C.* of the other Part, but only a *Deed-Poll*; now, where the Deed is *between the Parties*, none can have an Action upon that Deed but he who is Party to it, but where 'tis a *Deed-Poll* one of the Parties may covenant with another who is not a Party to do ſeveral Acts, for the Non-performance whereof he may bring an Action. 2 *Lev.* 74. *Cooker* verſus *Child.*

21. Debt, *&c.* in which the Plaintiff declared, that the Defendant by a certain Deed promiſed to pay, *&c.* 210 *l.* for 448 Sheep ſold to him by *Thomas Wawen ex parte* of the Plaintiff *prout ſcriptum, &c.* The Defendant craved *Oyer* of the Deed, which was, ſſ. *Articles of Agreement made between* Thomas Wawen, *on the Behalf of* Eliz. Gilby (the Plaintiff) *and* Lionel Copley *of the other Part*; wherein *Wawen* covenants that *Copley* ſhall enjoy ſuch Lands for eight Years, *&c.* and in Conſideration thereof, and for that *Wawen* had ſold to *Copley* 448 Sheep belonging to the ſaid *Gilby*, he the ſaid *Copley* covenanted to pay ſo much Rent for the Lands, and doth promiſe (but did not ſay to whom) to pay to *Eliz. Gilby* 210 *l.* for the Sheep, *&c.* and for Non-payment *ſhe* brought this Action; upon Demurrer to the Declaration it was objected, that *Wawen* ought to have brought the Action, and not *Gilby, who is no Party to the Deed*, becauſe where a Deed is made *inter partes*, as this is, ſhe who is no Party to it cannot have any Benefit by it, as ſhe might if it was a *Deed-Poll*, for in ſuch Deed there may be a Covenant with a *Stranger*, and that was *Cooker* and *Child*'s Caſe; 'tis true, in the Caſe of *Dutton* and *Pool*, the Promiſe was made to the Father, and the *Son* brought the Action, but that was an *Aſſumpſit* upon a verbal Promiſe, but here the Action is founded on a *Deed*; ſo where a Bill is made to *A.* for the Uſe of the ſaid *A.* and *B.* in ſuch Caſe *B.* cannot *releaſe* the Debt, tho' the Bill was made to his Uſe, becauſe he is no Party, and that was *Offley* and *Ward*'s Caſe; and this was the better Opinion in the principal Caſe, and *Shaw* and *Norwood*'s Caſe was agreed to be good Law. 3 *Lev.* 138. *Gilby* verſus *Copley.*

(C)

Void, or not, by Raſure and Interlineations.

1. THE Leſſor made a Leaſe for thirty-one Years, afterwards by another Deed, reciting the ſaid Leaſe, he demiſed the ſame Lands to *W. R.* the ſaid thirty-one Years being ended, *Habendum a die confectionis* of the ſecond Leaſe (the ſaid Term being ended) for thirty-one Years next enſuing, and the Words *a die Confectionis* were blotted with a Stroke of the Pen drawn thro', but yet were legible, and this was done by the *Leſſee himſelf*; adjudged, that the Deed was void, tho' the Blotting was not in a Place material, it being done by the Leſſee himſelf. *Mich.* 9 *Eliz. Dyer* 261. *Moor* 35. *S. P.*

2. In Ejectment, it appeared, that the Name of the Leſſor was wrong, and that after the Deed was ſealed, the Leſſee interlined it to make it right, which Matter the Defendant pleaded to avoid the Deed; adjudged, that if the Defendant had not ſhewed the Special Matter, and concluded his Plea in Bar to the Action, it had been not well pleaded, for to ſay *Non eſt factum* generally, is not good, as where an Action of Debt was brought on a Bond, the Seal being broken off, the Defendant cannot plead *Non eſt factum*, and give the Special Matter in Evidence, becauſe it was once his Deed, but to plead *Non eſt factum*, implies that it was never his Deed. *Moor* 30, 66. *S. P.*

3. Where an Eſtate cannot have its Eſſence without a Deed, there, if that Deed is raſed in any material Part, as in the Year of the King, or the Date after the Delivery, it makes the Eſtate void; but where it may have an Eſſence without a Deed, there, tho' 'tis created by a Deed, and that Deed is raſed, it ſhall not deſtroy the Eſtate, but the Deed. *Cro. Car. Miller* verſus *Manwaring.*

(D)

Of Pleadings in Deeds, &c. where profert hic in Curia is neceſſary, where not.

1. IN Ejectment, the Defendant pleaded, that *W. R.* was ſeiſed, and by Deed indented and enrolled, *Quod quidem ſcriptum hic in Curia prolat'*, he bargained and ſold the Lands to *R. R.* and his Heirs, who demiſed the ſame to this Defendant for a certain Term of Years, *&c.* the Plaintiff replied, and confeſſed the Deed of Bargain and Sale, but ſet forth, that *in eodem ſcripto indentato* (without ſaying *hic in Curia prolat'*) there was a Proviſo, that if the ſaid *R. R.* did not pay 300 *l.* to *W. R.* on ſuch a Day, then the Bargain and Sale ſhould be void, and that he did not pay it; the Queſtion was, whether the Plaintiff ſhould take any Advantage by this Deed, without a *Profert hic in Curia*; adjudged, that a Deed is ſet forth with a *Profert hic in Curia*, it remains in Judgment of Law in Court all that Term, and any Perſon may, during that Time, have Benefit by it, tho' he hath it not ready to ſhew. *Mich.* 36 *Eliz.* 5 *Rep.* 74. *Wymark*'s Caſe.

2. In Treſpaſs for Taking and carrying away four Aſhes, in a Place called *Cave-Cloſe*, the Defendant pleaded, that one *W. R.* was ſeiſed of the ſaid Cloſe, *&c.* and demiſed the ſame to *R. R.* for the Life of *M. P.* and covenanted, that it ſhould be lawful for the Leſſee and his Aſſigns to take *Houſebote*, and ſo derived a Title to his Maſter, and that the Defendant, as his Servant, took the four Aſhes for *Houſebote*; and upon Demurrer to this Plea it was objected, that the Defendant had juſtified under a Covenant in an Indenture, without a *Profert hic in Curia indenturam*, *&c.* it being a Thing which cannot be granted without Deed, to which it was anſwered, that he did not meddle with the Title, but juſtified only as a Servant; but adjudged, that where a Servant juſtifies under the Intereſt of his Maſter, he meddles with the Title, and muſt therefore produce the Deed, which being the Subſtance of his Title, he cannot juſtify without ſhewing it. *Mich.* 8 *Jac.* 2 *Cro.* 291. *Purfrey* verſus *Grimes.* Juſtification. (B) 12. *S. C.* 10 *Rep.* 88. *Dr. Leyfeild's* Caſe. *S. P.* Evidence. (D) 2. *S. C.*

3. *Quare Impedit* againſt *Sir John Shelley*, and againſt the Ordinary and Incumbent, in which the Plaintiff declared, that *Ed.* 4. *Anno* 8 of his Reign, granted to *W. R.* that he and his Heirs and Aſſigns ſhould have Felons Goods, and all other Goods forfeited *or to be forfeited* to the King, his Heirs or Succeſſors in ſuch a Manor, and ſo derives a Title to himſelf of theſe Liberties, and the Advowſon to *Sir John Shelley*, who *granted the next Avoidance to R. R.* who *was outlawed for Debt*, and that the Church became void, ſo that it was lawful for him to preſent; the Defendant, *Sir John Shelley*, confeſſed the Action, and the Biſhop demurred to the Declaration, ſuppoſing that the Grant extended only to the Goods of Perſons outlawed for Felony, and not in perſonal Actions, amongſt many other Points, this was one, whether the Declaration was good, for that the Plaintiff had ſet forth a Title to preſent, becauſe the Perſon to whom the Grant of the next Avoidance was made, had forfeited it to the Plaintiff upon this Outlary, and he did not conclude his Declaration with a *Profert hic in Curia* the ſaid Grant; but adjudged, that the Declaration was good, becauſe the Grant could not be produced by the Plaintiff, he being a Stranger to it, but that a Title accrewed to him wherever the Grant was, or the Grantee himſelf at the Time of the Outlary. *Mich.* 17 *Jac. Hob.* 303. *Holland* verſus *Shelley.*

4. In Ejectment, *&c.* the Defendant pleaded, that *W. R.* died ſeiſed of the Lands, which afterwards deſcended to him as Heir at Law, *&c.* the Plaintiff replied, that before *W. R.* had any Thing in the Lands, one *R. R.* was ſeiſed thereof, and demiſed the ſame to *O. O.* who died Inteſtate, and that *Adminiſtration was* granted to the Plaintiff, and traverſed, that *W. R.* died ſeiſed; the Defendant took Iſſue upon this Traverſe, and the Jury found for the Plaintiff; then it was objected in Arreſt of Judgment, that the Plaintiff had ſet forth an Adminiſtration, without a *Profert hic in Curia*; but adjudged, that the Declaration was good without it, becauſe it was the Poſſeſſion, and not the Adminiſtration, which gave him a Title, and the one was affirmed by the Verdict, and the other is only an *Inducement* to the Traverſe. *Hill.* 15 *Jac. Hob.* 218. *Cheſter* verſus *St. John.*

5. Where an Adminiſtration or an Executorſhip is of the Subſtance of the Action, there the Plaintiff muſt always conclude with a *Profert hic in Curia*, tho' this is now cured by Verdict where 'tis omitted, but yet in ſome Caſes the Declaration is good without a *Profert hic in Curia*, as where an Action on the Caſe was brought againſt the Sheriff for an Eſcape, ſetting forth, that whereas the Plaintiff, *as Executor of W. R.* had brought an Action of Debt againſt *R. R.* upon which he was outlawed, and was afterwards taken upon the *Capias Utlegatum*, and the Defendant ſuffered him to eſcape; this Declaration was held good, tho' the Plaintiff had declared as Executor, without a *Profert hic in Curia literas teſtamentarias*, for the Eſcape was a Wrong to the Executor himſelf, tho' what he recovers ſhall be Aſſets in his Hands. *Trin.* 12 *Jac. Hob.* 38. *Barrett* verſus *Winchcomb.*

6. The Defendant bargained and ſold his Lands to *W. R.* for 100 *l.* Proviſo, that if he paid the 100 *l.* and 10 *l.* for Forbearance a Year afterwards, then the Sale to be void, and it was agreed, but not in the Deed, that *in the mean Time the Bargainee ſhould have the Profits of the Land*, which made it amount to more than 10 *l.* in the Hundred. In Replevin, the Defendant avowed, *&c.* and the Plaintiff in Bar to the Avowry replied, ſetting forth the Bargain and Sale to *W. R.* and that he gave the Plaintiff Leave to put in his Cattle; the Defendant rejoined and confeſſed the Bargain and Sale for 100 *l.* Proviſo, that if he paid it in a Year afterwards, and 10 *l.* more for the Forbearance, that then, *&c.* then he pleaded the Statute 13 *Eliz. of Uſury*, with an Averment, that the Profits of the Lands were more than 10 *l. per Annum*; the Plaintiff ſurrejoined, confeſſing the Proviſo, but ſaid, that *before the Sealing the Deed*, it was agreed *verbally* between them, *that the Defendants ſhould receive the Profits, and not the Plaintiff*; and the Queſtion was, whether he might plead this verbal Agreement to avoid the Uſury; and adjudged, that he might, becauſe this Agreement is Part of the original Contract; but if this Agreement had been expreſſed in the Deed, and it had been delivered accordingly, then it had been an uſurious Contract, but an Agreement to take the Profits after the Deed was executed, will not make it ſo. *Trin.* 8 *Jac.* 1 *Brownl.* 191. *Burlacy* verſus *Ellington.*

Deer-Stealing.

(A)

See *Indictment. Juſtice of Peace.*

THE Defendant was indicted and convicted at Seſſions for Deer-ſtealing, and breaking the Park Pales; and upon a Writ of Error brought, he moved to be bailed till that was determined, but it was denied, upon which he was committed in Execution to the *Marſhalſea*; and there being another Indictment againſt him at the Seſſions for Deer-ſtealing, to which he had pleaded Not guilty, it was ruled, that it ſhould be removed and tried here. *Sid.* 286. *The King* verſus *Whitmore*. *Sid.* 320. *The King* verſus *Maſcall, S. P.*

See Acceſſary. (A) 9. Certiorari, (C) 6.

Default.

(A)

1. DEfault and Saver of Default, made a large Title in the old Books, when Actions were brought by Real Writs, as in a Writ of Right, *Quod ei deforceat, &c.* which are now quite out of Uſe; however I ſhall mention one or two Caſes concerning that Matter: In a *Quod ei deforceat, &c.* the Tenant joined Iſſue upon the mere Right, and the Jury appearing, the Demandant made Default; adjudged, that in ſuch Caſe Judgment final be given; but if the Tenant had made Default, 'tis otherwiſe, for then a *Petit Cape* muſt Iſſue againſt him; for it may ſo happen, that he may ſave his Default. *Trin.* 38 *Eliz.* 5 *Rep.* 85. *Penryn*'s Caſe. *Moor* 403. *S. P.*

2. In a Writ of Right, the Jury appeared, and the Tenant made Default; adjudged, that the Inqueſt ſhall not be taken upon his Default, for it ſhall be only recorded, that he made Default, and then a *Petit Cape* ſhall be awarded againſt him; but if the Demandant had made Default after Iſſue joined, it had been peremptory againſt him. 1 *Mar. Dyer* 98. *Lord Windſor*'s Caſe.

3. In Waſte againſt Husband and Wife, who was ſeiſed in Right of his Wife, *they appeared by Attorney*, and afterwards ſuffered Judgment to go by Default; then the Plaintiff releaſed the Damages, and took Judgment of the Place waſted, and having Seiſin, the Husband and Wife brought a *quod ei deforceat*, and the Queſtion was, whether it would lie, or not? it was inſiſted, that it would lie; becauſe to looſe the Land by Default, is no more than to looſe it in a Real Action upon the *Grand* or *Petit Cape*; but adjudged, that it will not lie, becauſe 'tis more than a Default *after Appearance*; for in ſuch Caſe the Tenant ſuffering Judgment to go by Default, 'tis a Contempt of the Court, in not anſwering the Charge, and 'tis the ſame Thing as if he had pleaded an inſufficient Plea. 1 *And.* 171. *Thatcher* verſus *Elmer.*

4. The Attorney General exhibited an Information againſt ſix Defendants, for aſſaulting the Sheriff of *Middleſex*, in ſerving an Execution on *W. R.* by Means whereof he eſcaped; all the Defendants plead Not guilty, and at the Trial there was but one of them appeared, the other five made Default; it was moved, that their Default ſhould bind him who appeared, becauſe they having all joined in one Plea, the Suit was entire, and therefore they cannot now be ſevered; but adjudged, that the Information being for a Criminal Offence, tho' they have all pleaded Not guilty, yet 'tis ſeveral, as to every one of them, and the Default of one ſhall not be the Default of the other; ſo the Enqueſt was taken by Default againſt thoſe five who did not appear, and they were all found guilty; but he who appeared was found not guilty, and the Court find them reſpectively, which Fines were proportioned according to the Circumſtances which aggravated the Offence. *Paſch.* 8 *Car. Cro. Car.* 182. *Sir James Wingfield*'s Caſe. *See* Fines. (A) 1. *S. C.*

5. The Earl of *Northumberland* brought a *Ceſſavit* againſt *Salthill*; the Sheriff returned him ſummoned, and upon Default, there was Judgment againſt him in *C. B.* upon which a Writ of Error was brought in *B. R.* (having firſt brought a *Writ* of *Deceit* againſt the Sheriff in *C. B.* upon which it appeared, that he was not ſummoned) and now he ſhould have aſſigned for Error *Non Tenure* at the Time of the *Ceſſavit* brought; but adjudged, that he could not, for this being a good Plea in Abatement to a *Ceſſavit*, and he having omitted to plead it by his own Default, eſpecially being Matter of Fact, he is concluded; 'tis true, he omitted to plead it, becauſe he was never ſummoned; therefore having obtained a Judgment in a Writ of Diſceit againſt the Sheriff, he may falſify the Judgment in the *Ceſſavit* for that Reaſon, but he ſhall never aſſign *Non Tenure* for Error. *Palm.* 57. *The Earl of Northumberland* verſus *Salthill.*

Iſſues joined, (D) 27. S. C. Mod. Ca. 1.

6. In Treſpaſs, the Defendant juſtified for a Way, and after *Iſſue joined*, the Cauſe came to a Trial at the Aſſiſes, but the Defendant made Default, and thereupon the Enqueſt was taken by Default, but the Iſſue being immaterial *B. R.* was moved for a *Repleader*; but it was denied, becauſe by the Default the Defendant was out of Court to all Purpoſes, but only that Judgment might be given againſt him; but in ſuch Caſe the Plaintiff ſhall not have Judgment by Default, tho' he may in ſome ſpecial Caſes; as for Inſtance, In an Action of Debt upon a Bond, if the Defendant pleads a Releaſe, and Iſſue is thereupon joined, and at the Trial the Defendant makes Default, the Plaintiff may pray Judgment by Default; becauſe by this Plea the Duty is confeſſed, and therefore the Inqueſt need not be taken by Default; but 'tis otherwiſe, if he plead *Non eſt factum*, for by that Plea the Duty is denied, and therefore, if he make Default the Inqueſt muſt be taken by Default. But in Treſpaſs, if the Defendant plead a Releaſe, and then make Default, the Plaintiff cannot pray Judgment by Default, becauſe the Damages are incertain, and therefore the Inqueſt muſt be taken by Default; and the Bar was adviſed by the Court never to make Default at *Niſi prius*; becauſe no Judgment could be afterwards given for the Defendant. 1 *Salk.* 216. *Staple* verſus *Haydon*.

Defeaſance.

(A)

Where 'tis good, where not.

1. IN *Audita querela*, the Caſe was, *Wheeler* entered into a Recogniſance to *T. S.* and there were Defeaſances in Writing made between them; but that Defeaſance which was delivered by the Plaintiff to the Defendant, varied in a Material Point from that which was delivered by the Defendant to the Plaintiff, who thereupon brought an *Audita querela*, ſuggeſting all this Matter; the Defendant pleaded the Defeaſance delivered to him by the Plaintiff as it was, tho' varying from the other, and demanded Judgment, if the Plaintiff ſhould have an Action againſt it, *&c.* and upon a Demurrer to this Plea, the Plaintiff had Judgment; for a Defeaſance need not be indented, and if 'tis (as to this Purpoſe) 'tis in the Nature of a Deed-Poll; and tho' in the principal Caſe there were two Parts of it, yet the Words are only of the Cogniſee, and where ever they vary from that Part delivered to the Cogniſor, they are void. 2 *And.* 58. *Hollingſworth* verſus *Wheeler*.

2. Debt upon Bond, the Defendant pleaded, that after the Bond, and before the Day of Payment of the Money by the Condition, the Plaintiff made a *Parol Agreement* with him (the Defendant) that in Conſideration of doing ſuch a Thing, he ſhould have a longer Day of Payment of the Money, which Day was yet to come; and upon Demurrer this was adjudged an ill Plea; for tho' there may be a Defeaſance to a Bond, with Condition to pay Money, yet it muſt not be by Parol, but by Writing. *Moor* 573. *Holford* verſus *Andrews*.

3. Debt upon Bond, the Defendant pleaded, that *After the making the Bond*, the Plaintiff by his Defeaſance promiſed, that if before ſuch a Day he did not bring Witneſſes to prove a true Debt, and that the Defendant promiſed to pay it, that then the Bond ſhould be void, and then avers, that the Plaintiff did not produce any Witneſſes, *&c.* the Plaintiff had Judgment, becauſe the Defendant had pleaded a Defeaſance made *after the Bond*, when it ought to be made at the ſame Time with the Bond, otherwiſe it ſhall not diſcharge it; but this Judgment was queſtioned, becauſe a Defeaſance is no more than a Conditional Releaſe, which is executory in its Nature, and therefore 'tis not neceſſary to be made at the ſame Time with the Bond. 2 *Saund.* 48. 1 *Lutw.* 415. *Graves* verſus *Hatchet*, *S. P.*

4. Debt upon Bond, conditioned to pay ſeveral Sums on *ſeveral Days*; the Defendant pleaded, that he paid all the Sums which were due before ſuch a Day, naming it, at which Day the Plaintiff, *by his Writing ſigned with his Hand* (which the Defendant brought into Court) agreed to defer the Payment of the Reſidue till a farther Day *not yet come*; and upon a Demurrer to this Plea, it was adjudged ill, becauſe this Action of Debt being founded on a Deed, there cannot be a Defeaſance thereof without a Deed, and a *Writing under Hand*, doth not imply, that was a Deed. 3 *Lev.* 235. *Blemerhaſſet* verſus *Pierſon*.

Defenſe.

(A)

1. THIS Word in a legal Signification is applicable to a Plea, and 'tis called ſometimes a full Defenſe, and that is where the Plea begins with theſe Words, *venit & defendit vim & injuriam quando, &c.* and this is uſual in Perſonal Actions, there is another Defenſe in Real Actions, and that is where the Plea begins with theſe Words, *venit & dicit*, and in ſome Caſes there needs no Manner of Defenſe; as where *Conuſance of Pleas* is demanded, that is, where any Perſon claims a Juriſdiction or Power to call a Cauſe out of another Court to be determined in his own, which may be done by thoſe, who by the King's Charter have Power ſo to do. *Hill.* 5 *Mar. Dyer* 157.

2. In every *Præcipe*, where Land is demanded, there the Defenſe muſt be *venit & defendit jus ſuum, &c.* as in a *Writ of Intruſion*, which is, where the Anceſtor dies ſeiſed of Lands of Inheritance, expectant upon an Eſtate for Life; and after the Death of the Tenant for Life, and before the Entry of the Heir another Perſon, who hath no Manner of Right, *intrudes*; ſo likewiſe in moſt Writs of Entry; ſo in *Writs of Aiel*, which are, when the Grandfather died ſeiſed of Lands in Fee-ſimple, and a Stranger enters immediately, and diſpoſeſſeth the Right Heir; ſo in *Writs of Eſcheat*, which are, where the Tenant hath an Eſtate in Fee, held of a Superior Lord, and dies ſeiſed without any Heir, there the Lord may have this Writ againſt him who gets into Poſſeſſion; ſo in all *Writs of Formedon*, which lie for him, who hath Right to Lands by Virtue of any Entail; ſo in Writs *De nativo habendo*, which were directed to the Sheriff, to apprehend a Villain who runs away from his Lord, and to reſtore him again; ſo in Writs *De Rationabilibus diviſis*, which lie where two Lords have Seigniories which are contiguous, and one encroaches on the other; but theſe Writs are now diſuſed.

3. In Writs *De Rationabilibus Eſtoveriis*, the Defenſe muſt be full, *viz. Venit & defendit vim & injuriam quando, &c.* So it muſt be in Replevin, *Quare Impedit*, Detinue of Charters, in all Actions on the Caſe, and generally in all Actions where Proceſs of Outlawry lieth; and ſo it was in the *following Writs*, which are now diſuſed; as in the *Writ of Recaption*, which lies for him who was a ſecond Time diſtrained for the ſame Cauſe, pending the Action grounded on the former Diſtreſs; in the Writ *Quo Jure*, which is where another Man claims Right of Common in my Land, and I bring this Writ to know *Quo Jure* he claims it; ſo in Writs *De injuſte Vexes*, which lies for a Tenant whom the Lord diſtrains for other Services than what he ought to make; ſo in Writs *Ejectione Cuſtodiæ*, which were brought by Guardians turned out of Poſſeſſion of Lands during the Minority of the Heir, and in many more antiquated Writs.

4. In Debt upon Bond, the Defendant by *T. S.* his Attorney *venit & dicit*, that *reſpondere non debet* to this Writ, and pleads an Excommunication certified againſt him by Commiſſioners Delegates; and upon a Demurrer to this Plea it was adjudged ill, becauſe there ought to have been a full Defenſe; beſides 'tis *reſpondere* for *reſponderi*. 3 *Lev.* 240. *Hampſon* verſus *Bell.*

5. In Ejectment the Defendant *venit & dicit*, that the Tenements are *Antient Demeſne*; and upon a Demurrer it was inſiſted, that this Plea was ill, for want of a full Defenſe, (*viz.*) *venit & defend' vim & injuriam, &c.* for ſo is 1 *Inſt.* 127. That the Defendant cannot plead any Plea before he hath made a Defenſe; but this muſt not be intended abſolutely, for in a *Scire facias* a Defenſe is never made; 'tis true, in *Antient Demeſne*, 'tis ſometimes made, but oftner without it, which proves, that it may be made with Defenſe, but it does not prove that it cannot be made without; adjudged, that this Plea was good, without a full Defenſe. 3 *Lev.* 182. *North* verſus *Hoyle.*

Delegates. See **Appeal.** (H)

Demand.

When, and where to be made. (A) | Where 'tis not neceſſary. (B)

(A)

When, and where to be made. See *Rent.* (F) per totum. *Requeſt.* (B) 3.

1. THERE are three Sorts of Demands; one in Writing, without Speaking, and that is in every *Præcipe* there is an expreſs Demand; there are ſome Demands without Writing, and thoſe are Verbal Demands of the Perſon, who is to do or perform the Thing, and there are ſome Demands in Law, which are made without Words or Writing, and thoſe are in all Entries on Lands, Diſtreſſes for Rent, taking or ſeiſing Goods, or ſuch like Acts.

2. Leſſee for Years, rendring Rent, and if it is behind for a Month after the Day on which it ought to be paid, that then the Term ſhall ceaſe; adjudged, that if the Rent is made payable *at ſome Place of the Land*, then, if 'tis not paid or tender'd at that Place, the Leſſor may enter and avoid the Leaſe, without demanding the Rent *on the Land*; but if it had been payable *on the Land*, or if there had not been any Place named where it ſhould be paid, there the Leſſor cannot enter, without demanding it on the Land, for there of Right the Rent is payable. 33 *H.* 8. *Dyer* 51.

3. Leaſe for Years, rendring Rent, and if 'tis behind at the Day, *&c. and ten Days afterwards, being demanded, and no Diſtreſs to be found* on the Land, then the Leſſor might re-enter, the Rent was behind ten Days after it was payable; but there was a ſufficient Diſtreſs on the Land on the 10th Day, *until* 3 *of the Clock in the Afternoon*, and then the Leſſee drove his Cattle away, and *at the laſt Hour of the Day*, the Leſſor came and demanded the Rent; adjudged, that he could not re-enter upon the Failure of Payment, becauſe there was a ſufficient Diſtreſs to be taken on the laſt Day, before the Demand, tho' not after; and the Diſtreſs ſhall not refer to the Time of the Demand, but to the laſt of the ten Days. *Mich.* 40 *Eliz. Cro. Eliz.* 63. *Worceſter* verſus *Stone. Godb.* 67. *S. C.*

4. Where a Meſſuage and Lands are let together, the Meſſuage is the Principal, and there the Rent ought to be demanded, for the Land is only Acceſſary, and the Poſſeſſion of the Houſe is the Poſſeſſion of all the Land demiſed. 2 *Rep. Bettiſworth's* Caſe. Feoffment. (C) 6. *S. C.*

5. In Replevin the Caſe was, a *Rent of* 20 l. *per Ann.* was granted to *Dennis* for Life, payable at the four uſual Feaſts quarterly, and if Arrear in Part or in All, *after either of the ſaid Feaſts*, and not paid within ſix Weeks after, if it *is lawfully demanded*, that then the Grantee might enter and diſtrain, *&c.* until the Rent of 20 *l.* and the Arrear is paid: There was 30 *l.* in Arrear, and the Grantee came the laſt Day of the ſix Weeks after a Quarter, and demanded the 30 *l.* at the Houſe, and it not being paid, he diſtrained; it was inſiſted, that this Diſtreſs was not lawful, becauſe the Rent ought to have been demanded the laſt Inſtant of that Day on which it was reſerved to be paid, and not of the laſt Day of the ſix Weeks, which is the Day of Grace, and the Demand muſt be for the Rent due on that Quarter, and for no other; for without Demand nothing is liable to a Diſtreſs, becauſe the Diſtreſs is granted upon a Condition precedent, and no Rent being demanded for the other Quarter's when due, therefore no Diſtreſs can be taken for it. *Sed per Curiam*, this is not like a Condition in a Leaſe, for in ſuch a Caſe the Condition, if not expreſſed, is always implied in Law to be precedent, becauſe it goes to defeat an Intereſt, and therefore the Rent muſt be demanded before the Leſſor can re-enter; but in the Principal Caſe the Condition is not precedent, but the Grantee is at Liberty to take the Grant in what Manner he will, for if he brings a Writ of Annuity for the Rent, then 'tis an Annuity; if he demands it, and diſtrains and avows, then 'tis a Rent-Charge, if he doth not demand it, then 'tis a Rent-Seck: Now the Grant for him to diſtrain after a Demand, and retain the Diſtreſs till the 20 *l.* and Arrears are paid, is the ſame Thing as to ſay, retain till all the Arrears are paid, and not only till the Arrears due at the laſt Feaſt, or Day of Payment before the Demand, are paid, and theſe being the Words of the Grantor ſhall be taken in the ſtrongeſt Senſe againſt himſelf. 1 *And.* 253. *Dennis* verſus *Boſden.*

6. The Duke of *Norfolk* mortgaged Lands to Alderman *Howard*, upon Condition to be void upon Re-payment of the Money; but before the Day of Payment, the Duke was attainted of Treaſon, and all his Lands were veſted in the Queen; adjudged, that ſhe ought to make no Tender, but that the Alderman ought to demand his at the Exchequer, and not on the Land. *Mich.* 31 *Eliz. Goldsb.* 137. *Howard's* Caſe.

7. A Vicar made a Leaſe of his Vicarage of *Pancras* and Glebe Lands, with the Appurtenances (excepting the Houſe) reſerving Rent of 20 *l.* payable yearly at *Lammas*, and the Feaſt of *St. Peter ad Vincula*, by equal Portions; and if the Rent be behind for the Space of a Month, *&c.* it ſh ould be lawful for him to diſtrain, and the Leſſee gave Bond for Performance of Covenants, and for Rent arrear on the 29th of *Auguſt*; the Vicar brought an Action of Debt, the Defendant pleaded,

ed, that the Rent was not demanded on the *29th Day of Auguſt*, upon which they were at Iſſue; it was objected, that this Iſſue was incertain, for the Plaintiff had alledged the Demand to be *ſuper terras Glebales*, which was too general, he ought to have ſhewed where, and in what certain Place; adjudged, that it had been better ſo to have done, but this Exception was diſallowed, for if the Rent was not well demanded, it ought to have been ſhewn on the other Side; but it may be a Queſtion, whether any Demand was neceſſary. *Paſch. 26 Eliz. Godbolt* 23. *Buſh's* Caſe.

8. In Replevin, the Defendant avowed, for that his Father was ſeiſed of the Manor of *B.* and granted a Rent of 20 *l. per Annum* out of it to the Avowant, *&c.* payable at ſuch Feaſts, *&c.* and if it was behind for ſix Days afterwards, *if lawfully demanded*, then it ſhould be lawful for the Grantee to diſtrain; the Grantor afterwards ſold the Manor to the Queen, and ſhe granted it to the Plaintiff, upon whom the Grantee of the Rent diſtrained for the ſame, and all the Arrears, having firſt demanded it whilſt it was in the Poſſeſſion of the Queen; adjudged, that the Manor, *&c.* was privileged from a Diſtreſs whilſt it was in the Poſſeſſion of the Queen; but the Demand of the Rent was good, without any Prejudice to her Prerogative, and the Grantee had no other Remedy, but to Petition the Queen for it; and in ſuch Caſe he muſt ſet forth in his Petition, that the Rent was actually demanded; yet when the Queen had granted it to a Subject, that Privilege is now gone, and a Diſtreſs made upon him ſhall be a good Demand. *Mich.* 31 *Eliz.* 1 *Leon.* 190. *Wicks* verſus *Dennis.*

9. Leaſe for one Year, rendring Rent when the Leſſor ſhould demand it; adjudged, that if he demand it before the End of the Year, it muſt be on the Land, and the Leſſee muſt be there at that very Time, for the Time being incertain when it will be demanded, 'tis reaſonable that the Leſſor ſhould give the other Notice when he will demand it; but if the Leſſor ſhould demand it perſonally of the Leſſee *off the Land*, the Demand is not good, becauſe the Land is the Debtor, and there it ought to be demanded; but if the Year is expired, then the Leſſee muſt attend at the Land at his Peril, becauſe the End of the Year is the Time of Payment appointed by their Agreement, and the Law. 1 *Brownl.* 135. *Stretton* verſus *Cuſh.* Repairs. (A) 9. *S. C.*

10. Leaſe by the Dean and Chapter of *Chicheſter*, rendring Rent at the Cathedral Church of *Chicheſter*; adjudged, that the Demand ought to be made at the moſt frequented Part of the Church, tho' it was *off the Lands in the Leaſe*, and at the laſt Inſtant of the Day on which 'tis reſerved to be paid, and before the Setting of the Sun. *Paſch.* 5 *Jac.* 1 *Brownl.* 138. *Dean and Chapter of Chicheſter's* Caſe, and 1 *Brownl.* 96. *Ventris* verſus *Farmer. S. P.*

11. In Ejectment, upon Not guilty pleaded, the Caſe was, an Apparator came to the Parſon in the Church, and there told him, that he ought to pay his Tenths to ſuch a One, and at ſuch a Place, which was four Miles diſtant from the Church, and the Parſon not paying, *&c.* the Biſhop certified, that he refuſed to pay, *&c.* according to the Stat. 26 *H.* 8. and thereupon another Parſon was inſtituted, who made the Leaſe; adjudged, that this Demand was not purſuant to the Statute; for it was not an expreſs Demand, as required by the Statute, but only a Summons to pay, and that it ought to be made by one who had Authority to receive it, which an Apparator hath not; and tho' the *Biſhop* had *certified* the Refuſal after a Demand duly made, yet the Court is not to rely upon that Certificate, but upon the Matter, as 'tis ſpecially found upon the Verdict. *Moor* 541. *Reyner* verſus *Parker.*

12. Where a Rent was granted, with a Clauſe, that if it be behind ten Days after the Day on which it is limited to be paid, being *lawfully demanded*, that then the Grantee may diſtrain, yet he need not demand it before he diſtrains, for the Diſtreſs it ſelf is a lawful Demand. *Moor* 883. *Kingſwell* verſus *Crawley.*

13. Leaſe of Lands in *W.* rendring Rent at the *Exchange* in *London*, and for Non-payment there was a Clauſe of Re-entry, this Rent was neither demanded or tendered at the Day when it ought to be paid; adjudged, that the Leſſor could not re-enter, without demanding the Rent at the Place where it was payable off the Land. *Cro. Eliz.* 415, 536. *Tuskin* verſus *Edmonds. Moor* 408. *S. C.* 598. *S. C.* 703. *S. C. Plow. Com. Kidwelly's* Caſe *contra.*

14. In Replevin, *&c.* grant of a Rent iſſuing out of certain Lands *to be paid at another Place off the Lands*, and that if 'tis behind, and *lawfully demanded*, then the Grantee may diſtrain; the Queſtion was, whether he might diſtrain on the Land without a Demand of the Rent; it was inſiſted for him, that a Diſtreſs is a Demand in Law, but the Court inclined, that there muſt be a *Demand at the Place* where the Grantor had appointed the Rent to be paid, for 'tis Part of the Contract, and like a Condition precedent, which ought to be performed before the Party can be entituled to an Action; 'tis true, if the Rent had been to be demanded on the Land, in ſuch Caſe a Diſtreſs might have been a Demand; but in the principal Caſe it was payable at another Place. *Trin.* 17 *Car. March* 147. *Selden* verſus *King. Borough's* Caſe. 4 *Rep.* 72. *S. P.* Rent. (F) 6. *S. P.*

15. Debt upon Bond, conditioned to perform Covenants, one of which was, that the Plaintiff ſhould quietly enjoy, *&c.* and particularly ſhould not be interrupted by one *T. A.* The Defendant pleaded Performance; the Plaintiff replied, that on ſuch a Day the Defendant made a Leaſe of the Lands to the ſaid *T. A.* for a Term of Years yet to come, by Vertue whereof the ſaid Leſſee entered, *&c.* The Defendant rejoined, that the ſaid Leaſe was with a Clauſe of *Re-entry* for Non-payment of Rent, and that before the Leaſe made to the Plaintiff, the Rent was in arrear *& legitime demandat ſecundum formam Indenturæ*, and not being paid, the Defendant re-entered and made a Leaſe to the Plaintiff, *&c.* and upon a Demurrer to this Rejoinder it was adjudged, that this *Demand* was not well ſet forth, for it ought to be alledged certainly, *when and where* to be made, that it might appear to the Court to be legal. *Allen* 19. *Coleman* verſus *Painter.*

16. After

16. After a Bill of Exchange was accepted, the Perſon refuſed to pay the Money, and thereupon an Action was brought againſt him, in which the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Demand, as laid in the Declaration, was very incertain, becauſe it did not appear, whether it was according to the old or new Stile, and ſo it was incertain, whether the Money was due, for if according to the Old Stile, then it was not due; but adjudged, that ſince the Bill was accepted, it was not neceſſary to alledge any Demand, eſpecially ſince 'tis not laid as Part of the Cuſtom upon which the Action was founded. *Style* 370.

17. Debt upon Bond, conditioned to pay to the Plaintiff 300 *l. &c.* and to add 3 *l.* to every Hundred, *if demanded*; the Defendant pleaded Payment of the 300 *l.* and that he added 3 *l.* to every Hundred *ſecundum formam Conditionis præd'*; the Plaintiff replied, that he had not paid the 300 *l. abſq; hoc*, that he added 3 *l.* to every Hundred *ſecundum formam conditionis præd'*; and after a Verdict for the Plaintiff, the Judgment was arreſted, becauſe the Plaintiff did not alledge a Demand of the 3 *l.* for this being Matter of Subſtance, is not helped by the Iſſue or Verdict, and 'tis plainly Subſtance, for without a Demand the Plaintiff hath no Cauſe of Action, and it muſt be an actual Demand, and not implied by thoſe Words *ſecundum formam Conditionis, &c.* *Allen* 55. *Hill* verſus *Armſtrong*.

18. Debt for Rent reſerved upon a Leaſe for Years, in which there was a Proviſo, that if the Rent was *unpaid a Month after the Day of Payment, that in ſuch Caſe the Leaſe ſhall be void*; the Defendant to avoid this Action pleaded, that the Rent was behind for a Month, *&c.* and ſo the Leaſe void; and upon Demurrer to this Plea it was adjudged ill, becauſe he ought to have ſet forth, that the Rent was *demanded* of him; for tho' it was due of Common Right, yet an *Intereſt ſhall not be determined* without an actual Demand, and ſo laid in the Pleadings. 2 *Mod.* 264. *Steward* v. *Allen.*

(B)

Where 'tis not neceſſary. See (A) 14.

Hob. 8. S. C.

1. DEBT upon Bond for Performance of Covenants, the Defendant pleaded Performance; the Plaintiff replied, that he had not paid the Rent; the Defendant rejoined, that before the Day of Payment of the Rent, the Plaintiff *entered on Part of the Lands, and turned the Defendant out*, and upon that they were at Iſſue, and the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Plaintiff had not alledged any Demand made of the Rent; but adjudged, that it was implied in the Iſſue, that a Demand was not neceſſary, for the Iſſue was not for Non-payment of the Rent; but upon a collateral Point, which admits that it was not paid, becauſe it was ſuſpended by the Entry; and if it was ſuſpended, then the Demand had been to no Purpoſe. *Mich.* 10 *Jac.* 1 *Brownl.* 76. *Baker* verſus *Paine.*

2 Roll. Rep. 264, 267.

2. *Sir William Sands* granted an *Annuity* to his Servant to be paid to him at *Michaelmas* and *Lady-day, if it ſhould be demanded, Habendum* to him for his Life; the Servant died, and his Executors brought an Action of Debt for the Arrears of this Annuity due in the Life-time of their Teſtator, but did not ſet forth, that he had made any *Demand*; upon *Nil debet* pleaded, the Executors had a Verdict and Judgment in *C. B.* and upon a Writ of Error brought in *B. R.* it was inſiſted, that the Judgment was erroneous for Want of alledging a Demand, for where 'tis Parcel of the Grant it ſelf, and precedes the *Habendum*, there it muſt be actually made: But adjudged, that the * Bringing the Action is a ſufficient Demand, becauſe here is no Penalty, if 'tis not demanded; 'tis true, in a Grant of a *Rent-charge* by ſuch Words as are in this Caſe, a Demand would have been neceſſary, becauſe the Duty is real and fixed to the Land, to which the Party might reſort to make his Demand; but in the Grant of an Annuity 'tis otherwiſe, becauſe it may be incertain where to find the Grantor. *Palm.* 320. *Sands* verſus *Lea.*

* 7 Rep. 28. Dyer 348.

3. Leaſe for Years by Indenture, reſerving Rent, *&c.* to be paid *on Demand*, in which there were alſo ſeveral other Covenants to be performed on the Part of the Leſſee, and he entered into a Bond to perform all *Payments*, Covenants and Conditions in the Indenture; afterwards the Leſſor brought an Action of Debt on this Bond, the Defendant pleaded Performance, *&c.* the Plaintiff replied, and aſſigned the Breach, that the *Rent* was not paid at ſuch a Day; and upon a Demurrer to this Replication, it was objected, that it was ill, becauſe the Plaintiff did not ſhew that it was *demanded*, for the Bond refers to the Indenture, by which 'tis to be paid upon Demand; and if not demanded, then the Bond is not forfeited; 'tis true, if the Condition of this Bond had been expreſly to *pay the Rent*, then it need not be demanded, but the Condition is to perform all *Payments*, Covenants, *&c.* which *Payments* muſt be made as expreſſed in the Indenture, and thoſe are to be made upon *Demand:* But adjudged, that if the Matter had veſted * wholly on the Indenture, then the Rent muſt have been demanded; but this is an Action of Debt on the Bond collateral to the Indenture; and tho' the Word *Rents* is not mentioned in the Condition, yet it was to perform all *Payments, &c.* which is the ſame Thing in Effect with *Rents*, and if it had been for Payment of Rents, then they need not be demanded, and ſo it was adjudged in this Caſe. *Palm.* 490. *Polſon* v. *Warren.*

* *So is* Maud's *Caſe.* 7 Rep.

4. In an Action brought on a Charter-Party: *Hale* Ch. Juſt. was of Opinion, that upon a *Penalty*, the Party need not make a Demand, as he muſt in the Caſe of *Nomine Pœnæ*, for if a Man is bound to pay 20 *l.* on ſuch a Day, and in Default thereof to pay 40 *l.* in ſuch Caſe the 40 *l.* muſt be paid without Demand. 1 *Mod.* 89. *Bradcott* verſus *Tower.*

Demurrer.

Where a Demurrer to Pleas is good, where not, where it makes a Diſcontinuance, and of Demurrers for Duplicity, and to Part. (A)

Demurrers to Replications, good, and not good. (B)

Where Matters of Fact are confeſſed by it. (C)

Of general and ſpecial Demurrers. (D)

(A)

To Pleas good, and not good.

Demurrer, in Latin Moratur in Lege, *which is when either Plaintiff or Defendant reſt in the Judgment of the Court, upon a Point in Law, without any farther Proceeding or Anſwer, and this is ſometimes made by the Defendant to the Declaration or Replication of the Plaintiff, and ſometimes by him to the Plea of the Defendant.*

1. QUare *Impedit* by the Queen againſt the Archbiſhop of *Canterbury*, the Patron and Incumbent, *&c.* the Patron pleaded one Plea, and the Incumbent pleaded the ſame Plea in Bar to the Action; the Queen demurred in this Manner, *Quod ſeparalia placita per dictos, &c. ſeparaliter placitat', &c. dicta Domina Regina neceſſe non habet nec per legem terræ tenetur reſpondere*; adjudged, that the Demurrer ought to have been ſeveral, upon the Plea of the Patron by himſelf, and upon the Plea of the Incumbent by himſelf, and not joint, as it was in this Demurrer. *Hill.* 30 *Eliz.* 1 *Leon.* 139. *The Queen* verſus *Archbiſhop of Canterbury.*

2. Debt upon Bond, conditioned, that if *W. R.* ſhould render himſelf at ſuch a Place to an Arreſt, that then, *&c.* the Defendant pleaded, that by Privilege of Parliament, the Members thereof and their Servants, ought not to be arreſted by the Space of forty Days before and after the Sitting of the Parliament, nor during the Seſſions, and then ſets forth, that at ſuch a Time *W. R.* was a Servant to a Member of Parliament, ſo that he could not render himſelf, *&c.* The Plaintiff demurred to this Plea, and held good, for *W. R.* might have rendered himſelf at the Place, and then it would have been at the Peril of the Obligee, if he had been arreſted. *Trin.* 4 *Jac.* 1 *Brownl.* 92. *Jackſon* verſus *Kinſon.*

3. Debt againſt an Adminiſtrator, who pleaded, that the Inteſtate was indebted to him by ſeveral Bonds (reciting them) in the Sum of 80 *l.* and that Goods to that Value, and not above, came to his Hands, which he detained in Satisfaction of the Debt due to him, and that he had nothing, *ultra, &c.* The Plaintiff demurred to this Plea, becauſe it amounted to no more than *the general Iſſue*; adjudged, that was no Cauſe of Demurrer, for the Reaſon of a general Iſſue is, that the Record may not be too long where there is no Manner of Occaſion for it; and when 'tis ſo, the Court will Order the Defendant, upon a Motion to plead the general Iſſue, but the Plaintiff ought not to demur for that Cauſe. *Trin.* 13 *Jac. Hob.* 117. *Sir Henry Warner* verſus *Warniford.*

4. Where the Defendant pleads to Part, and demurs to Part, the Demurrer ſhall firſt be determined, and the Iſſue laſt, and the Reaſon is, becauſe upon the Trial of the Iſſue, the Jury may aſſeſs Damages as to both. *Palm.* 517. *Huntley* verſus *Bridges.*

5. Treſpaſs for Breaking his Fence and Entring his Cloſe; the Defendant pleaded, that *W. R.* was ſeiſed of the Land *and made a Leaſe thereof* to the Plaintiff, rendring Rent, with a Clauſe of Re-entry, and that he deviſed the Inheritance to the Defendant, and that the Rent being behind, he entered, for which the Action was now brought againſt him; the Plaintiff demurred, for that the Defendant did not ſhew, that the Leaſe made to the Plaintiff was a Leaſe of the Lands in which the Treſpaſs was ſuppoſed to be done, and becauſe the Defendant did not ſhew that he entered by the Leave of the Executor, which he ought to have done; and for this Cauſe the Demurrer was held good. *Trin.* 23 *Car. Style* 65. *Matthew* verſus *Herle.*

6. In Trover for two Oxen, the Plaintiff declared, that *he was poſſeſſed of them as of his own Goods*, and loſt them, and that the Defendant found and converted them to his own Uſe; the Defendant pleaded, that *W. R. was poſſeſſed of them as of his own Goods*, and loſt them at ſuch a Place, and that he died, having firſt made the Defendant his Executor, and gave *Colour* to the Plaintiff, who demurred to this Plea, becauſe it amounts to no more than the *general* Iſſue; and ſo it was adjudged, for the Plaintiff declared, that *he was poſſeſſed of them as of his proper Goods*; and the Defendant pleaded, that *W. R.* was *poſſeſſed of them as of his proper Goods*, which doth amount to *Not guilty*; for if the Property and Poſſeſſion was in *W. R.* then the Defendant could not be guilty of Taking them as the Goods of the Plaintiff. *Mich.* 2 *Car. Latch* 185. *Bellamy* verſus *Balthrop. Mich.* 2 *Car. Stiles* verſus *Snelgrave. S. P.*

7. An Adminiſtrator brought Debt on a Bond, the Defendant pleaded, that the Bond was conditioned for the Performance of Covenants, *&c.* in a Deed-Poll, and then pleaded, that he performed all, *without ſhewing what they were*; the Plaintiff demurred to this Plea, and there were Continuances from *Octab. Michaelis* to *Octab. Hill.* on which Day the Defendant pleaded again, that ſince the laſt Continuance, the Adminiſtration granted to the Plaintiff was revoked, and granted afterwards to him; adjudged, that if the Plaintiff ſhould take Iſſue, or demur to this ſecond Plea, that the Court muſt ſtill conſider upon his firſt Demurrer, for if it appears by what is confeſſed by that Demurrer, that he hath no Cauſe of Action, he can never have Judgment upon the ſecond Demurrer or Plea, let that be as it will. *Hill.* 13 *Jac. Hob.* 81. *Stoner* verſus *Gibſon. Moor* 871. *S. C.*

8. Caſe, *&c.* in which the Plaintiff declared, that in Conſideration he had paid to the Defendant ſixteen Guineas, he promiſed to pay to the Plaintiff 100 Guineas, if no Town in *Flanders*, garriſoned with 2000 Men, ſhould be taken or ſurrendered, by, or to the *French*, before the firſt of *September* 1695, and levies an *Indebitatus Aſſumpſit* for 100 Guineas, for a Wager, and another *Indebitatus* for 100 Guineas, for ſo much Money received to his Uſe; the Defendant *venit & defend' vim & injuriam quando*, &c. *& petit judicium narratione*, for that the Plaintiff had not ſet forth the Value of the ſixteen Guineas, *&c.* and concludes *& petit judicium de narratione, &c.* it was objected againſt this Form of Pleading, that it could not be a Demurrer, for then it muſt have been *quod narratio præd. eſt minus ſufficiens in lege*, it could not be a Plea in Bar, for then it ſhould have been *Action' non habere debet*, therefore it muſt be in Abatement, and then 'tis either to the Writ or Count, if to the Writ, where the Action is brought by Original, then it muſt be *petit judicium de Brevi*, and it muſt conclude in the ſame Form; if 'tis to the Count, then it muſt be *petit judicium de Billa & narratione*, for thoſe two Words ſignify the ſame Thing; 'tis true, in 2 *Saund.* 128. the Plea began in Bar, and concluded in Abatement, and that was the firſt Time that ſuch Incertainty of Pleading was introduced; but in the principal Caſe it was adjudged, that the Plea was neither in Bar or Abatement, but that it had all the ſubſtantial Parts of a Demurrer. 5 *Mod.* 131. *Leaves* verſus *Bernard.*

Where it makes a Diſcontinuance.

9. *Indebitatus Aſſumpſit* and *Quantum meruit*, as to the firſt, the Defendant pleaded *Non Aſſumpſit*, and as to the ſecond *petit judicum de Billa*, and ſo pleads in Abatement; the Plaintiff took *Iſſue on the Non Aſſumpſit*, and demurred to that Part of the Plea which was in Abatement (*viz.*) *minus ſufficien' ab actione ſua habend' præcludend'*, which is a Demurrer in Bar when the Plea was only in Abatement, for which Reaſon this was held to be a *Diſcontinuance*; but *Iſſue being joined on the Non Aſſumpſit*, the Proceedings on the Demurrer were ſtayed, becauſe the Diſcontinuance might be helped by the Verdict. 1 *Salk.* 218. *Carter* verſus *Davis.*

10. In Trover for a Box and 290 *Pieces of Silver*, the Defendant demurred to the Declaration, and the Plaintiff demurred to the Defendant's Demurrer, and concluded *& hoc paratus eſt verificare*, the Defendant maintained his Demurrer; adjudged, that all is *diſcontinued*, becauſe the Plaintiff did not join in Demurrer, for there is no Difference between Pleading over when a fair Iſſue is offered, and not joining in Demurrer, but demurring again, as the Plaintiff had done in this Caſe. 1 *Salk.* 219. *Campbell* verſus *St. John.*

Mod. Caſes 198. **Tis Common to a Plea in Abatement.*

11. It was ruled, that where a Defendant *demurs in Abatement*, the Court may give final Judgment, becauſe there cannot be a *Demurrer in* * *Abatement*; for if the Matter in Abatement is extrinſick the Defendant muſt plead it, if intrinſick the Court will take Notice of it. 1 *Salk.* 220. *Docminique* verſus *Davenant*; but in *Plow. Com.* in the Caſe of *Wimbiſh* verſus *Willoughby*, there is a Precedent of a *Demurrer in Abatement.*

For Duplicity, and to Part.

12. Where the Demurrer is for Duplicity, 'tis not ſufficient to ſay, that *duplex eſt*, or *Duplicem habet materiam*, but he muſt ſhew wherein. 1 *Salk.* 219. *Lamplugh* verſus *Shortridge.*

13. Where there is a Demurrer to Part, and Iſſue is joined as to the other Part, and the Plaintiff hath Judgment upon the Demurrer, he muſt enter a *Non Pros'* as to the Iſſue, otherwiſe he cannot proceed to a Writ of Inquiry upon the Demurrer, becauſe upon the Trial of the Iſſue the Jury will aſcertain the Damages for that Part for which the Demurrer was. 1 *Salk.* 219.

4 Mod. 254. **This goes to the Whole, and therefore makes the Plea double.*

14. In an Action of Debt for 18 *l.* for two Years Rent due on a Leaſe of a Meſſuage and ſeveral Parcels of Land, rendring the yearly Rent of 9 *l.* the Defendant, as to 9 *l.* Parcel of the Rent, pleaded *Nil debet*, and concluded to the Country, and as to the 9 *l.* Reſidue, he confeſſed the Demiſe as laid in the Declaration, *reddendo*, yearly 9 *l.* (*viz.*) 40 *s.* for ſuch a Parcel, and 7 *l.* for ſuch a Parcel; and as to the 40 *s.* Parcel thereof, he pleaded *Nil debet*, and as to the reſt * *Nil habuit in tenementis*; and upon a general Demurrer it was adjudged, that one Defendant cannot plead two ſuch Pleas which go to the Whole; but then it was objected againſt the Demurrer, that if *placitum is nomen collectivum*, this Demurrer will go to the Whole, and if ſo, the Plaintiff cannot have Judgment, becauſe the Plea of *Nil debet* is a good Plea. 1 *Salk.* 219. *Comb* verſus *Talbott.* See *Dyer* 325. b. 3 *Cro.* 139. 1 *Leon.* 125. 1 *Sid.* 39.

(B)

To Replications good, and not good.

1. IN Replevin, *&c.* the Defendant avowed, the Plaintiff in Bar to the Avowry, replies, that the Land was Copyhold, grantable in Poſſeſſion or Reverſion for Life, or in Fee, and that the Lord of the Manor had granted the Reverſion, *&c.* to him the ſaid Plaintiff, *after the Death of* W. R. *the Tenant for Life*, and then ſets forth, that he was dead, whereupon the Plaintiff entered; to this Replication the Defendant demurred, becauſe the Plaintiff did not ſhew, *by whom the Eſtate was granted to* W. R. adjudged, that was not the *Title* of the Plaintiff, but only Matter of Conveyance to it, and therefore no Cauſe of Demurrer. *Paſch.* 2 *Jac.* 2 *Cro.* 52. *Lodge* verſus *Fry.*

2. Treſpaſs for breaking his Cloſe and taking a Gelding; the Defendant pleaded, that twelve armed Men threatned to kill him, if he would not enter into the Plaintiff's Cloſe and take the Gelding; and that he, for fear of his Life and Wounding, did enter, *&c.* the Plaintiff demurred; adjudged, becauſe the Law will not allow one Man to do a Treſpaſs to another, for fear of Wounding or Threatning, for by ſuch Means the Party injured can have no Satisfaction; for if it ſhould be an Excuſe to the Perſon, who actually did the Treſpaſs, he can have no Remedy againſt him who threatened. *Mich.* 23 *Car. Style* 72. *Gilbert* verſus *Stone.* *See Hob.* 134.

3. Debt upon Bond to ſave the Plaintiff harmleſs, the Defendant pleaded *Non damnificatus*; the Plaintiff replied, and ſhewed a Breach by which he was damnified at *Weſtminſter*; the Defendant demurred, becauſe the Plaintiff did not ſhew in what County *Weſtminſter* was; adjudged a good Cauſe of Demurrer; for tho' 'tis a City, yet it ought to be ſhewed in what County it is. *Trin.* 24 *Car. Style* 142. *Nelſon* verſus *Thompſon.*

(C)

Where Matters in Fact are confeſſed by it.

1. EJectment againſt two Defendants; one appeared and pleaded the General Iſſue, Proceſs continued againſt the other, who after the laſt Continuance appeared and pleaded an Entry and Expulſion in Abatement of the Writ, to which Plea the Plaintiff demurred; and afterwards the other Iſſue was found for him, but he could never get Judgment, becauſe by his Demurrer he had confeſſed the Entry and Expulſion, and by Conſequence his Writ muſt be abated. *Hill.* 6 *Eliz.* 226.

2. Caſe, *&c.* for ſelling *falſe Bills of Publick Faith*, the Defendant demurred to the Declaration, for that the Ordinance of Parliament and the Commiſſioners Names, were miſrecited; adjudged, that was but an Inducement to the Action, the Ground whereof was the Deceit, which the Defendant had confeſſed by his Demurrer; and therefore the Plaintiff had Judgment. *Style* 343. *Gowke* verſus *Bayle.*

(D)

Of General and Special Demurrers.

1. IN Treſpaſs, *&c.* the Defendant pleaded Not guilty, as to the Force and Arms, without ſaying *& de hoc ponit ſe ſuper patriam*, and pleaded over to the Treſpaſs; and upon a Demurrer to this Plea, for that it was *double, inſufficient, and wanted Form*; adjudged, this being a general Demurrer, the Plaintiff ſhall not have any Advantage of this informal Plea without ſhewing it for Cauſe in a Special Demurrer, for he ſhould have concluded to the Country. *Sid.* 216. *Thacker* verſus *How.*

2. Adjudged, that if any Special Matter is pleaded, which hath the Colour of a Plea, but amounts to the general Iſſue, 'tis no Cauſe of Demurrer; as where in an Action of Debt the Defendant pleads a Releaſe, and if it be in Debt for Rent, and the Defendant pleads an Entry and Expulſion, this is no Cauſe of Demurrer, tho' in both Caſes upon *Nil debet* pleaded, he might have given the reſpective Cauſes in Evidence. 5 *Mod.* 18.

Deodand.

(A)

1. THIS is a Thing given as it were to God to appeal his Wrath, where a Man comes to a violent Death, but not by any reaſonable Creature; and it is forfeited to the King, and to be ſold by his Almoner, and the Money ariſing by ſuch Sale was by him to be diſtributed to the Poor.

The Rule in this Caſe is expreſſed in this Verſe, ſſ. *Omnia quæ movent ad mortem ſunt Deodanda*; but neither this Rule, or the Reaſon of a Deodand, is now obſerved; for if a Man is killed by the Wheel of a Cart drawn with Horſes, the Jury find that only a Deodand which was the immediate Cauſe of his Death and that is the Wheel; neither is that Wheel ſold and the Money diſtributed to the Poor; for Deodands are uſually granted to Lord's of Manors, and other Subjects, ſo that whatever is forfeited as a Deodand, is ſeiſed by them, and converted to their own Uſe as ſoon as the Matter is found by the Jury, which is the Manner how the Perſon was killed, and by what; and they uſually find the Value of the Thing.

2. My Lord *Coke* defines a Deodand to be where any Moveable Thing inanimate, or a Beaſt, which is animate, cauſeth the untimely Death of a reaſonable Creature, without the Will and Default of himſelf; but that it muſt be on the Land, and not on the Sea.

2 Roll. Rep. 23. 3. A Man riding a Horſe thro' the River *Trent* fell off, and was drowned, the Coroner's Inqueſt found, that his Death was cauſed *per Curſum aquæ*; and it was the Opinion of the Court, that it was well found, and that the Horſe was not a Deodand, for the Man was not carried out of his Depth, it was the Violence of the Water, which was the immediate Cauſe of his Death. 2 *Cro.* 483. *Lord Chandos*'s Caſe. *Poph.* 136. *S. P.*

4. There is a nice Diſtinction in the old Books, which was thus, (*viz.*) If a Boy under fourteen Years old is killed by a fall from a Cart, 'tis a Deodand; but if he is killed by a fall from a Horſe, in ſuch Caſe the Horſe is no Deodand; but I do not find any Reaſon given for this Diſtinction, probably it might be, that a Boy under that Age might not have Diſcretion to ride the Horſe, and ſo be the Occaſion of his own Fall; but the Law is now otherwiſe; and Juſtice *Twiſden* was of Opinion, that there was no more Reaſon for this Diſtinction than to cut off the Joint of the Thumb of a Cut-purſe, which formerly was Law, but not now. *Raym.* 208.

Raym. 97. Sid. 204. 5. A Man ringing a Bell was hanged with the Rope; the Queſtion was, if the Bell ſhould be a Deodand, and it was inſiſted, that it could not, becauſe it was faſtned to the Freehold and given to God before; two Judges were of Opinion, that it was not a Deodand for that Reaſon; but the Caſe was not adjudged. 1 *Lev.* 136. *The King* verſus *Croſſe.*

6. A loaded Waggon was met by a Cart on the Road, and endeavouring to paſs by the Waggon was overturned, and the Man who was in the Cart fell before the Wheels of the Waggon, which run over him and killed him; the Chief Juſtice *Pollexfen*, and the other Judge in the Circuit, to whom this Matter was referred, were of Opinion, that the Cart, Waggon, and Loading, and all the Horſes were forfeited, becauſe they all moved *ad mortem:* The Chief Juſtice at firſt doubted, whether the Cart was a Deodand; but remembring afterwards this Caſe, (*viz.*) A Man was thrown by his Horſe in a River, and was carried by the Stream to a Mill, and killed there by the Wheel, and adjudged, that both the Horſe and the Wheel were forfeited; but if the Man had been thrown from his Horſe by the Violence of the Stream, then the Horſe is not forfeited. 1 *Salk.* 220. *Caſe of the Lord of the Manor of Hampſted.* *See* 2 *Cro.* 483. *Lord Chandos*'s Caſe.

7. Inquiſition, *ſuper viſum corporis*, that the Wheel of a Forge moved to the Death of *W. R.* it was moved to ſtay Proceſs for ſeiſing it as a Deodand, becauſe it was Parcel of the Freehold, as the Wheels of a *Mill*, or a Milſtone are; for a Mill is a known Thing in the Law, and ſo are the material Parts of it, and therefore if one of the Milſtones is taken out to dreſs, and the Owner deviſes the Mill whilſt the Stone is out, yet it ſhall paſs as Part of the Mill; a Bell cannot be a Deodand; ſo the Proceſs was ſtaied. *Mod. Caſes* 187. *The Queen* verſus *Wheeler.*

Departure.

What ſhall be a Departure in Pleading. (A) | What ſhall not be a Departure. (B)

(A)

What ſhall be a Departure in Pleading.

1. DEparture is where the Plaintiff in his Replication, or the Defendant in his Rejoinder, waives the Matter in the Declaration, or in the Plea, and offers new Matter not mentioned before; as for Inſtance, In Replevin, the Avowant ſet forth, that long before the taking *one* W. R. *was ſeiſed of the Lands in Fee, and made a Leaſe to the Avowant for thirty Years*, and ſo avowed for Damage-feaſant; the Plaintiff replied, that *W. R.* was Tenant in Tail, *&c.* and conveyed to himſelf a Title as Heir in Tail, and that he entered upon the Leſſee and diſtrained; the Defendant rejoined, and ſet forth, that *W. R. reſerved a Rent on the ſaid Leaſe, which* the Plaintiff, as Son and Heir, had accepted after the Death of his Father, *&c.* adjudged, this was a Departure; for by his Plea he juſtified under a Leaſe made by Tenant in Fee, and in his Rejoinder, he ſets forth the Acceptance of the Rent reſerved upon a Leaſe made by the Tenant in Tail. *Mich.* 1 *Mar. Dyer* 95.

2. Leaſe for Years, without Impeachment of Waſte, in which the Defendant covenanted to fill up the Holes after he *had felled the Trees*, and gave Bond for Performance of Covenants; in an Action of Debt brought on this Bond for Non-performance of Covenants, the Defendant pleaded, that *he had not felled any Trees*; the Plaintiff replied, and ſet forth, that he felled Trees growing on two Acres of Ground, and had not filled up the Holes; the Defendant rejoined, and averred, that *he had filled up the Holes*, and concluded to the Countrey; and upon Demurrer to this Rejoinder it was adjudged a Departure from his Plea, for that was, that *he had not felled any Trees*, and by the Rejoinder, he confeſſed *the Felling, but that he had filled upon the Holes. Trin.* 8 *Eliz. Dyer* 253.

3. *Quare Impedit* againſt the Biſhop of *St. Aſaph*, who *juſtified by Lapſe*; the Defendant replied, that before the ſix Months expired, he preſented to the ſaid Biſhop one *W. R.* a Maſter of Arts, and Preacher allowed, *&c* the Biſhop rejoined, and confeſſed the Preſentation; but farther pleaded, that the Church to which *W. R.* was preſented, was with Cure of Sou's, and that the Pariſhioners there are *Welſh* Men, who ſpeak the *Welſh* Language, and no other, and becauſe the ſaid *W. R.* could not ſpeak that Language, he refuſed to admit him, and gave Notice of ſuch his Refuſal to the Plaintiff, and for what Cauſe; upon which Rejoinder the Plaintiff demurred, and it was adjudged a Departure from the Plea, for in that the Biſhop had juſtified *by Lapſe*, and by Virtue thereof had entituled himſelf to the Preſentation; and in his Rejoinder he confeſſed, that *the Plaintiff was preſented*, but he refuſed him, becauſe he did no ſpeak *Welſh. Trin.* 27 *Eliz. Albany* verſus *Biſhop of St. Aſaph.* 1 *Leon.* 31.

4. Debt upon Bond for Non-performance of an Award; the Defendant pleaded, that the Award was, that *he ſhould Releaſe all Suits to the Plaintiff*, which he had done; the Plaintiff replied, that it was true ſuch an Award was made, but that the Arbitrators did farther Award, that the Defendant ſhould pay unto the Plaintiff 15 *l.* at ſuch a Time and Place, and traverſed that, they had made ſuch an Award *only as* the Defendant had alledged; the Defendant rejoins, that true it is, that they did Award, that *he ſhould pay the Plaintiff ſuch a Sum*; but they did farther award, that the Plaintiff *ſhould releaſe to the Defendant all Actions, &c. which he had not done*; and upon Demurrer to this Rejoinder, it was adjudged a Departure from the Plea, for in that the Defendant had alledged an Award, that *he ſhould Releaſe all Suits to the Plaintiff*, and in the Rejoinder he ſet forth an Award, that *he ſhould pay to the Plaintiff* 15 *l. and that the Plaintiff ſhould releaſe to him all Actions*, which is all new Matter. *Mich.* 10 *Jac.* 2 *Bulſt.* 39. *Linſey* verſus *Aſtry. Godb.* 155. *S. C.*

5. The Plaintiffs declared, that by a Statute of *H.* 8. *Anno* 19 of his Reign, the College of Phyſicians in *London* were incorporated by the Name of Preſident, *&c.* and that none ſhould practiſe Phyſick in *London*, or within ſeven Miles thereof, without Licenſe under Seal of the College, under the Penalty of 5 *l.* for every Month, and that the Defendant had practiſed Phyſick in *London* twelve Months without Licenſe, *&c.* the Defendant pleaded the Statute 34 *H.* 8. that every one who hath Knowledge and Experience of the Nature of Herbs, *&c.* by Speculation or Practice, might apply the ſame to any outward Sore or Diſeaſe, for the Stone, Stranguary, *&c.* in any Part of the Realm, without Suit; and that he having Skill in the Nature of Herbs, *&c.* applied the ſame, *&c.* the Plaintiff replied, and ſet forth the Statute 1 *Mariæ cap.* 9. which recites the Statute 19 *H.* 8. and appoints, that it ſhall be in Force notwithſtanding any Statute or Ordinance to the contrary;

trary; the Defendant demurred to this Replication, and inſiſted, that it was a Departure from the Declaration, becauſe the Plaintiffs had intituled themſelves to the Action by Vertue of the Statute 19 *H.* 8. and by the Replication they had entituled themſelves by another Statute, not mentioned in the Declaration, *viz.* by the Statute 1 *Mariæ*; but adjudged no Departure, for it ſo tifies the Declaration, like the Caſe of the *Preſident of All-Souls* College *Mich.* 43 *Eliz.* who brought an Action againſt the Defendant for taking Toll in ſuch a Place, and ſhewed a Grant *from H. 6. Anno 26. of his Reign*, to be diſcharged of Toll; the Defendant pleaded Act of Reſumption of Liberties, granted by King *H.* 6. and ſo this Liberty was gone; the Plaintiff replied, and ſhewed a Revivor of them by the *Statute* 4 *H.* 7. and upon Demurrer to this Replication, it was objected, that it was a Departure from the Declaration, becauſe by that the Plaintiff had entitled himſelf to be diſcharged of Toll *by Vertue of a Grant from H.* 6. and by his Replication, he had entituled himſelf *by Vertue of the Statute* 4 *H.* 7. but adjudged no Departure, it was a kind of Confeſſing and Avoiding; in the Principal Caſe the Judgment for the Plaintiff was affirmed in a Writ of Error. *Trin.* 8 *Car. Cro. Car.* 186. *Butler* verſus *College of Phyſicians.*

6. on Treſpaſs for an Aſſault, Battery and Impriſoning the Plaintiff *on the laſt Day of* October, 6 *Car.* at *W.* the Defendant juſtified, for that 13 *Aug.* 6 *Car.* a *Supplicavit* iſſued out of Chancery, and thereupon the Sheriff, *&c.* directed a Warrant to the Defendant, who, by Virtue thereof, on the 21*ſt Day of September*, arreſted the Plaintiff, and detained him two Days, and then delivered him to the Sheriff, *&c.* The Plaintiff replied, and confeſſed the Writ, Warrant and Arreſt 21 *Septemb.* and Impriſonment for two Days, and then ſets forth, that afterwards he gave Bail to the Sheriff, and was diſcharged; and that the Defendant *Poſtea* (viz.) *præd'* 1 *die Octob.* 6 *Car.* aſſaulted and impriſoned him of his own Wrong; and upon Demurrer to this Replication, it was adjudged a Departure from the Declaration, for the Plaintiff had declared for an Aſſault *on the laſt Day of October*, and in his Replication he ſet forth an Aſſault, 1 *die Octobris* 6 *Car. Mich.* 7 *Car. Cro. Car.* 165. *Tiler* verſus *Wall.*

See 4 Leon. 77. S. P.

7. Covenant, *&c.* upon an Indenture of *Apprenticeſhip*, the Defendant pleaded Infancy, *&c.* the Plaintiff replied, that by the *Cuſtom of London* Infants, after the Age of fourteen, might bind themſelves *Apprentices*; and upon Demurrer, the better Opinion was, that this was a Departure, becauſe the Plaintiff had brought this Action at Common Law, and by his Replication would have maintained it by Virtue of a *Cuſtom.* 1 *Lev.* 81. *Sid.* 142. *S. C.*

8. In Covenant, *&c.* the Leſſee pleaded Peformance generally; the Plaintiff in his Replication aſſigned a Breach in Non-payment of Rent; the Defendant rejoined, that the Plaintiff had entered and turned him out; adjudged upon Demurrer, that this is a Departure, becauſe the Rejoinder is not in Affirmance of the Plea; but the Matter therein contained ought to have been pleaded at firſt. *Sid.* 77. *Granger* verſus *Henborow. Raym.* 22. *S. C.*

9. In Covenant, *&c.* where the Covenant was to render Account, and the Plaintiff declared *generally*, the Defendant Infancy; the Plaintiff replied, that by the *Cuſtom of London* Infants are chargeable after fourteen Years of Age; and upon Demurrer to the Replication, the Court were devided, whether this was a Departure, becauſe the Action was brought generally *at Common Law*, and in the Replication the Plaintiff would maintain it by Virtue *of a Cuſtom. Sid.* 142. *Bold* verſus *Wallis.*

10. Debt upon Bond for Performance of Covenants, the Defendant in his Plea ſet forth, the Indenture, which was to return all the Effects of Goods ſent to *Barbados*, and then pleaded Performance, *&c.* The Plaintiff replied, that ſuch Goods were ſent, *&c.* of which the Defendant returned no Effects; the Defendant rejoined, that he had no *Order* to return them, and upon Demurrer this was adjudged a Departure, becauſe there was nothing of Order mentioned in the Covenants; and want of Order ſeems to be an Excuſe for Non-Performance. 2 *Lev.* 76. *Wood* v. *Kirkham.*

Sid. 444. 1 Mod. 43.

11. Debt againſt the Defendant upon a Bond conditioned to ſave harmleſs the Plaintiffs and their Succeſſors, Church-wardens of the Pariſh of *St. Peter's in Nottingham*, and the Pariſhioners thereof, of and from all Coſts and Charges for or by Reaſon of the Birth, Education, or Bringing up a *Baſtard Child*; the Defendant pleads *Non damnificati* generally; the Plaintiffs reply, and ſay, that neither the Defendant, nor any other Perſon, had provided any Maintenance for the Child after the ſaid Bond, and after two Months ſince the Birth of the Child, and to prevent its Periſhing, they paid ſo much for the Maintenance of the ſaid Child, and ſo were *damnified*; the Defendant rejoins, that he at his own Coſts, would have maintained the Child all that Time, and offered to do it, both to the Plaintiffs themſelves, and to other Pariſhioners, but they would not permit him ſo to do, but *de injuria ſua propria, & contra voluntatem* of the Defendant, they put the Child to Nurſe; and upon Demurrer to this Rejoinder, it was adjudged to be a Departure from the Plea; for the Defendant had pleaded *Non damnificati*, and the Plaintiff having ſhewed in their Replication, how they were damnified, the Defendant cannot rejoin, that the *Damnification* was of their Wrong; for that is a Departure from the Plea; he ſhould have pleaded that Matter at firſt. 2 *Saund.* 83. *Richards & al'* verſus *Hodges.*

12. Debt upon Bond, conditioned for Performance of Covenants, one whereof was to pay 12 *l. per Ann.* quarterly; the Defendant pleads Performance; the Plaintiff replied, and aſſigned a Breach for Non-payment of 3 *l.* Rent due on ſuch a Quarter; the Defendant rejoined, that before the 3 *l.* was due, the Plaintiff entered, and turned him (the Defendant) out of Poſſeſſion; and upon Demurrer, this Rejoinder was adjudged a Departure from the Plea; for he ought to have alledged this Matter in his Plea at firſt. *Raym.* 22. *Granger* verſus *Hemborough*, *Sid.* 77. *S. C. See Specket* verſus *Sheers*, *and ſee Cro. Car.* 76. *Chapman's* Caſe.

13. Debt upon Bond for Performance of an Award; the Defendant pleaded *Nullum arbitrium*; Plaintiff replied, and ſhewed the Award, and aſſigned the Breach; the Defendant rejoined, and ſet forth a Judgment obtained againſt himſelf by the Teſtatrix of the Plaintiff in an Action of Battery and Falſe Impriſonment, and that this Judgment was one of the Cauſes ſubmitted, of which the Arbitrators had Notice, but did nothing concerning it; the Plaintiff ſurrejoins, that the Award was made as well concerning that Judgment, as other Things *& hoc paratus & verificare*; and upon Demurrer, it was held, that the Surrejoinder was ill, becauſe in the Rejoinder the Defendant alledged, that the Arbitrators did not make any Award about the Judgment, and in the Surrejoinder the Plaintiff alledges, that they did; which is a Negative and an Affirmative, and therefore he ought to conclude the Surrejoinder to the Country, and not *& hoc paratus & verificare*; but Judgment was given for the Plaintiff, becauſe the Rejoinder was a Departure from the Plea; for the Plea was *Nullum arbitrium*, therefore he cannot in his Rejoinder alledge any Thing about an Award, as in this Caſe he did, concerning a Judgment, becauſe he had pleaded, that there was no Award. *Raym.* 94. *Morgan* verſus *Man.* 1 Sid. 180. 1 Lev. 127.

14. Debt upon Bond conditioned to pay ſuch Sums as the Obligor ſhould receive within fourteen Days, at ſuch a Place in *W.* as the Plaintiff (who was the Obligee) ſhould appoint; the Defendant *pleaded Payment*; the Plaintiff replied Non-payment of ſuch a Sum received by the Defendant at a Place by him (the Plaintiff) appointed; the Defendant rejoins, that the Plaintiff had appointed no Place; and upon a Demurrer to this Rejoinder, it was adjudged a Departure from the Plea; for the Defendant in his Plea ought to have ſet forth, that he had paid all but ſuch a Sum, for which, as yet, the Plaintiff had appointed no Place of Payment. 2 *Mod.* 31. *Smith* verſus *Hall.*

15. Treſpaſs againſt Husband and Wife, for a Treſpaſs done by the *Wife alone*; they plead Not guilty as to Part, and as to the reſt they plead in Bar, that the Husband was ſeiſed in Right of his Wife, *&c.* and that he made a Leaſe of Lands to the Plaintiff for a Year, rendring Rent, which being in arrear, *the Wife entered and diſtrained*; the Plaintiff replied, that after the *Diſtreſs* taken, the Wife *uſed ſome of the Goods diſtrained*, and ſold the reſt; the Defendants rejoin, that immediately after the Diſtreſs, the Wife gave Notice thereof at the Dwelling-houſe of the Plaintiff, and the Goods being not replevied within five Days after Notice, they with the Conſtable of the Place, cauſed the Goods to be appraiſed by three Perſons (it ſhould be two Perſons) ſworn by him, which was done accordingly, *&c.* and Traverſe, that the Goods were uſed by the Wife within five Days after the Diſtreſs, *&c.* and upon Demurrer after ſome Exceptions taken to the Bar, (which ſee in tit. *Baron and Feme.* (I) 28. it was objected, that the Rejoinder was a Departure from the Plea in Bar, becauſe the Defendants had juſtified by a *Diſtreſs at Common Law* for Rent arrear; and in their Rejoinder they maintain that Diſtreſs by the *new Statute of Diſtreſſes*, which they ought to have pleaded at firſt, but the Caſe was not adjudged upon this Exception. 2 *Lutw.* 1421. *Catlin* verſus *Milner.*

16. In Replevin, the Defendant avowed the Taking *in O.* for a Rent-Charge granted out of the Manor of *S.* which extended into *S. and O.* The Plaintiff replied, that ſhe recovered in Dower and had a third Part, *&c.* aſſigned to her *in S.* and that ſhe was ſeiſed as Tenant in Dower till the Defendant diſtrained, *&c.* in a Place called the *Warren in S.* and upon Demurrer to this Replication, the Queſtion was, whether it was a Departure, or not; adjudged, that the *Warren* mentioned in the Replication is a *Lieu conus*, and that *S. is the Will*, but neither of them can be in *O.* where the Avowry is made, becauſe that ſhall be intended a Vill, and one Vill cannot be in another, nor one *Lieu conus* in another; now, in this Replication, *S.* muſt be a Vill, or no Vill, if the one, then, as has been already ſaid, it cannot be in *O.* becauſe one Vill cannot be in another; if 'tis no Vill, then the Replication is ill for Want of a Vill, ſo the Defendant had Judgment. *Sid.* 9. *Weſton* verſus *Carter.* See *Storke* verſus *Fox.*

17. Debt upon a Bond for Performance of an Award, which was made for Payment of Money; the Defendant pleaded *Performance*, the Plaintiff replied, and aſſigned the Breach in *Non-payment*, *&c.* The Defendant rejoined, that he was *ready to pay the Money* at the Day and Place; and upon a Demurrer it was adjudged, that this Rejoinder was a Departure from the Plea; for the Defendant having pleaded Performance, that amounts to *Payment of the Money*, which Plea he hath relinquiſhed by his * Rejoinder, for there he ſays, that he was *ready to pay it*, *&c.* and *Payment and ready to pay*, are different Iſſues. *Sid.* 10. *Butcher* v. *Whiting.* 4 *Leon.* 79. *Clinton* v. *Bridges.* *S. P.* * 1 Lev. 85. Houſe v. Lander. S. P.

18. Debt upon a Bond for Performance of an Award, the Defendant pleaded *no Award made*; the Plaintiff replied, and ſet forth the Award made for the Defendant to pay the Plaintiff 250 *l.* in Right of his Wife, as a *full Moiety* of the Share of the Eſtate of *H. P.* her Father, and that upon Payment thereof the Parties ſhould ſeal general Releaſes; the Defendant rejoins, and ſets forth, that he and the Plaintiff differed about *All* the perſonal Eſtate of *H. P.* which they ſubmitted to Arbitrators, who did *not make an Award of all the perſonal Eſtate* of the ſaid *H. P.* and upon a Demurrer this Rejoinder was held to be a Departure from the Plea; for to ſay he did not make an Award of *All the perſonal Eſtate*, is a negative Pregnant, and implies, that an Award was made of Part of the perſonal Eſtate, when by the Plea the Defendant alledged that no Award was made. 1 *Lutw.* 382. *Mitchell* verſus *Pope.* *Keilw.* 75. *S.P.* *Sid.* 180. *S.P.* 2 *Saund.* 489. *S. P.*

19. Debt upon Bond, conditioned, that if the Defendant paid the Plaintiff's Attorney *All the Coſts and Charges of a Suit*, &c. *which the ſaid Attorney ſhould charge*, and diſcharge the Plaintiff thereof, then the Bond to be void; the Defendant pleads, that he had paid *All the Coſts of Suit* to the Attorney which he had charged the Plaintiff withal; the Plaintiff repli-

ed,

ed, that the Attorney had charged him with 4*l.* 16*s.* which the Defendant had not paid or diſcharged him (the Plaintiff) thereof; the Defendant rejoins, that the Attorney had not given him (the Defendant) any Bill of Coſts under his Hand, as by the Statute required; and upon Demurrer the Court held the Plea to be too general, for 'tis not ſufficient to ſay, that he paid *all the Coſts of Suit*, &c. but he ſhould have ſhewed, that the Attorney *charged ſo much and no more*, which he had paid, and that the Rejoinder was a Departure from the Plea, for he pleaded, that he paid *all the Coſts of Suit which the Defendant had charged*, and by his Rejoinder he excuſes the Non-payment of all, becauſe the Attorney had not delivered a Bill of Coſts under his Hand. 1 *Lutw.* 419. *Parkes* verſus *Middleton.*

20. In Debt upon a Recognizance againſt the Bail, they plead, that there was no *Capias* againſt the Principal; the Plaintiff replied, that there was a *Capias prout patet per Recordum*; the Defendant rejoined, that there was a Writ of Error brought and allowed, before the *Capias* was returned and filed; and upon a Demurrer to this Rejoinder, it was adjudged to be a Departure from the Plea, for that was, that there was no *Capias*, *&c.* but the Rejoinder was, that there was a *Capias*, but it was ſuperſeded. *Mod. Caſes* 139. *Parkins* verſus *Woollaſton.*

21. In Debt upon Bond for Performance of Covenants in a Leaſe; the Defendant *pleaded Performance*; the Plaintiff *replied*, and aſſigned a Breach in Non-payment of ſo much due for half a Year's Rent; the Defendant rejoined, and ſet forth, that ſo much was paid in Money, and *ſo much in Taxes*, upon the Statute for laying 4*s.* *per* Pound on Land, which was for the full half Year's Rent; and upon Demurrer to this Rejoinder, it was adjudged a Departure from the Plea, becauſe he had pleaded *Performance*, and now in the Rejoinder ſets forth *Matter of Excuſe*, why he did not perform, *&c.* which he ſhould have pleaded at firſt in Bar. 1 *Salk.* 221. *Arran Counteſs* verſus *Criſpe.*

(B)

What ſhall not be a Departure.

1. AN Adminiſtrator *de Bonis non* of *W. R. Executor of M. M. &c.* brought an Action of Debt; the Defendant pleaded, that the ſaid *M. M.* made the aforeſaid *W. R.* his Executor, who adminiſter'd, and having made *D. D.* his Executor, he died, and that he took upon him the Execution of the Will of *M. M.* the firſt Teſtator, and is yet alive; the Plaintiff replied, and confeſſed, that *M. M.* did make *W. R.* his Executor, who adminiſtred the Goods, and died, having firſt made *D. D.* his Executor, but that the ſaid *W. R. did not prove the Will of the firſt Teſtator*; and that the aforeſaid *D. D.* before he took upon him *onus teſtamenti* of *M. M.* the firſt Teſtator, refuſed before the Ordinary ſuch a Day to adminiſter his Goods as Executor to him; and upon Demurrer to this Replication, it was inſiſted for the Defendant, that it was a Departure from the Declaration; but adjudged, that it was not, for the Plaintiff declared as Adminiſtrator *of an Executor*; and in his Replication he ſhews, *how he was Executor quoad Adminiſtrationem*, but *not an abſolute Executor*, becauſe he had not proved the Will of the Teſtator, and then when he died without Probate his Teſtator is dead Inteſtate, and this Judgment was affirmed in a Writ of Error. *Mich.* 17 *Jac.* 2 *Cro.* 614. *Hayton* verſus *Wolfe.* Replication. (A) 5. *S. C.*

2. Debt upon Bond, conditioned, that if the Defendant ſerved the Plaintiff as a Brewer's Clerk, and performed ſuch Covenants, then the Bond to be void; the Defendant pleads Performance of of all, *&c.* The Plaintiff replied, that one of the Covenants was to give to the Defendant a true Account of all Money which he ſhould receive, *&c.* which he had not done; the Plaintiff replied, and confeſſed that he received ſuch a Sum, *&c.* and that he laid it up in the Plaintiff's Ware-houſe, from whence it was ſtolen by certain Malefactors, to him unknown, *& hoc paratus eſt verificare*; and upon Demurrer to this Rejoinder, it was objected, that it was a Departure from the Plea, becauſe that was, that he performed all the Covenants, one whereof was to account, but the Rejoinder is an Excuſe, why he did not account; adjudged no Departure, for ſhewing that he was robbed, is giving an Account what became of the Money. 1 *Vent.* 121. *Vere* verſus *Smith.* 2 *Lev.* 3. *S. C.* that the Demurrer was waived, and Iſſue was taken upon the Robbery.

Lev. 143. 3. In *Aſſumpſit* for 5000 *Royals Plate*, owing to him at *London*, the Defendant pleaded the Statute of Limitations; the Plaintiff replied, and tendered an Iſſue as to Parcel, and as to the Reſidue, the Defendant was indebted to him at *Teneriffe* in the Canary Iſlands *in Warda de cheap*, *&c.* and upon a Demurrer to this Replication, it was objected, that 'tis a Departure, becauſe the Plaintiff had declared for a Debt due in *London*, and in his Replication he alledges it was at *Teneriffe*; but adjudged, that this being a perſonal Thing, 'tis no Departure, for he who is indebted to another in one Place, is ſo in every Place. *Sid.* 228. *Bevin* verſus *Chapman.*

4. Caſe, *&c.* for Work done, and ſix ſeveral Promiſes were all laid upon 16 *Octob.* the Defendant pleaded generally *infra ætatem*; the Plaintiff replied as to Two of the Promiſes *præcludi non debet*, *&c.* becauſe the Defendant was of *full Age at the Time when thoſe Promiſes were made*; and as to the reſt, that they were for his neceſſary Apparel; and upon Demurrer to this Replication, it was inſiſted, that it was repugnant, becauſe the Defendant could not be an Infant, and of Age at one and the ſame *Time*; but adjudged, that the *Time* laid in the Declaration, and likewiſe in the Replication, was only a Circumſtance, and that the Plaintiff is not tied to a preciſe Day, and if the Defendant, by his Plea, force him to vary, 'tis no Departure. 1 *Salk.* 223. *Howard* verſus *Jenniſon.*

5. So in Treſpaſs, if the Defendant juſtifies on the Day in the Declaration, the Plaintiff may alledge another Day in his Replication. 1 *Salk.* 222. *Webley* verſus *Palmer.*

6. So in *Treſpaſs* for Taking his Cattle *in the King's Highway*, the Defendant juſtified the Taking, *&c. Damage-feaſant*; the Plaintiff replied, that Time out of Mind, *&c.* there had been a Way both for Horſe and Foot, for all People, *&c.* from ſuch a Place, and that he drove his Cattle over the Way, and that in Paſſing they eat, *&c.* the Defendant rejoined, that the Cattle were *Commorant on the Way*, upon which they were at Iſſue, and the Plaintiff had a Verdict; and upon a Motion for a *Repleader*, becauſe the Treſpaſs put in Iſſue was not the ſame Treſpaſs for which the Plaintiff had declared; it was adjudged, that a Departure muſt be from ſomething which is material, which this is not, becauſe where the Treſpaſs is tranſitory, 'tis idle and immaterial to ſet forth, that it was done in the *Highway*, therefore 'tis no Departure, when the Plaintiff in his Replication followed the Defendant, who led him another Way; and when the Iſſue was taken upon the Commorancy, the Defendant admitted, that the Plaintiff had Right to a Way, but that he ſtayed on it longer than he ſhould. 1 *Salk.* 222. *Palmer* verſus *Phillips.*

7. Treſpaſs, *&c.* for Breaking his Houſe and Taking away his Goods; the Defendant juſtified the Taking and Carrying away *Nomine diſtrictionis* for Damage-feaſant; the Plaintiff replied, that after the Diſtreſs taken, and in the very ſame Day, the Defendant *converted* them to his own Uſe; and upon Demurrer to this Replication it was inſiſted, that it was a Departure from the Declaration, becauſe that was for a Treſpaſs, and this ſhews that it was a Trover and Converſion; but adjudged, that the Abuſe of a Diſtreſs makes a Man a Treſpaſſer *ab initio*, and by Conſequence the Shewing the Abuſe is no Departure, for the Converting is either a Trover or Treſpaſs at the Election of the Plaintiff, and the Replication had determined his Election, to make it a Treſpaſs. 1 *Salk.* 221. *Gargrave* verſus *Smith.* See *Yelv.* 96, 97.

Deprivation.

What are Cauſes of Deprivation. (A) | For what a Parſon ſhall not be deprived. (B)

(A)

What are Cauſes of Deprivation.

1. DEprivation is either *ab officio*, or *a Beneficio*, the firſt is called *Depoſitio* or *Degradatio*, which is where a Clergyman is deprived of his Orders in a ſolemn Manner by the Biſhop, for a Crime deſerving Death, but this rarely happens; nor Deprivation *a Beneficio* very often, which is an Act in the Spiritual Court grounded upon ſome Crime or Defect in the Perſon deprived, by which he is diſcharged from his ſpiritual Promotion or Benefice, by a Sentence declaratory, upon a ſufficient Cauſe proved againſt him in that Court, which Cauſes are:

Baſtardy,	*Defectus Scientiæ*,	*Irregularitas Perſonæ*,
Conſcientia Criminis,	*Grave ſcandalum*,	Schiſm, *&c.*
Debilitas Corporis,	Hereſy,	and many more.

2. Before the Reformation, *Marriage* was a ſufficient Cauſe for Deprivation, as for Inſtance, the Incumbent made a Leaſe, *&c.* rendring Rent, which was confirmed by the Patron and Ordinary; afterwards he was deprived, becauſe he was a married Man, thereupon the Grantee of the next Avoidance preſented his Clerk, who was admitted and inducted; it was adjudged, that the Marriage of a Prieſt was a good Cauſe to deprive him, and that this Leaſe being void, becauſe it was made by one who was not capable to make it, ſhall not bind the new Incumbent. *Mich.* 4 *Mar. Dyer* 133.

3. Where a Layman is preſented to a Benefice, 'tis a good Cauſe if the Biſhop refuſe him, and if he admits him, 'tis a good Cauſe of Deprivation; but in the laſt Caſe, he being Incumbent *de facto*, muſt be deprived by a Sentence in the Court, and the Ordinary muſt give Notice thereof to the Patron. 13 *Eliz. Dyer* 292. 1 And. 16. Benefeild *v.* Pickring.

See 1 Brownl. 70. Mortimer *v.* Freeman. 2 Brownl. 37. Parker's *Caſe.*

4. One *Townſend*, a Layman, was preſented to a Living, and there being no Sentence of Deprivation againſt him in a Year after the Death of the laſt Incumbent, the *Archbiſhop of York*, preſented one *Pickering* by Lapſe, without any Notice given to the true Patron of the Incapacity of

Townſend; thereupon *Bedingfeild*, who was the true Patron, brought a *Quare Impedit* againſt the Archbiſhop and *Pickering*; and there being a definitive Sentence in the *Arches* againſt *Townſend*, the ſaid Patron ſet forth his Title in the *Quare Impedit*, to preſent upon an Avoidance by the *Deprivation of Townſend*; and an Exception was taken to this Declaration, becauſe he did not ſet forth *before what Judge* he was deprived, but it was diſallowed. *Dyer* 293. *Bedingfeild* verſus *Archbiſhop of York* and *Pickering*. *See* Reſignation. (B) 3. *contra.*

5. The Preſentation of a Layman is not a meer Nullity in itſelf, but there ought to be a Sentence of Deprivation, and *Notice* given to the true Patron, before the Biſhop can have a Title to preſent by Lapſe. *Dyer* 293, 247. *Moor* 606. *Coſtard* verſus *Wingfeild*. *S. P.*

6. By the Statute 13 *Eliz. cap.* 12. 'tis enacted, that he who doth not ſubſcribe unto and read the Articles of Religion, ſhall be *deprived ipſo facto*; adjudged, that upon ſuch a Deprivation there needs no Sentence declaratory thereof, becauſe the Avoidance was by Act of Parliament, but in ſuch Caſe the Ordinary muſt give Notice to the Patron of the true Cauſe of Deprivation, and without ſuch Notice a Lapſe ſhall not incur upon him. 18 *Eliz. Dyer* 346, and 369 and 327. 6 *Rep. Green*'s Caſe. *Poſtea* Preſentation. (B) 6. *Trin.* 18 *Car. March* 119. *Biſhop of Hereford* verſus *Oakly*. *S. P.*

7. The Biſhop of *London, by and with the Aſſent* of five other high Commiſſioners (naming them) deprived the Rector of *North Luffenham* of his Rectory, for ſpeaking reproachful Words, and depraving the Book of Common Prayer; in an Action of Treſpaſs brought by the Rector, he inſiſted, that his Deprivation was void, becauſe the Sentence was by the *Biſhop, with the Aſſent of five other Commiſſioners*, when it ſhould have been done by the Sentence of them all, and not by One with the Aſſent of the others; beſides, he ought not to be deprived for the firſt Offence, but upon the Second after Conviction in the firſt, by which he is to loſe the Profits of his ſpiritual Promotions for ſix Months, but not to be deprived for the firſt Offence: But adjudged, that the Form of this Deprivation, being ſuch as is uſually in the Spiritual Court, ought to be allowed by the Judges; and as to the Deprivation it ſelf, they held it good, being done by Authority of the Commiſſion, and that by Virtue of a Commiſſion warranted by this Clauſe in the Statute, all the Popiſh Biſhops and Prieſts were deprived; for the Commiſſioners have Power to proceed and puniſh the Offence proved or confeſſed before them. *Mich.* 35 *Eliz.* 5 *Rep. Cawdry*'s Caſe. *Poph.* 59. *S. C.*

8. There were two Incumbents of one Church, and the one ſued the other to deprive him, for not Reading the Articles of Religion, and giving his *Aſſent* to them, according to the Stat. 13 *Eliz.* the Jury found, that he gave his *Aſſent to them for ſo much as they agree with the Word of God*; adjudged, that this was not ſuch an unfeigned Aſſent as that Statute requires. *Mich.* 34 *Eliz. Cro. Eliz.* 252. *South* verſus *Clerke.*

9. Dr. *Bonner* was made Biſhop of *London* by *H.* 8. and continued Biſhop till 2 *Ed.* 6. and then a Commiſſion iſſued forth to the Lord Chancellor, and other Commiſſioners, to ſummon Biſhop *Bonner* before them, and if he was contumacious, and would not anſwer, *then to impriſon or deprive him*; the Commiſſioners accordingly did *firſt impriſon and then deprive him*: The Biſhop *appealed* from their Sentence, and pending the Appeal another was made Biſhop by King *Ed.* 6. who made a Leaſe, under which the Defendant claimed; afterwards, *Anno* 1 *Mar.* King *Edward*'s Biſhop was declared an Uſurper, and by a definitive Sentence, Biſhop *Bonner* was reſtored, who made a Leaſe to the Plaintiff; the Court inclined, that the Power of the Commiſſioners being in the Disjunctive, either *to impriſon or deprive*, they could not do both, as they did in this Caſe; therefore they having impriſoned him firſt, their Depriving him afterwards muſt be void, and if ſo, *Bonner* ſtill continued Biſhop, and ſo the Leaſe made by the other Biſhop was void; but admitting the Deprivation to be good, even in ſuch Caſe the Appeal did ſuſpend the Sentence, and if it did, then the other was not Biſhop of *London*, and if he was not, then the Leaſe made by him is ſtill void: But the Plaintiff exhibited a Bill in Chancery, and had a Decree againſt the Leſſee of Biſhop *Bonner*. *Mich.* 6 *Jac.* 3 *Bulſt.* 73. *Lechmere* verſus *Carr.*

10. A Parſon was convicted at the Aſſiſes for *Manſlaughter*, and allowed his Clergy, and diſcharged; afterwards he was ſued in the Spiritual Court, in order to be deprived of his Benefice, and thereupon he moved for a Prohibition, which was granted by the Court, for they all agreed, that being *convicted for Manſlaughter*, and diſcharged by the Statute 18 *Eliz.* of Clergy, he ſhall not be queſtioned again in the Spiritual Court. 2 *Cro.* 430. *Searle*'s Caſe. *See* Prohibition. (E) 13. *S. C.*

11. *Smith* was deprived by the High Commiſſioners for not conforming to the Canons, offering to ſubſcribe to all that the Laws and Statutes of this Realm require, when he ought to ſubſcribe generally, and not with any Reſervation, and for this he was deprived; and the Reaſon given in the Sentence was, becauſe he was *refractarius*; from this Sentence he appealed, and pending the Appeal, one *Bird* was preſented, inſtituted, and inducted into his Living, but *Smith* would not quit the Poſſeſſion; thereupon a *Vi Laica amovenda* iſſued out of Chancery, and the Sheriff coming to the Parſonage-Houſe, *Smith* and his Company fled, and *Bird* finding the Door open, entered and took Poſſeſſion; thereupon *Smith* made Affidavit, that the Sheriff turned him out by Force, and put *Bird* in, and moved the Court of *B. R.* for Reſtitution, and it was granted; then *Bird* exhibited a Bill in Chancery againſt *Smith*, ſetting forth all this Matter, and prayed an Injunction to quiet the Poſſeſſion till the Sentence of Deprivation ſhould be repealed; and it was ruled by the Lord Chancellor, with the Aſſiſtance of the two Chief Juſtices and Chief Baron,

that *Bird* ſhould keep the Poſſeſſion till the Repeal, and that a Writ *de vi Lacia, &c.* is not returnable, unleſs there is a Force, and then the Sheriff ought to apprehend the Offenders, and to commit them, and return the Writ into *B. R.* and there they ſhall be fined and puniſhed; but that *B. R.* cannot make a Rule for *Reſtitution* upon an *Affidavit* of the Force, but the Writ *de vi Laica* muſt be taken of the File, and ſent into the Chancery, from whence it came, there to be filed; and then upon an Affidavit of the Force, that Court may award Reſtitution. *Moor* 781. *Bird* verſus *Smith.*

(B)

What are not ſufficient Cauſes of Deprivation. See (A) 10.

1. 'TIS generally true, that thoſe Cauſes, which are not ſufficient for the Biſhop to refuſe Admiſſion and Inſtitition of a Clerk, are not ſufficient Cauſes of Deprivation, if he is admitted; as where the Biſhop of *Norwich* refuſed to admit a Clerk, becauſe he *frequented Taverns, and was a Player at unlawful Games*; theſe were adjudged not ſufficient Cauſes; for tho' they were Offences prohibited by the Law to ſome Perſons at certain Times, yet they were no otherwiſe Offences than as they were prohibited, for they were not *mala in ſe*, and therefore no Cauſes of Deprivation. 12 *Eliz. Dyer* 293.

Deputy.

Who may make a Deputy. (A) | Who cannot make a Deputy. (B)

(A)

Who may make a Deputy. See *Leet.* (A) 20. *Office.* (A) 7. (D) 4.

1. GRANT of the Office of *Remembrancer* in the Exchequer to *Robert Blague* for Life, to exerciſe by himſelf, or *per ſufficientem Deputatum*; this was *Anno* 18 *H.* 7. and afterwards, *viz. Anno* 3 *H.* 8. he was made a Baron of the Exchequer *quam diu ſe bene geſſerit*, and yet he continued to exerciſe the ſaid Office of Remembrancer, by Deputy. *Paſch.* 5 *Eliz. Dyer* 197.

2. Where an Office is granted to a Man and his Heirs, he may make an Aſſignee of that Office, and by Conſequence a Deputy. 9 *Rep. Comb's* Caſe.

3. The Earl of *Eſſex* held ſeveral Manors of the King by the Service, to be Conſtable of *England*, he had Iſſue two Daughters, and died; afterwards they married; adjudged, that before Marriage they might exerciſe that Office by Deputy, and that the youngeſt Daughter being married to the King, the Husband of the eldeſt ſhall now exerciſe the Office alone. *Trin.* 12 *Eliz. Dyer* 208. *Humfrey de Bohun's* Caſe.

4. The King granted the Office of Steward of his Houſhold, and of all his Manors, *&c.* to the Earl of *Shrewsbury*, for Life, but there was no Power given in the Grant to make a Deputy of the Office of Steward of the Manors; and by the ſame Letters Patents he granted to the Earl the Office of Park-Keeper in *N.* to hold and exerciſe *Offic. prædict'* by his * Deputy or Deputies; and in the Concluſion of the Grant, he commanded all his Officers, *&c.* to be aſſiſting to the ſaid Earl *& Deputat' ſive Deputatis ſuis*; adjudged, that tho' a Steward cannot make a Deputy without Special Words, becauſe 'tis an Office of Truſt and Knowledge, which are Qualities annexed to his Perſon; yet when the King grants a Stewardſhip to an *Earl*, he may make a Deputy, becauſe of the Dignity of his Perſon; for an Earl is *præpoſitus Comitatus*, and there is no Occaſion for any expreſs Words in the Grant to give him that Power, for it ſhall be intended, that his Time is taken up ſo much with the Publick Affairs of the Kingdom, that he cannot in Perſon attend ſuch an Inferior Office. 9 *Rep. Earl of Shrewsbury's* Caſe. *See Lady Ruſſell's* Caſe. Office. (A) 7. * Plow. Com. 381.

5. Error to reverſe a Judgment in the Palace-Court, held before *James* Duke of *Ormond*; and the Error aſſigned was, that the Duke was not in Court, but that it was held before one *Wynn*, his Deputy, according to the Grant, and that there cannot be a Judicial Place to hold a Court by Deputy; but adjudged, that many Recorders hold their Courts by Deputy. 1 *Lev.* 76. *Molins* verſus *Werby.* Sid. 94.

(B)

Who cannot make a Deputy.

1. THE Office of Chirographer and *Cuſtos Brevium* in the Court of Common Pleas is in the Gift of the Crown, and cannot be exerciſed by Deputy, as appears in a Patent granted by Qeen *Eliz.* to one *Robert Kirton*, in which there is a Proviſo, that *continue moretur in propria perſona ſua ſupradict' officio abſque aliquo deputato, &c.*

Deſcent.

(A)

Where the Heir ſhall take by Deſcent. See *Deſcription.* (C) 3. *Kindred* per totum. *Purchaſe.* (B) per totum.

1. THE Teſtator deviſed his Lands to his next Heir, and his Heirs; adjudged, this is a void Deviſe, and that the Deviſee ſhall take by Deſcent, becauſe a Man cannot raiſe a Fee-ſimple *to his own Right Heirs by the Name of Heirs*, as a Purchaſe either by Conveyance, Uſe, or Deviſe. *Plow. Com.* 545. *See pl.* 2.

2. This is where Lands or Tenements come to the Heir, either in a direct or collateral Line; 'tis likewiſe where the Heir comes to an Eſtate by Way of *Limitation*; as where the Anceſtor takes an Eſtate for Life by any Conveyance, and in the ſame Deed an Eſtate is limited to his *Heirs*, either in Fee or Tail, there the Words *Heirs* is not a Word of Purchaſe, but they are in by *Deſcent*, and not by *Purchaſe*; and 'tis a Rule in Law, that a Man cannot raiſe a Fee-ſimple to his own Right Heirs, by the Name of *Heirs*, as a *Purchaſe*, either by Conveyance of the Land, or by Uſe or Deviſe; for if he deviſe Lands to one who is his Heir at Law, the Deviſe as to him is void, for he ſhall take by Deſcent. 35 *H.* 8. *Dyer* 54. 3 *Mar. Dyer* 126. *S. P. See pl.* 1. *S. P.*

3. *The Son* purchaſed Lands in Fee, and died without Iſſue; the Queſtion was, whether the Brother of his Grandmother on the Part *of his Father*, or the Brother of his Mother, ſhould have the Lands; adjudged, that the *Brother of his Grandmother* ſhall inherit as Heir to him; for tho' he is not of his Name, he is of the *moſt antient and worthy Blood by the Male Side of his Father*; 'tis true, the *Brother of his Mother* is nearer in Blood, but ſtill the other is to be preferred for the Reaſon before mentioned. *Trin.* 14 *Eliz. Dyer* 314. *Paſch.* 5 *Eliz. Plow. Com.* 442. *Clear* v. *Brooks.*

4. Two Brothers, the youngeſt had Iſſue a Son, and was attainted of Treaſon and died, the elder Brother having a Title to a Petition of Right, died without Iſſue; adjudged, that the Son of him who was attainted hath loſt this Right; for tho' this Title was in his Uncle and Anceſtor, who was not attainted, yet his Father, who was the *Medius Anceſtor*, and thro' whom he muſt convey that Title to himſelf, being attainted, the Deſcent is obſtructed by that Means. *Dyer* 274. *Graves's* Caſe.

5. The Father having two Sons, and being ſeiſed in Fee of Lands *in two Counties*, deviſed his Lands *in one County* to his youngeſt Son, and died ſeiſed of all the Premiſſes; his eldeſt Son entered on the whole, and before the younger Brother made any Entry, the ſaid elder Brother made a Leaſe thereof to *W. R.* rendring Rent; the Leſſee entered and paid the Rent ſeveral Years to the elder Brother; afterwards he caſually walked over the Land in Company of the Leſſee, but made no ſpecial Claim, and 24 Years after the Death of his Father, the younger Brother entered on the Land thus deviſed to him; the Queſtion was, if the Dying ſeiſed of his Father, and Deſcent of the Lands to his Heir, ſhould take away the Entry of the younger Brother? and adjudged, that it ſhould not; for in this Caſe there was not any Deſcent, becauſe by the Death of the Father the Freehold was immediately veſted in the youngeſt Son, by Virtue of the Deviſe; and when the elder Brother made a Leaſe of the Lands to *W. R.* he did a wrong to his younger Brother, and gained a tortious Eſtate, and by the Payment of the Rent to him, and by his walking over the Land, he did not gain any *Seiſin*; beſides a Deviſee hath only a Title to enter by Virtue of the Deviſe, which ſhall not be bound by any Deſcent. *Mich.* 32 *Eliz.* 1 *Leon.* 209. *Matthewſon* verſus *Trott.*

4 Leon. 48. S. C. *better reported.*

6. The Grandfather being Tenant in Tail of Lands, made a Leaſe thereof to the Grandſon, rendring Rent, and afterwards died; then the Father entered and paid the Rent, and died in Poſſeſſion; adjudged this was no Deſcent, for the Payment of the Rent explains by what Title he entered; and ſo he ſhall not be a Diſſeiſor, but at the Election of another. *Trin.* 30 *Eliz.* 1 *Leon.* 121. *Pie* verſus *Leverſage.*

7. The Father was indebted by Bond, and being ſeiſed of Lands in Fee, he deviſed the ſame to his Wife until his Son ſhould come of Age, Remainder *to his Son in Fee*, and died, having no other Lands than thoſe mentioned in the Will; adjudged, that the Son ſhall be in by *Deſcent*, and ſhall not have the Election to waive it, and to be in by the Deviſe. *Mich.* 27 *Eliz.* 2 *Leon.* 101. *Baſhpole*'s Caſe.

8. The Father had Iſſue a Son and *Daughter* by one Venter, and a *Daughter* only by another Venter, and made a Leaſe of his Lands to *T. S.* for Life, the Reverſion deſcended to the Son, who had Iſſue a Son, and died, and that Son died without Iſſue, then the Tenant for Life died; adjudged, that the Daughters ſhall inherit, notwithſtanding there was a Deſcent of the Reverſion from the Son to his Son. 1 *And.* 31.

9. The Father had Iſſue *Alice by one Venter, and* James *by another Venter*, and deviſed a Moiety of his Lands to his Wife for ſeven Years, and the other Moiety to *Alice* on the Day of her Marriage; the Wife entered, and within ſeven Years *Alice* married and entered on the other Moiety, then *James* died without Iſſue; adjudged, that after the ſeven Years the Heir of the whole Blood ſhall have one Moiety by Deſcent, and that *Alice* ſhall have no more that one Moiety. 1 *And.* 47.

10. *Henry Courtney* the Father had Iſſue *Edward*, and was attainted of Treaſon, and died; *Edward* purchaſed Lands, and died without Iſſue; adjudged, that neither of the Siſters of *Henry*, or their Children, ſhould inherit to theſe Lands purchaſed by *Edward* their Nephew, and yet neither he, or his Aunts were attainted; but becauſe *Henry*, thro' whom the Aunts muſt derive their Pedigree and Conſanguinity to *Edward*, was attainted, therefore the Deſcent to them was obſtructed. *Cro. Car.* 241. *Courtney*'s Caſe. Palm. 19.

11. In *Courtney*'s Caſe laſt mentioned, if the Grandfather of *Edward* had been attainted, and not his Father, this would not have hindered the Deſcent from *Edward* to his Aunts, becauſe the Attainder had been paramount the Conſanguinity, which was between *Henry* and his Siſters; as for Inſtance, *William Hobby* had Iſſue *Philip and Mary*, and was attainted of Treaſon, and died; *Phillip* purchaſed Lands, and died without Iſſue; adjudged, that notwithſtanding the Attainder, *Mary* ſhall take by Deſcent from *Philip*, becauſe the Deſcent between them was immediate, and the Law doth not Regard the Diſability of the Father. 40 *Eliz. Hobby*'s Caſe. 4 *Leon.* 5.

12. The Father had two Sons by ſeveral Venters, and deviſed his Lands to his Wife for Life, and after her Deceaſe, to *T. S.* his eldeſt Son, and his Heirs; it was objected againſt the Son, that he took this Eſtate by *Purchaſe*, and not by *Deſcent*, becauſe he did not take it *preſently* upon the Death of his Father, as he would have done, if he had taken by Deſcent; for he was not to have it whilſt his Mother was living; but adjudged, that the Deviſe was void as to the Son, and that he took the Eſtate by Deſcent, becauſe nothing more was deviſed to him than what he had by Law; and the Taking it after the Death of his Mother, makes no Manner of Alteration in the Limitation of it to him, it only ſhews when, and in what Manner he ſhall be in Poſſeſſion. *Style* 148. *Preſton* verſus *Holmes*.

13. Deviſe of Lands to *T. S.* for Life, and after his Deceaſe to the *Heir* of his Body for ever; adjudged, that the Word *Heir* in the Singular is *nomen collectivum*, and the ſame with *Heirs* in the Plural Number; and that the Deviſee hath a Fee-ſimple executed in him, and that his *Heirs* ſhall take by *Deſcent*, and not by *Purchaſe*. *Style* 273. *Pawſey* verſus *Lowdall*. *Poſtea* Fee-ſimple in Wills. (A) 4. *S. C.*

14. The Teſtator being ſeiſed in Fee of Lands which he had by the * *Mother's Side*, deviſed them to his Heirs on the Part of his Mother; adjudged this Deviſe was void, and that the Deviſee ſhall take by Deſcent. 3 *Lev.* 127. *Hedges* verſus *Row*. *See Kindred. (A) 11.

15. In a Special Verdict in Ejectment, the Caſe was, *Robert Ramſey* born in *Scotland*, had four Sons born there before the Union, (*viz.*) *Robert*, *Nicholas*, *John* and *George*; *Robert* the eldeſt Brother died, leaving Iſſue *Margaret*, *Iſabel* and *Jane*, who were alſo *Aliens*; *Nicholas*, the next Brother, had Iſſue *Patrick*, *born in England*, and by an Act of Parliament made in *Ireland*, *Anno* 10 *Car.* 1. it was enacted, that all *Scots* ſhould be reputed the King's natural Subjects of *Ireland*; *John* the third Son (who was afterwards Earl of *Holderneſs*) was naturalized by Act of Parliament in *England*, *Anno* 1 *Jac.* and afterwards purchaſed the Lands in Queſtion, and died without Iſſue; *George* the 4th Son was likewiſe naturalized here about ſeven Years after his Brother the Earl, and had Iſſue *John* the now Defendant; the Queſtion was, whether *Patrick*, the eldeſt Son of *Nicholas*, might claim thoſe Lands as Heir to his Uncle *John*, Earl of *Holderneſs*, by Virtue of the *Iriſh* Naturalization, or that they ſhould deſcend to *John* the Son of *George*, by Virtue of his Naturalization in *England*? it was my *Lord Hale*'s Opinion, that in Caſes of *Deſcent between Brothers*, the Law takes no Notice of the Diſability of their Father (as in this Caſe of *Robert Ramſey* the Father, who was an Alien) but only of the immediate Relation of Brothers as Brothers, and not in Reſpect of their Father; tho' 'tis true, that he is the Foundation of their Conſanguinity; ſo that the Diſability of the Father doth not hinder the Deſcent; for 'tis not the Natural Blood, but the Civil Qualification of that Blood by the Law of the Land, which makes them inheritable one to the other, and this Law finding them natural Brothers, and tranſplanted into the Civil Rights of this Realm, by Birth or Naturalization (which is the ſame Thing in Effect) doth ſuperinduce on their natural Conſanguinity a Civil Hereditary Quality, which makes them inheritable to one another; and if ſo, then in the Principal Caſe, the Diſability of *Robert Ramſey* being an *Alien*, doth not diſable *George* his 4th Son to inherit to *John Earl of Holderneſs*, his third Son, and by Conſequence it doth not diſable *John* the Son of *George* to inherit to the ſaid 1 Lev. 59. Hardr. 224. Vaugh. 274.

ſaid Earl his Uncle. 1 *Vent.* 413. *Collingwood* verſus *Pace.* 2 *Vent.* 1. *Craw* verſus *Ramſey.* *S. P. Jones* 10. *S. C. Vaughan* 274. *Sid.* 193. *S. C.* 2 *Sid.* 23, 52, 148. *S. C. by the Name of* Foſter verſus *Ramſey.*

16. 'Tis generally true, that where an Eſtate is deviſed *to the Heir at Law, but attended with a Charge*, that in ſuch Caſe he takes by *Purchaſe*, and not by Deſcent; as where Lands were deviſed to the Heir at Law, and his Heirs, upon Condition that he *diſcharges all his Father's Debts within a Year after his Deceaſe*; here the Heir hath a Fee-ſimple, but becauſe he was bound by this Condition, he hath it as a *Purchaſer*, and not by Deſcent; but the latter Authorities ſeem to be otherwiſe, for where the Teſtator deviſed his Lands *to his next Heir at Law for ever, provided he pay* 100 *l. within ſix Months after the Death of his Wife, to ſuch Perſon as ſhe ſhould direct*; it was inſiſted in this Caſe, that the *Heir* could not take by *Deſcent*, becauſe the Lands came to him clogged with a Condition to pay Money, which made a great Alteration in his Eſtate, for he was to take it otherwiſe by the Will, than he would have done by the Common Law; but adjudged, that the Condition to pay this 100 *l.* made no Alteration as to the *Deſcent*; for it was only a Charge in Equity upon the Land, and that it would be a forced Conſtruction of the Will to make him take by Purchaſe, and not by Deſcent. 1 *Lutw.* 593. *Clerke* verſus *Smith.*

17. In a Special Verdict in Ejectment, the Caſe was, the Teſtator deviſed his Lands to his Grandſon and his Heirs, *upon Condition, that he pay out of them* 200 l. *to ſuch Perſon as his Wife ſhall by Deed appoint*; the Teſtator died, his Grandſon entered, and the Wife died, *without making any Appointment*, then the Grandſon died, leaving an Heir on his Mother's Side, under whom the Plaintiff claimed; and an Heir on his Father's Side, under whom the Defendant claimed; and the Queſtion was, whether the Grandſon was in either by Deſcent or Purchaſe under the Will? and adjudged, that he was in by Deſcent, becauſe the Will gives him the ſame Eſtate the Law would have given him without it; 'tis true, it was under the *Poſſibility of a Charge of* 200 *l.* which never happening, by Conſequence he takes as Heir on the Part of his Father, and in this Caſe *Cro. Car.* 161. *Gilpin's* Caſe was denied. 1 *Salk.* 241. *Clerke* verſus *Smith.* *See Dyer* 124, 371. 3 *Leon.* 64, 70. *Cro. Eliz.* 833, 919. *Moor* 644. *Vaugh.* 271. *Hardr.* 204. 2 *Mod.* 644.

18. The Teſtator had two Daughters, and one of them had a Son, and ſhe died, and the Teſtator deviſed his Lands to his Grandſon and his Heirs; the Queſtion was, whether he ſhall take the whole by the Will, or one Moiety by Deſcent, and the other Moiety, as Coparcener with his Aunt? and adjudged, that he ſhould take the Whole by the Deviſe; 'tis true, where an Eſtate is deviſed to an Heir, which would have deſcended to him, and in the ſame Eſtate, if no Will had been made, there the Heir ſhall take by Deſcent; but here was not a Deviſe to an Heir, becauſe both Coparceners make the Heir, and one cannot be Heir alone, therefore the Grandſon muſt take by Will, becauſe nothing can deſcend to him, *ut uni cohæredi.* 1 *Salk.* 242. *Reading* verſus *Royſton.*

Deſcription.

Of a wrong Deſcription of the *Place* in Deeds or Wills. (A)
Of a wrong Deſcription of the *Thing* in Deeds or Wills. (B)
Of a wrong Deſcription of the *Perſon*, in Deeds or Wills. (C)

(A)

Of a wrong Deſcription of the Place **in Deeds and Wills.** See *Deviſe* (B) per totum.

1. IN Treſpaſs, the Caſe was, *Hartwell*, *Rode* and *Aſhen*, were three Vills in the *Pariſh* of *Rode*, and a Grant was made of all Tithes *in the Tenure of* Richard Wake *in* Rode *and Aſhen*, (but did not mention *Hartwell*) and all other Tithes *in Rode*, and at the Time of the Grant all the Tithes in *Hartwell* and *Rode* were in the Tenure of the ſaid *Wake*; the Queſtion was, whether the Tithes in *Hartwell*, in the Pariſh of *Rode*, did paſs or not? and adjudged in *B. R.* by three Judges againſt the Opinion of the Ch. Juſtice, that the Tithes in *Hartwell* did paſs; but upon a Writ of Error in the Exchequer-Chamber, that Judgment was reverſed, becauſe the Tithes of *Hartwell*, being a Vill, could not paſs by the Name of the Tithes in *Rode* and *Aſhen*, for *Rode* being likewiſe a Vill, ſhall not be taken for the Pariſh of *Rode*, and ſo to include *Hartwell*, for a Vill and a Pariſh are diſtinct and different Things. 2 *And.* 124. *Farmer's* Caſe.

2. The

2. The *Duke of Northumberland* being ſeiſed of ſeveral Meſſuages *in the Pariſh of St. Sepulchre, London*, bargained and ſold to the *Lady Lea*, all his Tenements *in the Pariſh of St. Andrew in Holborn in the Occupation of W. R.* to have to her for Life, Remainder to her Daughter and her Heirs; now, tho' it was true, that the Meſſuages were *in the Occupation of W. R.* yet becauſe the firſt Allegation was falſe, (*viz.*) that they were in the Pariſh of *St. Andrew*, when they were in the Pariſh of *St. Sepulchre*, the Bargain and Sale was void. 3 *Rep. Dowry's* Caſe, 10.

3. The Teſtator deviſed all the Profits of his Houſes and Lands lying *in the Pariſh of Billing*, and in a *Street* there, called *Brook-ſtreet*, to his Wife for Life, when in Truth there was *no ſuch Pariſh as Billing*, but the Land, ſuppoſed to be deviſed, laid in *Billing-ſtreet*; adjudged, that the Profits of that Land paſſed by this Deviſe. 1 *Brownl.* 131. *Pacy* verſus *Knolls*.

(B)

Of a wrong Deſcription of the Thing it ſelf in Deeds and Wills.

1. IN Ejectment, the Caſe was, that *T. S.* being ſeiſed in Fee, made an Agreement with *G. D.* to ſell his Lands to him, but before any actual Conveyance was made to *G. D.* he the ſaid *G. D.* ſold the Lands to *W. H.* and he the ſaid *W. H.* deviſed the ſaid Lands in thoſe Words, (*viz.*) I bequeath to my Son *R. H. all my Lands which I purchaſed of G. D.* when in Truth he did not purchaſe them of *G. D.* but of *W. H.* but becauſe it was under the original Agreement made between *T. S.* and the aforeſaid *G. D.* tho' no formal Conveyance was made to him, it was adjudged, that the Deviſe was good. *Cro. Eliz.* 121. *Thorp* verſus *Thompſon*.

2. The Teſtator deviſed *a Houſe* wherein *Henry Nicholls dwelleth*, called the *White Swan*; now *Nicholls* had only the Uſe of an Entry and three upper Rooms in the Houſe, yet it was adjudged, that the *whole Houſe* paſſed, becauſe the Word *Houſe* in the Beginning of the Sentence, which is called the *White Swan* at the End of it, muſt neceſſarily refer to the *whole Houſe*, for it can never be intended, that the *Houſe* called the *White Swan*, extended only to the Entry and three upper Rooms, but this Sentence might have another Conſtruction, if the Houſe only had been deviſed with the Addition of the *White Swan*. *Cro. Car.* 122. *Chamberlaine* verſus *Turner*. *Jones* 195. *S. C.*

3. So where the Teſtator deviſed his *Corner-Houſe in Andover, in the Tenure of one Hitchcock*, which was a Miſtake, for the Houſe was not in his Tenure, but of one *Benſon*; 'tis true, the Teſtator had *another Houſe* adjoining which was in the Tenure of *Hitchcock*; adjudged, that Houſe did not paſs, but the *Corner-Houſe*, becauſe that Houſe was ſufficiently deſcribed by the Name of the *Corner-Houſe* before, and the Addition, that it was in the Tenure of *Hitchcock*, is a plain Miſtake, and Surpluſage, and ſhall not make that ill which was well deſcribed before. *Jones* 379. *Blake* verſus *Gold.* *Cro. Car.* 447. *S. C.* See *pl.* 4.

4. The Teſtator having two Houſes, one called the *Upper Houſe*, and the other called the *Lower Houſe*, deviſed all his Tenements for the Payment of his Debts, until his Grandſon ſhould come of Age, and afterwards he deviſed *all his ſaid Tenements*, (viz.) *Two Parts of the Lower Houſe*, for raiſing 200 *l. &c.* the *Remainder* to his Grandſon and his Heirs; the Queſtion was, whether the (*Viz.*) and the Clauſe which immediately followed it, did reſtrain this Deviſe to the *Lower Houſe* only, or whether the *Whole* paſſed to the Grandſon by thoſe Words which went before, (*viz.*) *All his ſaid Tenements*; and adjudged, that the *Whole* did paſs by thoſe *general Words*, and that the (*Viz.*) was only directory, to whom Part of it ſhould go. 4 *Mod.* 140. *Bagnall* verſus *Abdett*. See *pl.* 3.

(C)

Of a wrong Deſcription of the Perſon in Deeds and Wills.

1. A Wrong Deſcription of the Perſon will not make the Deviſe void, if there is otherwiſe a ſufficient Certainty what Perſon was intended by the Teſtator; as for Inſtance, a Deviſe to *John Smith, the eldeſt Son of Thomas Smith*, when in Truth his Name was not *John*, but *Robert Smith*, yet the Will is good, becauſe there is a Certainty of the Perſon, by naming him to be *the eldeſt Son of Thomas Smith*, for he can have but one *eldeſt Son*. 3 *Leon.* 18. *Owen* 35. *S. C.*

2. Yet it hath been adjudged, that where there are *ſeveral Deſcriptions of one Perſon*, they muſt all meet at the Time of the Will executed, or the Deviſe is void, (*viz.*) The Teſtator deviſed his Lands to *T. S.* in Tail, Remainder *to the next of Kin of his Name*; now the *next of Kin*, which is one of the Deſcriptions of the Perſon was his Brother's Daughter, who was married, and by Conſequence *not of his Name*, which is the other Deſcription of the Perſon, for ſhe loſt his Name by her Marriage; adjudged, that the *next Heir Male of his Name* ſhall have the Land, but if ſhe had been a ſingle Woman at the Time of the Death of the Teſtator, tho' ſhe had afterwards married, the Deviſe to her had been good. *Cro. Eliz.* 532. *Bon* verſus *Smith*, and 576. *Jobſon's* Caſe. *S. P.* * 1 *And.* 306. *Brown* verſus *Peas.* *S. P.* *Cro. Eliz.* 357. *S. C.* *Owen* 24. *S. C.*

* Poſtea pl. 6.

3. The

3. The Father had one Son and a Daughter, and ſhe had Iſſue one Daughter, and no more; the Father deviſed, that his Lands ſhould deſcend to his Son, and if he died *without Iſſue of his Body*, then *to the right Heirs of his Name*, equally to be divided, Part and Part alike; his Brother was of *his Name*, but not his *right Heir*, for the Daughter of his Daughter was his *right Heir*, but ſhe was not of *his Name*; adjudged, that the Son had an Eſtate-tail, but that the Will was void as to the Reverſion, after the Eſtate-tail ſpent, for that deſcended to the Son of the Teſtator, who dying without Iſſue, and his Siſter being likewiſe dead, it muſt deſcend to her Daughter, who was the Grandaughter of the Teſtator. *Moor* 860. *Counden* verſus *Clerke*. *Hob.* 29. *S. C.*

2 Leon. 92. S. C. 3 Leon. 89. S. C. Godb. 26. S. C.

4. Deviſe to his Wife *for Life*, and after her Death *to her Children unpreferred*; now, tho' theſe are general Words, yet they were adjudged a ſufficient Deſcription, who ſhould take by this Will. 1 *And.* 61. *Amner* verſus *Loddington*. Cro. Eliz. S. C.

5. But where the Teſtator had a Son and a Daughter, and deviſed his Lands to his Wife for Life, and afterwards *to his Iſſue*; this was adjudged void, becauſe the Word *Iſſue* being in the ſingular Number, 'tis incertain which *Iſſue* he intended; 'tis true, *Juſtice Crook* was not of that Opinion, for he held that it ſhall go to the Son as moſt worthy; and the Lord Chief Juſtice *Hale* was of the ſame Opinion. 2 *And.* 134. *Tayler* verſus *Sawyer*. See 1 *Ven.* 229.

Cro. Eliz. 307. Owen 24. Antea pl. 2.

6. The Teſtator being ſeiſed of the Manors of *Warners* and *Churchhall*, deviſed *Warners* to the eldeſt Son of his Couſin *Richard Foſter* in Fee, and the Manor of *Churchall* to one *Waters*, during her Life, and that if after her Death, any of his Couſin *Foſter*'s Children ſhall be living, then he deviſed the *Manor of Churchall to him, that ſhould have the Manor of Warners*: The Couſin *Foſter* had Iſſue *George* and *John*, *George* entered on the Manor of *Warners*, and died without Iſſue, then *John* entered and ſold it, afterwards *Waters*, who had the Manor of *Churchall* died, *John Foſter*, who ſold *Warners*, being ſtill living; the Queſtion was, whether he ſhould have *Churchall*, and adjudged, that he ſhould not, becauſe he was not a Perſon deſcribed by the Will to take it, for that muſt be the Perſon who ſhould have *Warners* at the Time of the Death of *Waters*, which *John Foſter* had not, becauſe he ſold it. 1 *And.* 306. *Brown* verſus *Peas*.

Detinue.

(A)

What it is, where it lies, and where not.

1. *Detinue* in the Common Law is like *Actio Depoſiti* in the Civil Law, 'tis a Writ which lies againſt him, who having Goods or Chattels delivered to keep, and refuſes to redeliver them; in this Action the Thing detained, and not Damages, is to be recovered, but 'tis an Action rarely brought, for Trover is now the uſual Action in ſuch Caſes.

2. *Detinue* will not lie for *Money*, or for Corn, unleſs the one is in Bags and the other in Sacks, for theſe are Things which cannot be diſtinguiſhed. *Trin.* 28 *H.* 8. *Dyer* 22. *Moor* 394. *Banks* verſus *Whetſtone*. *S. P.*

3. Trover for a Chain of Gold found by the Defendant, who *ſold it* to divers Perſons unknown to the Plaintiff, and converted the Money to her own Uſe; the Chief Juſtice *Dyer* held, that *Detinue* had been the more proper Action, becauſe the Plaintiff did not ſhew, that *the Sale was in a Market Overt*, ſo the Property was not altered. *Mich.* 3 *Mar. Dyer* 121. *Lord Monteagle*'s Caſe.

4. *Detinue, &c. de una Domo, vocat.* a Bee-houſe, after a Judgment for the Plaintiff, a Writ of Error was brought, and the Error aſſigned was, that *Detinue* would not lie *of an Houſe*; the Judgment was reverſed. 2 *Cro.* 29. *Coupledike* verſus *Coupledike*.

5. Two Executors, one of them *having a Bond, in which* W. R. *was bound to the Teſtator in* 20 *l.* gave it to the Defendant in Satisfaction of his *own Debt*, and died, the ſurviving Executor brought an Action of *Detinue* againſt the Defendant for this Bond; the Court was divided in Opinion, whether the Action would lie, or not. *Mich.* 38 *Eliz. Cro. Eliz.* 496. *Kelſon* verſus *Nicholſon*. *Moor* 422. *S C.* that the Action doth not lie.

Sid. 246. 6. *Detinue* for a Deed, the Plaintiff had a Verdict, that the Defendant detained the Deed, and the Jury gave 20 *l.* Damages, but did not find the Value of the Deed, then iſſued out a *Diſtringas* to deliver the Deed, or the Value, and afterwards a Writ of Inquiry iſſued for the Value, and the

the Jury found a different Value from what the firſt Verdict found; it was objected, that there cannot be Damages and a *Writ of Inquiry* too, but *Twiſden* held there might be both, and the Plaintiff had Judgment. *Raym.* 124. * *Burton* verſus *Robinſon.* See *Ward* verſus *Colepepper. S. P.* and *Gardner* verſus *Hobbs*, and *Harcourt* verſus *Weekes, and* Writ of Inquiry. (C) 7. * Sid. 246.

7. Where Goods are prohibited to be imported under Pain of *Forfeiture*, one Part to the King, the other to him who will inform, *&c.* or ſue for the ſame; it was adjudged, that the Subject may bring *Detinue* for his Part, becauſe the very bringing the Action veſts a Property in him. 1 *Salk.* 223. *Roberts* verſus *Witherall*; 'tis true, the uſual Courſe is by Information. *Hardres* 217. *Pitcher* verſus *Jones.* 5 Mod. 193.

Devaſtavit.

By paying Debts of the Teſtator by ſimple Contract, before Bonds or Judgments. (A)
By paying Legacies before Debts. (B)
By releaſing Debts, by ſelling Goods at an Undervalue, or by converting them; and where an Executor of a waſting Executor is chargeable. (C)
Where the Husband ſhall be charged for Waſte done by his Wife. (D)

(A)

By paying Debts of the Teſtator, &c. by ſimple Contract, before Bonds or Judgments.

1. A *Devaſtavit* by an Executor or an Adminiſtrator, is by miſemploying the Eſtate, or miſbehaving himſelf in the Management thereof, and this may be done by ſeveral Acts, and firſt by paying Debts upon *ſimple Contract*, before Debts on *Bonds or Judgments:* But then he muſt have *Notice* of the Bond, which regularly is by an Action commenced againſt him, for the Law doth not oblige him to take Notice of it himſelf, no nor of *a Judgment on Record* againſt his Teſtator, becauſe he is not privy to Acts done either by or againſt him. 1 *Mod.* 175. 3 *Lev.* 115. *S. P. Moor* 752. *S. P.*

(B)

By paying Legacies before Debts. See *Executor.* (C) 3.

1. WHere an Executor, *&c.* payeth Legacies before Debts, and hath not ſufficient to ſatisfy both, 'tis a *Devaſtavit*, but Legacies may be paid before the Breach of any Covenants entered into by the Teſtator, for otherwiſe this Inconvenience would neceſſarily enſue, (*viz.*) The Performance of the Will would be obſtructed, becauſe 'tis a certain and preſent Miſchief not to pay Legacies when they are actually due, and if an Executor ſhould be compelled by the Law to wait for a Breach of a Covenant he may wait for ever; for it may happen that the Covenant will never be broken. *Allen* 38, 39. *Eales* verſus *Lambert. Goldsb.* 142. *Woodcock* v. *Herne. S. P.* Style 37.

(C)

By releaſing Debts, &c. or by ſelling Goods at an Undervalue, or converting them to his own Uſe; and where an Executor of a waſting Executor is chargeable.

1. SO where an Executor ſells the Teſtator's Goods at an Undervalue, if it was in a fraudulent Manner, 'tis a *Devaſtavit*, but if more could not be had, 'tis otherwiſe; ſo where the Sheriff hath the Teſtator's Goods in Execution, and ſells at an Undervalue, or if they are ſold by an Infant for leſs than they are worth, this ſhall not make the Executor chargeable. *Kelw.* 59. a. 3 *Leon.* 143.

2. But 'tis to be obſerved, that if Judgment is had againſt an Executor, upon a Demurrer, the Sheriff in ſuch Caſe cannot return *nulla bona Teſtatoris*, becauſe by the Demurrer the Executor hath confeſſed that he had Goods, *&c. Cro. Eliz.* 102.

3. There are ſome Caſes in the old Books which prove, that where an Executor waſtes the Goods of the Teſtator, and afterwards he makes *T. S.* his Executor, and dies, leaving Aſſets, that an Action of Debt will not lie againſt ſuch an Executor of the waſting Executor, upon a Suggeſtion of Waſte by the firſt Executor, becauſe 'tis a perſonal Wrong which died with him, and with this ſome of the later Authorities agree. 3 *Leon.* 241. *Sir Brian Tuck*'s Caſe. 2 *Lev.* 110. *Brown* verſus *Collins*. *S. P.*

4. Where an Executor is appointed for a certain Time, and after the Expiration thereof another is appointed to be Executor by the ſame Will, in ſuch Caſe, if the firſt Executor waſtes the Goods, the other ſhall be chargeable, tho' he hath done no Waſte, becauſe he may have an Action againſt the waſting Executor. *Hob.* 265.

5. Formerly the Courſe was, that *where the Judgment was had againſt an Executor* for the Debt of his Teſtator, and if upon a *Fieri facias* to have Execution *de Bonis Teſtatoris*, the Sheriff had returned, that the Executor had *ſold the Goods, or had converted them to his own Uſe*, or that there were *nulla Bona*, then a *Scire fieri Inquiry* ſhould iſſue againſt him, to ſhew Cauſe why the Plaintiff ſhould not have Execution *de Bonis propriis*; and if upon ſuch *Scire fieri Inquiry* the Sheriff had returned a *Devaſtavit*, in ſuch Caſe the Plaintiff might have an *Elegit de terris Executoris*, as well as an Execution *de Bonis propriis*. *Cro. Eliz.* 216. *Mead* verſus *Cheyney*. *Moor* 299. *S. C.* 2 *Leon.* 188. *S. C.* *Poſtea* Elegit. (A) 3. *S. C.*

6. But where an Adminiſtrator, during the Minority of an Infant Executor, poſſeſſed himſelf of the Teſtator's Goods, and when the Infant came of Age, he gave the Adminiſtrator a Releaſe of all Demands, now in ſuch Caſe, tho' the Goods never came to his Poſſeſſion, that Releaſe is a *Devaſtavit*. *Cro. Car.* 490. *Kniveton* verſus *Latham*. Infant. (D) 2. *S. C.* See *Kitley*'s Caſe. *Godb.* 29.

7. When this Method of Proceeding was uſed, it became a Queſtion, what was a good Plea to ſuch a *Scire fieri Inquiry*; and it was agreed, that the beſt Plea was, that *nulla Bona devenerunt ad manus, &c.* with which he could ſatisfy the Debt ſince the *Scire facias* brought; ſome were of Opinion, that *Plene adminiſtravit* would be good, becauſe this Proceſs was only to make Defendant anſwer, but they all agreed it would be dangerous to plead *Non Devaſtavit*. *Style* 56. *Fitchett* verſus *Woolaſton*.

8. But now the Courſe of theſe old Proceedings is altered, for Debt will lie againſt an Executor in the *Debet* and *Detinet*, where there is a *Judgment* againſt his Teſtator, upon a *Suggeſtion* only, that he had *waſted* the Goods, and this is a more expeditious Way than the old Method of a *Scire fieri Inquiry*, and that it had no Manner of Inconvenience attending it; for where the Plaintiff brings an Action of Debt againſt an Executor, upon a Judgment obtained againſt his Teſtator, upon a Suggeſtion, that he had waſted the Goods, he muſt prove every Part of his Declaration upon the Trial of the Iſſue; and ſo it was adjudged in the firſt Caſe of this Nature, which is in 1 *Lev.* 147. 2 *Sid.* 102. *S. C.* *Corey* verſus *Ihinn*, and *Carter* 2. *Barrell* verſus *Richmond*. *S. P.*

9. 'Tis to be obſerved, that Debt would not lie againſt the Executor, upon a Suggeſtion of Waſte done by him, unleſs there was a *Judgment* firſt obtained, either againſt the Teſtator or himſelf, and then upon *Nil debet* pleaded, if the Plaintiff doth not prove, that the Executor did actually Waſte the Goods, he muſt be nonſuited. 1 *Lev.* 155. *Wheatly* verſus *Lane*. 1 *Saund.* 216. *S. C.* 1 *Vent.* 315, 321. *Ent* verſus *Withers*. 2 *Lev.* 209. *S. C.*

10. But as to this Matter there was ſome Diſtinction made between a lawful Executor, and an *Executor de ſon Tort* waſting the Goods of the Teſtator, for in the firſt Caſe, the Executor poſſeſſes himſelf of the Goods lawfully, and if he afterwards waſtes them, and dies, an Action would not lie againſt his Executor, upon a Suggeſtion, that the firſt Executor had waſted the Goods, becauſe it was a perſonal Wrong, (as in the Caſe laſt mentioned) and died with him; but an *Executor de ſon tort* poſſeſſes himſelf of the Goods *wrongfully*, and if he afterwards waſtes them, and dies, leaving Aſſets, his Executor ſhall be charged upon the Suggeſtion of a *Devaſtavit* in his Teſtator, becauſe he came *wrongfully* by the Goods, and therefore the Wrong ſhall not die with his Perſon. 2 *Lev.* 133. *Aſtry* verſus *Nevitt*.

11. And even before the Statute 30 *Car.* 2. *cap.* 7. it hath been decreed in Equity *againſt the Executor of a lawful Executor*, who had waſted the Goods, and died, that ſuch Executor ſhould be liable to make good to the Creditors of the Teſtator, ſo much as the firſt Executor had waſted, and ſo far as he had Aſſets of the ſaid firſt Executor. 1 *Ch. Rep.* 257. *Chamberlaine* verſus *Chamberlaine*. Aſſets. (A) 4. *S. C.*

12. 'Tis true, there is a Caſe where 'tis otherwiſe adjudged, (*viz.*) an Action of Debt was brought againſt Husband and Wife, *Executrix* to her firſt Husband, wherein the Plaintiff ſet forth, that he had obtained *a Judgment* againſt them, which was not yet ſatisfied; that the Wife died, and that Execution was awarded againſt her Husband, who ſurvived, and that after the Death of the Teſtator, ſeveral of his Goods, to the Value of the Debt now in Demand, *came to his Hands, and to the Hands of his late Wife, as Executrix*, which he had *converted to his own Uſe*; upon a Demurrer to this Declaration, the Queſtion was, whether this Action would lie againſt the Huſband after the Death of his Wife; and the Court enclined, that it would not, becauſe there was only a bare Suggeſtion of Waſte done; and that if a *Devaſtavit* had been actually returned by the Sheriff, and a *Scire fieri Inquiry* had been brought to enquire to what Value, and the Wife had died before any Judgment had been obtained upon that Writ, her Husband ſhould not be charged,

a fortiori, where there is no Return made, but a *Devaſtavit only ſuggeſted*; which is a Perſonal Wrong in the Wife alone, and dies with her. 1 *Lutw.* 670. *Baron* verſus *Berkley*. There is a proper Remedy in Chancery, which ſee *pl.* 11.

13. But now by that Statute 'tis enacted, *that if an Executor* de ſon tort *Waſtes the Goods, and dies, his Executor ſhall be liable in the ſame Manner as his Teſtator would have been, if he had been living.*

(D)

Where the Husband ſhall be charged for Waſte done by his Wife. &c.

1. A Widow, who was Executrix to her firſt Husband, and who had Aſſets in her Hands, waſted the ſame, and then married again; my Lord *Coke* was of Opinion, that her Husband ſhall be charged, tho' none of thoſe Aſſets came to his Hands, and that Judgment ſhould be againſt him *De bonis propriis* for the *Devaſtavit* of his Wife before the Coverture between them. 1 *Roll. Rep.* 268. *Lumley* verſus *Hatton. pl.* 2. *S. P.* Baron and Feme. (H) 16. *S. C.*

2. The Teſtator deviſed a Term of Years of which he was poſſeſſed to *T. S.* and made his Wife Executrix, and died; the Widow married again, and her Husband took a new Leaſe of the ſame Eſtate from the Leſſor; adjudged, that this Acceptance of the new Leaſe was a Surrender of the old Leaſe, and a *Devaſtavit* in the Husband. *Moor* 358. *Carter* verſus *Love. Owen* 56: *S. P.*

3. A Widow, who was an Executrix, waſted the Goods of the Teſtator, and afterwards ſhe married; adjudged, that her Husband, and ſhe with him, ſhall be charged for her Waſte, and if the Husband alone had waſted the Goods after he had married the Widow Executrix, it ſhould have been a *Devaſtavit* in her, becauſe it was her Folly to marry ſuch a Man; and in ſuch Caſe, if a *Judgment* is had againſt them, and afterwards one of them dieth, the Charge ſhall be upon the Survivor, becauſe by the *Judgment* the Nature of the Debt is altered; but if there had been no Judgment againſt them in the Life-time of the Wife, and the Husband had ſurvived, he would not have been charged. *Cro. Car.* 519. *and Sid.* 337. *Eyre* verſus *Coward.* 2 *Lev.* 144. *Horſey* verſus *Daniell, S. P. pl.* 1. *S. P.*

4. Debt againſt Husband and Wife, as Adminiſtratrix to her firſt Husband, and upon a Judgment obtained againſt them, the Plaintiff brought a *Fieri facias* to have Execution of the Goods of the Inteſtate; the Sheriff returned *Nulla Bona*, and upon a Suggeſtion, that they had waſted the Goods of the Inteſtate, the Plaintiff brought another *fieri facias* againſt them, with a Clauſe in this Writ, *ſi ſibi conſtare poterit per inquiſitionem*, that they had waſted the Goods; then that the Sheriff *Scire fecerit* the Defendants to ſhew Cauſe why Execution ſhould not be *De bonis propriis*, which is the uſual Courſe, and this is called a *Scire fieri Inquiry*; the Sheriff returned, that the Jury found the Wife had waſted the Inteſtate's Goods to the Value of 100 *l.* in her Widowhood, and that the Husband had not committed any Waſte *& ſi devaſtaverunt*, according to the Writ, he prayed the Diſcretion of the Court; and upon this Special Return of the Sheriff, the Court awarded Execution *De bonis propriis* of the Husband and Wife, becauſe he is to be charged for the Waſte done by his Wife *dum ſola. Cro. Car.* 603. *Knight* verſus *Hilton.* Adminiſtration. (Y) 7. *S. C.*

5. A Debt was due to *T. S.* who made a Feme Sole his Executrix, and died, then the Widow married again, that very Perſon, who was the Debtor; this ſecond Husband died, and afterwards an Action being brought againſt her as Executrix, *&c.* ſhe pleaded *Riens inter maines*; the Queſtion was, whether ſhe had committed a *Devaſtavit* by the Inter-marriage with the Debtor of her Teſtator; 'tis certain, it muſt be ſo, if the Debt had been releaſed thereby, or if it had been extinguiſhed; but it was adjudged, that it was only *ſuſpended* for a Time, and that upon the Death of her Husband the Action would revive, and that ſhe might maintain it againſt his Executor. *Cro. Eliz.* 114. *Croſſman* verſus *Read. Moor* 236. *S. C.* 1 *Leon.* 320. *S. C.* 8 *Rep.* 136. *a. S. P. Poſtea* Marriage. (C) 4. *S. C.*

6. Debt upon Bond againſt Husband and Wife, as Executors, in which Action the Plaintiff ſet forth, that they had waſted the Goods of the Teſtator; but upon a Demurrer to the Declaration, the Defendants had Judgment, becauſe a Feme Covert cannot do any Waſte during the Coverture; 'tis true, the Waſte done by her Husband, ſhall charge her, if ſhe ſurvive him; but then it muſt be upon a Judgment obtained againſt him, and not on a Bond, on a bare Suggeſtion of a *Devaſtavit.* 2 *Lev.* 145. *Horſey* verſus *Daniell.*

7. By the Statute 30 *Car.* 2. 'tis enacted, that an *Executor of an Executor de ſon tort*, or an *Adminiſtrator*, ſhall be liable, as their Teſtator or Inteſtate would have been; a *Davaſtavit* was brought againſt an *Adminiſtrator* of an Executor, who had waſted; and it was objected, that it did not lie, becauſe the Statute charges only the *Executor* of the waſting Executor; therefore the rightful Executor ſhall not be charged, nor his Adminiſtrator: *Sed per Curiam*, a rightful Executor, who waſtes the Goods of the Teſtator, is a Kind of an Executor *de ſon tort*, for abuſing his Truſt, and therefore 'tis liable that his Adminiſtrator ſhould be liable to a *Devaſtavit.* 3 *Mod.* 113. *Holcomb* verſus *Petit.* 30 Car. 2. *cap.* 7.

8. Upon a *Devaſtavit* ſuggeſted againſt two Executors, the Writ was directed to the Sheriff, to enquire of the waſting of both, who returned, that one had waſted, but ſaid nothing as to the other; 3 Cro. 587, 81. Noy 72. Cro. Car. 295, 312.

other; after a Verdict and Judgment, this was aſſigned for Error; but adjudged, that it was aided by the Verdict, it being only an inſufficient Return; otherwiſe, if no Return at all. 1 *Salk.* 363. *Brook* verſus *Ellis.*

Deviſe.

By what Words Lands will paſs in a Deviſe, and what other Things by a Deviſe of Lands. (A)
Deviſe, where 'tis void, where not. (B)
Deviſe of Lands for Payment of Debts. (C)
Deviſe of Lands lying in two Vills or Counties, and of Lands in a *lieu Conus* in the ſame Vill. (D)
Deviſe of the ſame Lands twice in the ſame Vill. (E)
Deviſe of Money. (F)
Deviſe of Lands purchaſed after the making the Will. *See Purchaſe of New Lands.* (G)

(A)

By what Words Lands will paſs in a Deviſe, and other Things by the Deviſe of Lands.

Moor 359. S. C. Owen 74. S. C. Palm. 376. S. C. Cro. Eliz. 476, cont.

1. THE Teſtator was ſeiſed of an Houſe in *A.* and of an *Houſe* and Lands *in B.* and deviſed to *T. S.* his Houſe in *A.* with all and ſingular his *Lands, Meadows* and *Paſtures in B.* adjudged, that his *Houſe in B.* ſhall not paſs, for tho' by a Feoffment, or a Leaſe of *Lands*, the Houſes will paſs, yet Wills are to be taken according to the Intention of the Teſtator; and here the *Particular* Deviſe of the *Lands, Meadows, and Paſtures,* excludes the general Intendment of the Word *Terra,* which comprehends both Houſe and Lands; affirmed in the Exchequer-Chamber. 2 *And.* 123. *Ewer* verſus *Heydon.*

2. *Deviſe* is a Word properly applicable to Lands, and *Bequeath* to Goods; but *Lands* will paſs by a Deviſe of *Rents*, and by the Word Livelihood and Mortgage; as where the Teſtator being ſeiſed in Fee, made his Will in theſe Words *(viz.)* As concerning the Diſpoſition of all my Lands and Tenements, I deviſe the *Rents of H.* to my Wife for Life, Remainder over in Tail; it was adjudged, that the Lands paſſed by the Deviſe of the Rents. *Moor* 640, 771. *Kerry* verſus *Dethick.* 2 *Cro.* 104. *Owen* 30. *S. C. Cro. Car.* 37. *Cripps* verſus *Griſſell, S. P.*

3. Where a Man hath a *Rent* out of Lands, to him and to *his Heirs, during the Life of another,* he cannot deviſe this *Rent*, either at Common Law, or by the Statutes 32 & 34 *H.* 8. of Wills, becauſe he is not ſeiſed of an abſolute Eſtate in Fee, but only *during the Life of another*; and the Statutes require, that the Teſtator ſhould be ſeiſed of an abſolute Eſtate in Fee. *Cro. Eliz.* 804. *Gawen* verſus *Roots. Moor* 625. *S. C.*

4. But where a Man is ſeiſed of Lands in Fee, and hath an Eſtate likewiſe for Years in other Lands, and deviſeth *All his Lands and Tenements*, the Eſtate for Years will not paſs, becauſe there are other Lands which may ſatisfy the Words of the Deviſe. *Cro. Car.* 392. *Roſe* verſus *Bartlet.*

5. The Teſtator was ſeiſed in Fee of a *Portion of Tithes in H.* and having no Lands, or other Hereditaments there, he deviſed *all his Lands whereſoever* to his Brother, and his Heirs, and died; it was adjudged in this Caſe, that the *Tithes* paſſed by the Deviſe of *Lands*; for tho' they are diſtinct from the Land it ſelf, and ariſing out of it, yet in Wills the Property of Words are not ſo much to be conſidered as the *Intention* of the Teſtator, who certainly intended, that he had ſome Fee-ſimple Eſtate in *H.* becauſe he had nothing there which could ſupply the Words of his Will, but the Fee-ſimple of theſe Tithes. *Stile* 279.

6. By a *Deviſe of Lands* an equitable Right will paſs; as where the Teſtator agreed with a Copyholder to buy his Lands, and purſuant to that Agreement the Owner made a Surrender thereof out of Court, to the Uſe of the Teſtator, who, before the ſaid Surrender was preſented, or he admitted, made his laſt Will, and thereby deviſed all his Copyhold Lands to *T. S.* after his Death and ſoon afterwards died; it was decreed, that the Lands ſhould paſs, becauſe the Teſtator had an Equity to recover them, and the Vendor ſhall ſtand ſeiſed for the Vendee till a legal Aſſurance could be made of the Copyhold. 1 *Ch. Rep.* 39. *Davie* verſus *Beardſham.*

7. The Teſtator being poſſeſſed of Goods, and alſo ſeiſed of Lands in Fee, deviſed in theſe Words *(viz.)* I make Sir *Giles Bridges* of *Wilton, my ſolie Ayere and Texecutrice*; adjudged, that both

the Fee-ſimple of the Lands and the Goods alſo paſs, and the falſe *Engliſh* ſhall not make the Will void, when the Teſtator's Intent ſo plainly appears; the Teſtator in this Caſe being for the moſt Part beyond Sea, did not underſtand good *Engliſh*. 2 *Sid.* 75. *Marret* verſus *Sly*.

(B)

Where 'tis void, where not. See *Deſcription*, per totum.

1. ADjudged, that if the Maſter or Preſident of a College, deviſeth Lands to his College, and dieth, ſuch Deviſe is void, becauſe when it ſhould take Effect (*viz.*) at the Death of the Teſtator the College is without a Head, and ſo not capable to take by a Will. 4 *Leon.* 222. *The Preſident of* Corpus Chriſti *College*'s Caſe.

So where the Teſtator was poſſeſſed of a Term for Years, and deviſed it to *T. S.* and afterwards mortgaged it to *R. H.* and performed the Condition, and died, the Deviſe is void. *Roll. Ab.* tit. Deviſe. (z) 3. 1 And. 7. S. C. Bendl. 131.

2. The Teſtator had a Son and a Daughter, and deviſed his Lands *to his Iſſue*, and died; it was adjudged, againſt the Opinion of Juſtice *Croke*, that this Will was void for the Incertainty to which of his *Iſſue* it ſhall paſs; but it hath been ſince held, that the Word *Iſſue* being *nomen collectivum*, tho' 'tis in the ſingular Number in the Will, the Male Iſſue ſhall be preferred; and that 'tis a wrong Expoſition to make it void for Incertainty, which of his Iſſue he meant. 2 *And.* 134. *Tayler* verſus *Sawyer*. *Cro. Eliz.* 742. *S. C.* 1 *Vent.* 229. *S. P.* Cro. Eliz. 741. S. C. Raym. 83. *there cited, and denied to be Law.*

3. But where the Husband deviſed Lands to his Wife for Life, and after her Death, *to the Heirs Males of any of his Sons, or next of Kin*; the Court inclined, that this was a void Deviſe, becauſe the Clauſe being in the *Diſjunctive*, it could not appear, whether the Teſtator meant the Heirs Males of his Son, or not. *Style* 240. *Beal* verſus *Wyman*.

4. But by a late Statute, all Deviſes are made void and fraudulent *againſt Creditors only, their Heirs and Executors*, and ſuch Creditor may bring an Action of Debt upon his Bond, or other Specialty, againſt the *Heir at Law* of the Obligor, and againſt the Deviſee jointly, who ſhall be chargeable for a falſe Plea in the ſame Manner as the *Heir* would have been for ſuch Plea, or for not confeſſing the Aſſets deſcended, (*i. e.*) for the Debt and Damages, without any Writ of Enquiry. 4 & 5 *W. & M. cap.* 14.

(C)

Of Deviſes of Lands for Payment of Debts. See *Chattels* per totum.

1. THE Teſtator deviſed his Lands to his Executors, *for the Payment of his Debts, and until they ſhould be paid*, Remainder over; adjudged, that the Executors had not an Eſtate *for Life*, but only a Chattel Intereſt, determinable upon the Payment of the Debts; this Judgment is cited by my Lord *Coke* in *Matthew Manning*'s Caſe, who tells us he was of Counſel for the *Executors*, and that, if it had been conſtrued to be an Eſtate for their Lives, then it would have determined by their Deaths, which might happen before the Debts were paid, and by Conſequence they might never be paid; becauſe in ſuch Caſe the Lands would not go to their Executors, but to their Heir at Law: But if it was a Chattel Intereſt, then, if the Executors ſhould die before the Debts were paid, it would remain as Aſſets to their Executors, and the Debts would be paid, which was plainly the Intention; but if it had been by any other Conveyance at Common Law, as by Grant of an Eſtate, *&c.* for Payment of Debts, *&c.* and not by a Will, then it had been an Eſtate for Life. *In* 8 *Rep.* 96. *a. Cordell*'s Caſe, cited in *Matthew Manning*'s Caſe, *and Cro. Eliz.* 315. *S. C.*

2. Where the Teſtator deviſes his *Land* for *Payment* of Debts, and makes his Executor, and dies, leaving Aſſets, no Part of them, nor his perſonal Eſtate, ſhall be applied for that Purpoſe, becauſe he expreſly provided, that his Lands ſhould ſtand charged for the Payment of his Debts, which ſhews, that he intended his Perſonal Eſtate for his Executor; but if a Man by any other Conveyance, diſpoſeth his *Lands for Payment of his Debts*, and then dies Inteſtate, leaving Perſonal Aſſets, thoſe ſhall ſtand charged in the Hands of his Adminiſtrator, for the Payment thereof; and this is for the Benefit of the Heir, becauſe it doth not appear, that he intended any Thing for the Adminiſtrator. 1 *Lev.* 203. *Feltham* verſus *Haleſton*.

(D)

Of Lands lying in two Vills or Counties, and of Deviſes of Lands in lieu conus in the ſame Vill.

1. THE Teſtator had Lands in a *Vill*, and in *two Hamlets in the ſame Vill*, and by his Will he deviſed all his Lands *in the Vill, and in one Hamlett*, naming it, to *W. R.* and died; adjudged, that the Lands in the *other Hamlet*, tho' they were *in the ſame Vill*, did not paſs; and the Reaſon was, becauſe they were not expreſſed; but one of the Judges was of a contrary Opinion, for the Principal Word *Vill*, comprehends the Lands in both the *Hamlets*; which is true, and probably the Lands in both might have paſſed by a Deviſe of all his Lands in *the Vill*, if he had not expreſly named the Lands in one *Hamlet*. *Dyer* 261.

2. The Manor of *Cheſham* is Part in *Cheſham*, and Part in *Hertford*, and the Father having other Lands in *Hertford*, deviſed his *Manor of Cheſham*, to his eldeſt Son in Tail, and his Lands in *Hertford* to his youngeſt Son; adjudged, that the youngeſt Son ſhall have that Part of the Manor of *Cheſham* which lies in *Hertford*. 2 *Leon.* 190. *Sir Anthony Denys*'s Caſe.

3. There were Lands called by the Name of *Hayſland*, which extended into *two Vills*, (viz.) into the Vills of *Cleyton* and *Cockfield*, in the County of *Suſſex*, and the Teſtator deviſed all his Lands in *Cockfield*, to his youngeſt Son, and his Heirs, and if he died without Iſſue, then his three Daughters ſhould have *Hayſland*; the Teſtator died, the youngeſt Son died without Iſſue; adjudged, that the Daughters ſhall not have all the Lands called *Hayſland*, but only ſo much thereof as lies in *Cockfield*, becauſe ſo much, and no more, was deviſed by the Father to his youngeſt Son. *Cro. Eliz.* 674. *Wooden* verſus *Osborne*. 3 *Leon.* 77. *S. C.* 2 *Cro.* 21. *S. C.* reported by the Name of *Tuteſham* verſus *Roberts*.

4. *Goddard* being ſeiſed of Lands in *Odiham* and *Stapley*, which was a *lieu conus* in the ſame Vill, covenanted to make an Aſſurance of his ſaid Lands, and to *limit the Uſes of his Lands in Odiham* to one Uſe, and of his Lands in *Stapley* to other Uſes, which Conveyance he made accordingly; he, to whom the Uſes of his Lands in *Odiham* were limited, claimed the Lands in *Stapley* likewiſe, becauſe that was in the Vill of *Odiham*, and Part of that Vill; this being the Caſe in a Special Verdict in Ejectment, it was adjudged, that he to whom the Uſes of the Lands in *Stapley* were limited, ſhall enjoy thoſe Lands; but if this had been a Conveyance at Common Law, and not by Way of Uſe, it had been otherwiſe. 1 *And.* 245. *Goddard*'s Caſe.

Owen 74. Cro. Eliz. 476. Moor 359.

5. The Teſtator was ſeiſed of a *Houſe in Oxfordſhire*, and of an *Houſe and Lands in Hertfordſhire*, and deviſed all his Houſe in *L.* in *Oxfordſhire*, and all other his Houſe, Meadows and Paſtures, with their Appurtenances, *in Hertfordſhire*, to *Wm. Ewer*, *&c.* adjudged, that the *Houſe in Hertdforſhire* did not paſs, which Judgment was affirmed upon a Writ of Error in the Exchequer-Chamber; 'tis true by a *Grant or Feoffment* of all his *Lands in Dale*, a Houſe will paſs, but 'tis not ſo in a Will; for ſuch Conveyances ſhall be taken in the ſtricteſt Senſe againſt thoſe who made them; but in Wills, the *Intention* of the Teſtator will prevail, where it may be collected out of the written Words. 2 *And.* 123. *Heydon*'s Caſe.

6. The Teſtator had a *Moiety* of certain Lands lying in the County of *Kent*, and another Moiety of other Lands, lying in *Eſſex*, and he deviſed *all his Moieties* (in the plural Number) and other his Lands in *Kent*, to *W. R.* and died; adjudged, that by this Deviſe, both his Moieties, as well that in *Eſſex*, as that in *Kent*, paſſed. 1 *Bulſt.* 117. *Mirrell* verſus *Nicholls*.

(E)

Of the ſame Lands twice in one Will.

1. WHere there are ſeveral Deviſes of the *ſame Thing* in one Will, the laſt muſt take Place; but where the Deviſe is of *Lands* to one in Fee, and in the ſame Will the ſame Lands are deviſed to another in Fee, this makes them *Jointenants*; but if the Deviſe of Lands is to one *in Fee*, and to another for *Life or Years*, both may ſtand; ſo where the Deviſe of Lands is to one in Fee, and of a *Rent* out of the ſame Lands to another, both are good. 3 *Leon.* 11. 2 *Cro.* 49. *S. P. Co. Litt.* 112. *S. P.*

2. The Teſtator deviſed *All his Lands to John* in Tail, and in the ſame Will he deviſed Part of his Lands to *W. R.* adjudged, this latter Clauſe was an Explanation of his *Intention* (viz.) That *John* ſhould have *All the Lands*, except thoſe deviſed to *W. R.* who ſhall take by Way of Remainder after the Death of *John*, without Iſſue; but it had been otherwiſe, if the Deviſe had been to *John* in Fee-ſimple, and afterwards he had deviſed Part of his Lands to *W. R.* in Fee; becauſe one Fee-ſimple Eſtate cannot be limited after another Fee. *Yelv.* 209. *Wallop* verſus *Darly*. 2 *Cro. Brown* verſus *Jervois*.

(F)

Deviſe of Money. See *Legacies*.

1. THE Wife being with Child, the Husband made his Will, and deviſed, that *all his perſonal Eſtate*, after Debts and Legacies paid, ſhould be laid out in Lands (if he had a Son) and be ſettled on his Brother, for preſerving his Name, and if he had a *Daughter*, then ſhe ſhould have 3000 *l. paid* at the Day of Marriage, and that her Mother ſhould have 80 *l. Part of the Intereſt of the* 3000 *l.* for the Education of ſuch Daughter; the Teſtator died, and afterwards the Wife was delivered of a *Daughter*; the Queſtion was, whether ſhe ſhould have the *remaining Intereſt of the* 3000 *l.* or whether it ſhould go to the Executor of the Husband, in Truſt for his Brother, to be laid out in Land; and it was inſiſted for the Brother, that 'tis plain the Father intended no more than 3000 *l.* for the Daughter, and that appointing her 80 *l.* Part of the Intereſt yearly for her Education, he had excluded her from the reſt: But it was decreed, that where a Sum of Money is deviſed to a Child *to be paid at ſuch an Age*, it ſhall have the *Intereſt* of it till that Time, rather than the Executor, which is very clear, where no Maintenance is otherwiſe provided for the Child, and even in this Caſe, where a Maintenance was appointed, yet the Court decreed, that the Executor ſhould account to the Daughter for what Intereſt he had paid to the Brother. 2 *Vent.* 346.

2. Upon the Pleadings in Equity, the Caſe was, *Sir William Blois* had Iſſue a Son and *two Daughters* by the firſt Venter, and a Daughter only, called *Jane*, by his ſecond Wife, and upon this ſecond Marriage he ſettled Lands in Jointure to his Wife for Life, and after her Deceaſe (in Caſe he had one Daughter, and no more) to raiſe 3000 *l.* for ſuch Daughter, to be paid at her Day of Marriage, ſo that ſhe married after ſixteen, afterwards *Sir William Blois deviſed* the Reverſion of theſe Lands to his ſecond Wife, and to other three Perſons, and directs, that after his Son ſhall raiſe 9000 *l. for his three Daughters*, then they ſhould let him have the ſaid Lands; the Queſtion was, ſince *Jane*, the Daughter of the ſecond Venter had 3000 *l. by the Settlement*, and there being 9000 *l.* appointed for the *three Daughters by the Will*, of which ſhe was one, whether ſhe ſhould take a double Portion, one by the Settlement, and another by the Will, and the Lord Keeper *Finch* decreed, that the Will was only an accumulative Security for the 3000 *l.* given by the Settlement, and that upon Payment of 9000 *l.* the Plaintiff ſhould have the Eſtate. 2 *Vent.* 347. *Blois* v. *Blois*.

3. An Impropriator deviſed all his Tithes, *&c.* to *T. P.* who ſerved the Cure, and to all who ſhould ſerve the Cure after him; the Lord *Chancellor Finch* decreed, that tho' the Curate was not capable to take by this Deviſe, in ſuch Manner as the Teſtator had directed, becauſe he was not a Body corporate, and had not Succeſſion, yet the Heir of the Teſtator ſhould be ſeiſed in Truſt for the Curate for the Time being. 2 *Vent.* 349.

4. Where *Lands* are deviſed for Payment of Debts and Legacies, and the *Reſiduum* of the perſonal Eſtate is given to the *Executors after the Debts and Legacies are paid*, in ſuch Caſe the perſonal Eſtate ſhall in the firſt Place be applied to the Payment of the Debts and Legacies, as far as it will go, and the Lands ſhall not be charged any farther than to make up what the perſonal Eſtate falls ſhort. 2 *Vent.* 349.

5. The Father deviſed 250 *l.* to his Son, and made his Wife Executrix, and died, afterwards ſhe married again, and then the Son exhibited a Bill in Equity againſt Husband and Wife, for this Legacy of 250 *l.* The Defendants, in their Anſwer, pray an *Allowance for the Maintenance and Education of the Son*, but the Court would not allow them to diminiſh the Sum, becauſe by the Law the Mother ought to maintain the Child, but a Sum of Money for binding him Apprentice, and paid, the Mother ſhall be allowed in Diſcount. 2 *Vent.* 353.

6. The Father having three Daughters, *Mary*, who was unmarried, and *Martha* and *Elizabeth*, both married, deviſed to *Martha*, the Wife of *Cornelius Collett* 400 *l.* he giving Bond to his Executors, upon Payment of the Money, to purchaſe Lands of that Value, and ſettle it upon *Martha*, and the Heirs of her Body; and by the ſame Will he deviſed the *Reſiduum* of his perſonal Eſtate to his Executors, after Debts, *&c.* paid, to purchaſe Lands of that Value, and when purchaſed, to be ſettled on the Heirs of the reſpective Bodies of his three Daughters, *or otherwiſe* his Daughter *Mary*, and the Husbands of his married Daughters *ſhall give Bond* for ſo much as they ſhall reſpectively receive of the *Reſiduum* of the perſonal Eſtate of his Executors, the ſame being divided into three Parts, and to ſettle and aſſure ſuch Part of the ſaid Money unto, and upon the Child and Children of his ſaid three Daughters, Part and Part alike; afterwards *Martha* died within ſix Months after her Father, leaving Iſſue one Daughter, and no more, which Daughter died within four Months after her Mother, the other two Siſters ſurviving; then the Husband of *Martha* adminiſtred both to his Wife and Daughter, and exhibited his Bill in Equity to have the 400 *l.* and likewiſe the Share or third Part of the *Reſiduum* of the perſonal Eſtate, which amounted to 700 *l.* the Chancellor *Finch* decreed the Payment of the 400 *l.* with Intereſt, from the Time of the Exhibiting the Bill, which was diſmiſſed as to the 700 *l.* becauſe the Intereſt thereof was not veſted in the Child till the Executors had made Election to purchaſe Lands, and ſettle them as directed by the Will, or to pay the Money to the Daughter and their Husbands, that they might purchaſe and ſettle Lands to the ſame Uſes, and if nothing veſted in the Child till ſuch Election, nothing could veſt in the Father as Adminiſtrator, tho' it was much inſiſted, that he might have given Bond for the third Part of the

Re-

Reſiduum, as directed by the Will, and to ſecure it for his Child, and if ſo, it would come to him as Adminiſtrator; but it was held, that even in ſuch Caſe the Money ought to be laid out in Lands, and to be ſettled, as in the Will is appointed, and if ſo, the Husband could have no Benefit of it, for there would have been a joint Eſtate for Life in the Daughters, with ſeveral Inheritances. 2 *Vent.* 356. *Collett* verſus *Collett.*

7. The Teſtator deviſed his Lands to *T. P.* and his Heirs, in Truſt for *Katharine*, and the Heirs of her Body, and if *Katharine* died without Iſſue, then to *Jane for Life*, and in the ſame Will there was this Clauſe, that if *Katharine* died without Iſſue, *and Jane be then deceaſed*, then, and *not otherwiſe*, he deviſed the Lands to *I. N.* and his Heirs; the Teſtator died, and *Katharine* died without Iſſue, but *Jane ſurvived her*, and afterwards died, then *I. N.* exhibited a Bill in Equity againſt *T. P.* and the Heir at Law of the Teſtator, to have this Truſt executed to him; and the Lord Keeper *North* decreed the Lands to him, notwithſtanding *Jane ſurvived Katharine*, becauſe thoſe Words (if *Jane* be then deceaſed) ſeem only to expreſs his Meaning, that *Jane* ſhould be certain of the Lands for her Life, and that *I. N.* ſhould not have them till ſhe was dead, and then, and not before, he ſhould have the Poſſeſſion. 2 *Vent.* 363.

8. In Wills there muſt be an apparent Intent of the Teſtator to diſinherit the Heir. *Cro. Car.* 369. *Spritt* verſus *Bence.*

(G)

Of Lands afterwards purchaſed. See *Purchaſe of New Lands.*

1. THE Teſtator deviſed to his Wife all ſuch Sums of Money, *Lands, Tenements and Eſtate whatſoever, whereof at the Time of his Deceaſe he ſhould be poſſeſſed*; and after the Making this Will he purchaſed Gavelkind Lands; and the Queſtion was, whether they paſſed by this Deviſe; adjudged, that a Deviſe of perſonal Things is good, tho' the Teſtator had them not at the Time of his Will, becauſe they go to the Executor, and the Legacy doth not paſs by the Will, but by the Aſſent of the Executor to whom the Will is directory; but a Chattel real, as a Leaſe for Years, doth not paſs. *Gouldsb.* 93. That a Deviſe of Lands is not good, if the Teſtator had nothing in them at the Time of Making his Will, becauſe a Man cannot give what he hath not, and that which is void in the Original can never be made good; if an Infant make a Will, 'tis void, tho' he came of Age before he dies, and ſo of a Feme Covert, tho' ſhe become Diſcovert, and yet in theſe Caſes there was only a perſonal Diſability, but in the principal Caſe there is a real Diſability, for the very Thing it ſelf is wanting. 1 *Salk.* 237. *Bunter* verſus *Coke.*

Dilapidation.

(A)

See *Reſignation.* (B) 3.

1. BY the Statute 13 *Eliz. cap.* 10. 'tis enacted, that *if any Eccleſiaſtical Perſon, who is bound to repair the Buildings whereof he is ſeiſed in Right of the Church, ſuffers them to be in Decay, and makes any fraudulent Gift of his perſonal Eſtate, on Purpoſe to hinder the Succeſſor from recovering any Dilapidations againſt his* Executor or Adminiſtrator, *in ſuch Caſe the Succeſſor ſhall have the like Remedy in the Spiritual Court againſt the Grantee of ſuch perſonal Eſtate, as he might have againſt the Executor or Adminiſtrator of ſuch Eccleſiaſtical Perſon, * and all Money recovered for Dilapidations, ſhall, within two Years, be laid out upon the Repairs,* &c. *under the Penalty of forfeiting double the Value to the Queen, which ſhall not be ſo employed.* * *See* 14 Eliz. cap. 11.

2. This Dilapidation may be occaſioned either by Negligence or Wilfulneſs; and by the Law, the Executor or Adminiſtrator of him in whoſe Time it was done or ſuffered, muſt make amends to the Succeſſor; if they refuſe, he hath a proper Remedy in the Spiritual Court, or he may bring an Action of Debt againſt them at Common Law, in which Action he ſhall recover Damages in Proportion to the Dilapidations.

3. Adjudged, that a Parſon cannot fell Trees on the Lands which he hath in Right of the Church, unleſs for Repairing the Parſonage-Houſe or Buildings; if he doth, he may be puniſhed, either in the Spiritual Court or at Common Law. *Godb.* 259. *Biſhop of Sarum's* Caſe. 2 *Bulſt.* 279. *Biſhop of Durham's* Caſe.

4. Caſe, *&c.* in which a Parſon declared againſt his Predeceſſor for Dilapidations, ſetting forth, that the Defendant being a Parſon, accepted another Benefice, and left the Houſes of the former out of Repair, and that the Cuſtom of the Realm in ſuch Caſe was, that he ought to pay to the Succeſſor *tant' denariorum ſummam quant' ſufficien' ad reparand'*, and that the Repairs amounted to ſo much, *&c.* after a Verdict for the Plaintiff, it was objected, that this Action would not lie, for

it was meerly ſuable in the Eccleſiaſtical Court, and the Chief Juſt. *Pollexfen* was of that Opinion, but the other Judges held, that the Action would lie, and that in *Mich.* 3 *Jac.* 2. *C. B. Rot.* 332. *Day* verſus *Hollington*, it was ſo adjudged upon a Demurrer. 3 *Lev.* 268. *Jones* verſus *Hill.*

5. Libel in the Spiritual Court for Dilapidations, the Defendant ſuggeſted for a Prohibition another Action brought againſt him formerly in *C. B.* for the ſame Dilapidation *ad damnum* 100 *l.* to which he pleaded a Tender of 10 *l.* and averred, that it was ſufficient to repair the Dilapidations; and upon a Replication, that it was not ſufficient, they were at Iſſue, and the Jury found that it was ſufficient, and thereupon the Defendant had Judgment, which he now pleaded in Bar to this Suit in the Spiritual Court, but they refuſed to receive his Plea: The Prohibition was granted for a Recovery at Common Law, for Dilapidations are a good Bar to that Court. 3 *Lev.* 413. *Okes* verſus *Ange.*

Diminution.

(A)

1. ERROR, *&c.* to reverſe a Judgment obtained by *W. R.* againſt the Father of the Plaintiff; the Error aſſigned was, for Want of a *Warrant of Attorney* in a Common Recovery; the Plaintiff prayed a *Certiorari* to the Chief Juſtice of the Common Pleas, and another to the *Cuſtos Brevium*, and one returned *Non inveni*, the other *Non habetur aliquod Warrantum*; and now the ſaid *W. R.* being dead, the Plaintiff brought another Writ of Error by *Journeys Accounts* againſt his Heir at Law, who appeared and alledged Diminution *in hoc*, that the Warrant of Attorney was not certified, and prayed another *Certiorari* to the Chief Juſtice, and another to the *Cuſtos Brevium*; it was objected, that it ought not to be granted, becauſe a Certificate is in Nature of a Trial, and here the Chief Juſtice, who is a Judge of Record, hath certified, that no Warrant of Attorney is to be found, ſo that Diminution cannot be alledged in that Warrant of Attorney: But on the other Side it was ſaid, that this new *Certiorari* was only to inform the Court, whether there was any Warrant of Attorney, or not; for the Return of the firſt *Certiorari* was not peremptory, that *Non habetur*, but only *Non inveni aliquod Warrantum*, and therefore if the Court grants this new *Certiorari*, and 'tis certified that *Habetur warrantum Attornat'*, this is not contrary to the firſt Certificate, for both may be true; but the Court would not grant a new *Certiorari*. *Trin.* 26 *Eliz.* 1 *Leon.* 23. *Dorrell* verſus *Thynn.* *Moor* 148. *S C.*

2. After a Writ of Error brought, and the Defendant hath pleaded *In nullo eſt erratum*, he cannot afterwards alledge Diminution, becauſe by that Plea he affirmeth the Record to be ſuch as is certified upon the Writ of Error. *Hill.* 13 *Car. Godb.* 266. *Brook* verſus *Gregory.*

3. Error to reverſe a Judgment in Ejectment; the Error aſſigned was, for that the Plaintiff had declared on a Leaſe made *for three Years*, and in the Plea-Roll and Record of *Niſi prius*, it was on a Leaſe *for five Years*; and upon Diminution alledged by the Plaintiff in the Writ of Error, he had a *Certiorari*, and the Declaration was certified, that it was only *for three Years*; and the Defendant in the Writ of Error, after Diminution alledged by the Plaintiff, had another *Certiorari*, and thereupon it was certified, that he had declared upon a Leaſe *for five Years*; adjudged, that this ſecond Certificate, upon Diminution alledged by the Defendant, ſhall be received, becauſe it warrants the Declaration as 'tis entered on the Plea-Roll and Record of *Niſi prius*. *Trin.* 1 *Car. Cro. Car.* 64. *Howell John* verſus *Thomas.* *Godbolt* 407. * *Crouch* verſus *Haines.* *S. P.*

* 2 Roll. Rep. 352. S. C.

4. Judgment againſt *Baniſter* in the *Toulſell* in *Dublin*, in a Plaint of Debt, who brought a Writ of falſe Judgment in *B. R.* there, and after the Aſſignment of Errors there, the Defendant pleaded *in nullo eſt erratum*, and the Judgment was affirmed, and *Baniſter* was taken in Execution, who now brought a Writ of Error in *B. R.* here, and aſſigned two Errors, (*viz.*) that no Plaint was entered in the *Toulſell*, and at the End of the Declaration, *per quod actio accrevit* were omitted; and before the Defendant pleaded to theſe Errors, *Baniſter* alledged a *Diminution*, and prayed a *Certiorari* to the Chief Juſtice of *B. R.* in *Ireland*, to certify the Reſidue of the Record, *&c. coram vobis reſiden'*, and that if any Part of the Record was not *coram vobis*, then to write to the Mayor and Aldermen of *Dublin*, who are Judges of the Court of *Toulſell*, to certify it, and that the Chief Juſtice would certify it to *B. R.* here, and now it was moved for a *Superſedeas* to this *Certiorari*, becauſe after *In nullo eſt erratum* pleaded in *Ireland*, he cannot alledge Diminution of any Thing omitted in the Record in the *Toulſell*, for by that Plea he hath admitted the Record to be well certified by the Judge of that Court; beſides, the Court of King's Bench here hath nothing to do with any inferior Court there, but only with *B. R.* and when the Record which is there, is certified here, the Party cannot alledge Diminution in the Certificate of the inferior Court, becauſe the Judgment of the Court of *B. R.* there is only in Queſtion here; but it was adjudged, that 'tis uſual to alledge Diminution after *In nullo eſt erratum* pleaded, not

ex rigore juris, but *ex gratia Curiæ*, and afterwards a new Diminution was granted for theſe Words only, (*viz.*) *per quod actio accrevit. Palm.* 285. *Baniſter* verſus *Kennedy.*

5. Debt againſt Executors, the Action was laid at *Bridgnorth in Com. Salop*; the Defendants plead *Ne unques Executors*; the Plaintiff replied, that they adminiſtered *apud Salop*, and the *Venire facias* was awarded *de Bridgnorth*, and the Cauſe was tried, and the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought, and Errors aſſigned, a *Scire facias* was ſued out, to which the Defendant pleaded *In nullo eſt erratum*; and the Plaintiff alledged Diminution *de Venire facias*, and prayed a *Certiorari*, which was granted; and upon the Return thereof, he, (the Plaintiff in Error) alledged for Error, that the *Venire facias* was not well awarded from *Bridgnorth*, for it ought to be *de Salopia*; adjudged, that this *Certiorari* was not well awarded, for after *In nullo eſt erratum* pleaded, neither Plaintiff or Defendant can alledge Diminution, becauſe by that Plea the Record is allowed; 'tis true, the Court may award a *Certiorari* to inform their Conſcience of the Truth of the Record (if they pleaſe) in *C. B.* and ſo is *Biſhop's* Caſe; but in that Caſe the Defendant in Error had not joined *In nullo eſt erratum*, but ſaid nothing, *Ideo remanet inde indefens'*. *W. Jones* 139. *Weaver* verſus *Felton.*

6. Error of a Judgment in Battery in *Cheſter*, and the Error aſſigned was, for that the Declaration was by Way of Recital, (*viz.*) *quod cum* he was beaten, upon which the Judgment was reverſed, then a new *Certiorari* was prayed, for that the Record was right below; but it was anſwered, that Diminution cannot be alledged of a Thing which is fully certified, but in ſomething that is wanting, as Want of an Original or of a Warrant of Attorney, *&c.* 2 *Lev.* 206. *Wettenhall* verſus *Sherwin.*

Diſceit. See **Antient Demeſne.** (B) per totum.

Diſcontinuance.

What ſhall be a Diſcontinuance of Poſſeſſion and Eſtate. (A)
What ſhall be a Diſcontinuance of Proceſs or Plea, what not, and where the Plaintiff ſhall be allowed to diſcontinue, and where not. (B)

(A)

What ſhall be a Diſcontinuance of Poſſeſſion or Lands.

1. DIſcontinuance of Lands is ſuch an Intermiſſion, that a Man, tho' he hath Right, cannot enter on his Lands which are aliened, but muſt recover the Poſſeſſion by Law, as where the Husband ſells thoſe Lands which he hath in Right of his Wife, or where Tenant in Tail makes a Feoffment of the Lands entailed, not warranted by the Statute 32 *H.* 8. theſe are called Diſcontinuances.

2. Tenant in Tail, Remainder in Fee to his Siſters, the Tenant in Tail by Deed indented, tho' in Truth it was a Deed-Poll, did *give, grant, and confirm*, for a certain Piece of Money, *&c.* to *W. R.* and his Heirs, without the Words *Bargain and Sell*, *Habendum* to the ſaid *W. R.* with Warranty, *&c.* againſt the Tenant in Tail and his Heirs, and a Letter of Attorney to make Livery and Seiſin; this Deed was enrolled within a Month after it was executed; and about four Months afterwards the Attorney made Livery and Seiſin; Tenant in Tail died without Iſſue, the Siſters entered, and *W. R.* the Feoffee re-entered, and thereupon they brought this Action, and had Judgment, for this Deed was not any Diſcontinuance, becauſe it was a Bargain and Sale, and not a Feoffment; 'tis true, there was a Letter of Attorney to make Livery, and it was accordingly made, but it was after the Enrollment, and then it comes too late for the Warranty to hurt them; beſides, by the Words give, grant, agree and confirm *for Money*, if the Deed be duly enrolled, the Lands ſhall paſs as both by the Statute of Uſes, and by the Statute of Enrollments, as well as upon the Words Bargain and Sale. *Mich.* 14 *Eliz.* 3 *Leon.* 16.

Cro. Eliz. 827. 3. In Ejectment, the Caſe was, the Teſtator deviſed to his *Wife for Life*, Remainder in Tail to another, *Remainder to the next Heir Male of his Surname in Fee*, and died; then the Widow married him who was next in Remainder, and ſhe and her Husband levied a Fine to *W. R. &c.* and took back an Eſtate by the ſame Fine to her ſelf for Life, Remainder to *her Husband in Fee*, who was before Tenant in Tail, they afterwards ſuffered a Recovery to the ſame Uſes as in the Fine; the Wife died, and ſo did the Husband, without Iſſue, then he who was right Heir of the

Surname of the Teſtator entered; and adjudged, that the Entry was lawful; for the Fine levied by the Wife, who was only *Tenant for Life*, tho' he in Remainder was joined with her, was not a Diſcontinuance of the Remainder to the next Heir of his Surname, becauſe the Eſtate moved from the Wife, and it was her Fine, and but the Confirmation of him in Remainder, who joined with her; now, where Tenant for Life levies a Fine *ſur Cogniſance de droit*, 'tis a Forfeiture of her Eſtate; and in this Caſe the Eſtate-Tail being ſpent (for the Husband died without Iſſue) he in Remainder may enter for a Forfeiture, for his Remainder was neither diſcontinued by the Fine, nor his Right of Entry taken away by the Recovery. *Hill.* 43 *Eliz. Owen* 129. *Peck* verſus *Charnock*. *Moor* 634. *S. C.*

4. *Tenant for Life*, Remainder to his Son *in Tail*; the *Tenant for Life* made a Feoffment in Fee, to the Uſe of himſelf for Life, Remainder to his Son *in Fee*, afterwards they both came on the Land, and made a Feoffment in Fee *to W. R.* it was argued, that tho' the Tenant for Life had committed a Forfeiture by making a Feoffment in Fee, yet this was not a Diſcontinuance of the Eſtate-Tail, becauſe the Remainder-Man in Tail might waive the Forfeiture, as he ſeemed to do in this Caſe; for when he joined with the Tenant for Life, in the Feoffment made on the Land, that was a ſufficient Declaration, that he did not enter for a Forfeiture; but adjudged, that it was a Diſcontinuance; for when he entered it ſhall be adjudged, that his Entry was the Forfeiture, and then he hath gained a Poſſeſſion, and by Conſequence 'tis a Diſcontinuance; for the Poſſeſſion cannot be in both. *Trin.* 30 *Eliz.* 1 *Leon.* 127. *Toft* verſus *Tompkins.*

5. Feoffment upon Condition, that the Feoffee ſhould give back the Lands *to the Feoffor, and to his Wife in Tail*, Remainder to the *Right Heirs* of the Husband; they had Iſſue a Son, the Huſband died, afterwards the Son, in the Life-Time of his Mother, levied a Fine, with Proclamations to Sir *Geo. Brown*, and his Heirs; the Wife entered, and *made a Leaſe for three Lives, not warranted by the Statute* 32 *H.* 8. the Cogniſee re-entered; adjudged, that the Leaſe made by the Wife, tho' it was not with Warranty, yet it was within the Statute 11 *H.* 7. *cap.* 20, for a *Diſcontinuance* ſtands in equal Degree with a *Warranty*; and this Leaſe making a Forfeiture of her Eſtate, the Cogniſee may enter for the Forfeiture, becauſe the Eſtate-Tail of the Son being barred by the Fine, the Cogniſee is now that Perſon to whom the Intereſt, Title and Inheritance doth belong, after the Death of the Wife. 3 *Rep.* 50. *Sir Geo. Brown's* Caſe. Cro. Eliz. 513.

6. In Treſpaſs, the Defendant pleaded, that *N. N.* his Anceſtor was ſeiſed, and died ſeiſed, and that the Lands deſcended to him; the Plaintiff replied, that before *N. N.* had any Thing in the Land, *W. R.* was ſeiſed in Fee, and made a Feoffment to another to the Uſe of himſelf, and of his Wife for Life; afterwards to the Uſe of *R. R.* his Son, for Life; and after his Deceaſe, to the Uſe of the *Heirs Males of the Body of the ſaid R. R.* that the Husband and Wife died; that *R. R.* who was Tenant for Life, entered, and *made a Feoffment to N. N.* who entered, and deviſed it to his youngeſt Son for Life, and that *T. R.* as Son and Heir of the Body of *R. R.* entered, and let the Lands to the Plaintiff; it was objected in this Caſe, that the Heir Male of *R. R.* could not enter, becauſe by the Feoffment which his Father made, the Eſtate-Tail was diſcontinued; but adjudged, that it was not; the Court gave no Reaſon for this Judgment, therefore the Reporter puts a *Quære* to it. *Paſch.* 31 *Cro. Eliz.* 277. *Maſon* verſus *Nevill.*

7. Tenant in Tail made a Leaſe for 21 Years, and afterwards a Feoffment in Fee, with a Letter of Attorney to *W. R.* to make Livery, *&c.* the Attorney entered, and put the Leſſee out of Poſſeſſion, and made Livery; this is a Diſcontinuance of the Entail, tho' the turning the Leſſee out of Poſſeſſion, was wrongful. *Moor* 91. 1 And. 130. Darrell's *Caſe.*

8. Adjudged, that when Husband and Wife are Tenants in Special Tail, Remainder in Tail to *T. S.* Remainder over, and the Husband makes a Feoffment in Fee to certain Uſes, and dies, then the Wife levies a Fine, that this Feoffment made by her Husband, was a Diſcontinuance of his Eſtate-Tail, and corroborated by her Fine before her Entry; ſo that now ſhe could never enter and be remitted; 'tis true, the Statute ſaid, the Feoffment of the Husband ſhall not be a Diſcontinuance, but that the Wife may enter; but 'tis certainly a Diſcontinuance till her Entry, which Entry is now taken away by her Fine. 2 *Roll. Rep.* 311. *Moor's* Caſe.

9. Tenant in Tail, and he in Reverſion in Fee joined *in a Leaſe to* W. R. *for Life*, not warranted by the Statute 32 *H.* 8. Tenant in Tail died without Iſſue, he in Reverſion having firſt deviſed it, the Queſtion was, whether this was a Diſcontinuance of the Eſtate-Tail, or of the Reverſion; it was argued, that it was not a Diſcontinuance at all; becauſe it ſhall not be taken to be a tortious Leaſe, when it was not the Intent of the Parties to make it ſo, or to diſinherit him in Reverſion; but adjudged, that the Deviſe was void, becauſe the Leaſe for Life is only the Leaſe of the Tenant in Tail, tho' he in Reverſion joined in it; for the Livery and Seiſin muſt be made by the Tenant in Tail, and by him only, becauſe the Power of the Freehold, and the Poſſeſſion and Inheritance was only in him; then as ſoon as the Leaſe for Life was made, the Eſtate-Tail was * diſcontinued, during the Life of the Leſſee, and the Reverſion was diſplaced, becauſe the Tenant himſelf had gained a new Fee, and ſo became ſeiſed of the Reverſion in Fee expectant upon the Eſtate for Life; therefore 'tis a Diſcontinuance. *Hill.* 8 *Car. Cro. Car.* 281, 294. *Baker* verſus *Hawkins.* W. Jones 358. Hutt. 126. S. C. * *See* Stephans v. Britteridge.

W. Jones 323. 10. Husband and Wife being ſeiſed of Lands to them, and to the Heirs of the Body of the Husband, Remainder to *B. C. D.* ſucceſſively in Tail, Remainder to the Right Heirs of the Huſband; he and his Wife, and *C.* who was the ſecond Remainder-Man in Tail, made a Feoffment in Fee to *W. R.* with Warranty, and afterwards the Husband and Wife levied a Fine to the ſame *W. R.* and his Heirs; the Husband died without Iſſue, and ſo did *B.* and *C.* then *D.* who was the third Remainder-Man in Tail, entered; adjudged, that his Entry was not lawful; becauſe the Feoffment made by the Husband and Wife, was a Diſcontinuance of the Eſtate-Tail, and the joining him, who was the ſecond Remainder-Man in Tail, with them in this Feoffment, was not material, becauſe there was an immediate Remainder-Man in Tail, whoſe Eſtate was diſcontinued. *Trin.* 7 *Car. Cro. Car.* 233, 320, *King* verſus *Edwards. See* 2 *Roll. Rep.* 311.

11. Formedon in Deſcender for one Meſſuage and *fifteen Acres of Land* in the Iſle of *Ely*, in which the Demandant ſet forth, that *M. W.* being ſeiſed in Fee, deviſed the Premiſſes to *T. W.* and the *Heirs of his Body*, who entered, and died, and that the ſame deſcended to *J. W.* the now Demandant; the Tenant pleaded in Bar a Fine levied in a Court of Record in *Ely*, by *T. W.* the Father of the Demandant to the Father of the Tenant, and his Heirs, which Fine was levied of the Lands by the Name of *One Meſſuage, one Garden, one Orchard, and Common of Paſture, &c.* The Demandant replied, that it doth not appear, that the *fifteen Acres* were contained in the Fine, and ſo prayed Seiſin of the *Meſſuage and Lands, &c.* The Tenant rejoined, and prayed Judgment *for the Meſſuage*, for that the Demandant had made no Anſwer as to that; and as to the *fifteen Acres* he pleaded, that thoſe Lands, as well as the Houſe, are contained in the Fine by the Name of *one Meſſuage, one Garden*, one *Orchard*; and upon Demurrer the Demandant had Judgment; for the Fine was only a *Diſcontinuance* of the Eſtate-Tail; ſo that tho' the 15 Acres are the Lands of the Demandant, and to which he hath a Right, yet he cannot enter till he hath recovered the Poſſeſſion by Law in a *Formedon*. 2 *Lutw.* 959. *White* verſus *Auſtin.*

Of ESTATE.

Tenant in Tail levied a Fine to the Uſe of *W. R. for the Life of* W. R. *with Warranty*; and afterwards he levied another Fine to the Uſe of himſelf and his Heirs, with Warranty, and afterwards bargained and ſold the Lands to another, and his Heirs; adjudged, that the firſt Fine thus levied by Tenant in Tail, made a Diſcontinuance, but it was only during the Life of *W. R.* for it remains no longer a Diſcontinuance, when the wrongful Eſtate is gone, by which it was cauſed; that the ſecond Fine did not enlarge the Diſcontinuance, becauſe the Eſtate raiſed by the Fine returned back to the Cogniſor, and by Conſequence the Warranty which was annexed to it was extinguiſhed. 1 *Salk.* 244. *Hunt* verſus *Bourn.*

(B)

What ſhall be a Diſcontinuance of Proceſs or Plea, what not; and where the Plaintiff ſhall be allowed to diſcontinue, and where not.

See *Damages.* (B) 7. *Jeofails.* (B) 6. *Replication.* (A) 8. *Verdict.* (G)

1. *Diſcontinuance of Pleas* is ſuch an Intermiſſion, that the Party hath loſt his Opportunity to proceed, and muſt begin a new Suit, and therefore where an Action is long depending, and continued from one Term to another, thoſe *Continuances* muſt be all entered, otherwiſe there will be a *Diſcontinuance*; as for Inſtance, the Plaintiff *declared in Michaelmas-Term*, and the Defendant imparled till *Hillary-Term*, and from thence to *Eaſter-Term* following; but theſe *Diſcontinuances* were not entered; then the Plaintiff declared again in *Eaſter-Term*, and the Defendant avowed for Damage-feaſant, upon which they were at Iſſue; and at the Trial the Plaintiff was nonſuited upon full Evidence, and upon a Writ of Enquiry awarded, the Jury gave Damages for the Avowant; thereupon a Writ of Error was brought, and the Error aſſigned, that there were no *Continuances* entered; as to that it was anſwered, this could not be aſſigned for Error, becauſe it was after a Verdict; but adjudged, that it was not helped by any Statute of *Jeofails*; for here was no Verdict; the Plaintiff was nonſuit, and the Verdict given by the Jury on the Writ of Enquiry, is but an Enqueſt of Office; then it was objected, that here was no *Diſcontinuance*, becauſe the ſecond Declaration *in Eaſter-Term* had no Relation to that made in *Michaelmas-Term*, but was a new Declaration of its ſelf; and therefore there ought not to be any *Continuance* of the firſt; but it was adjudged a *Diſcontinuance*. *Mich.* 38 *Eliz. Cro. Eliz.* 412. *Courtier* verſus *Barret.*

2. In Account of divers Receipts of Parcels of Goods; the Defendant pleaded to Iſſue to all the Parcels, except one, and as to that he ſaid nothing; the Plaintiff had a Verdict, and the Defendant moved in Arreſt of Judgment, that the whole Pleadings were diſcontinued, and that it was not remedied by the Statute 32 *H.* 8. *cap* 30. becauſe no Anſwer being given to one Parcel, the Plaintiff could not have Judgment according to his Declaration; but adjudged, that it was remedied by this Statute, by which 'tis expreſly enacted, that *after a Verdict*, Judgment ſhall be given, notwithſtanding any Diſcontinuance. *Mich.* 29 *Eliz. Godb.* 55. *Gomerſall* verſus *Gomerſall.*

3. In Ejectment in the Common Pleas in *Ireland*, the Plaintiff had Judgment, thereupon a Writ of Error was brought in the King's Bench there, and the Error aſſigned was, want of an Original; the Defendant in the Writ of Error pleaded, that ſuch a Day an Original was filed, and concluded to the Countrey, when the Matter of this Plea ſhould be tried by the *Record* (viz.) *whether the Original was filed*, for that appears on Record; and therefore the Plaintiff in the Writ of Error ought to have replied to this Plea, which he died not, but yet the Judgment was reverſed for want of an Original; thereupon the Plaintiff in the Action brought a Writ of Error in the King's Bench in *England*, and aſſigned for Error a Diſcontinuance in the Proceedings in the Court of King's Bench in *Ireland*; becauſe the Plaintiff in the Writ of Error there, had not replied to the Defendant's Plea in Bar, nor demurred to it for concluding *to the Countrey*, in a Matter which ought to be tried by the *Record*; and this was adjudged a *Diſcontinuance*. *Mich.* 5 *Jac. Yelv.* 117. *St. John* verſus *Cummin.*

4. Three Executors recovered againſt the Defendant by Default, who brought a Writ of Error, and aſſigned a Diſcontinuance for Error; for that the Suit being continued by all three till ſuch a Time, and ſo entered on the Roll, there did but two appear at that Time, and Day was given to all three until another Day, which was entered on the ſame Roll; adjudged, this was a Diſcontinuance, and not to be amended, for the Court muſt give Credit to the Roll; and by that 'tis plain, that two of the Plaintiffs only appeared, and the third made Default, which is a Non-Proſecution of the Defendant on that Day, and ſhall go to all three afterwards; the Judgment was reverſed. *Trin.* 7 *Jac. Yelv.* 155. *Paſton* verſus *Luſher.*

5. Debt upon Bond, the Defendant pleaded Payment upon which they were Iſſue, and the Plaintiff had a Verdict in *Michaelmas*-Term 3 *Jac.* but there being a Miſtake in the *Venire facias*, the Plaintiff entered a *Retraxit* in *Michaelmas*-Term, 4 *Jac.* and Judgment was given *quod defendens eat ſine die*; the Plaintiff afterwards brought a new Action, and the Defendant pleaded the former Judgment in Bar, whereupon Error was brought, and the Error aſſigned was, that there was a Diſcontinuance, for there were no Continuances entered from that *Michaelmas*-Term, when the Verdict was given, to that *Michaelmas*-Term in which the Judgment was given; and this was not aided by any Statute, becauſe the Judgment was not given upon the Verdict, but upon the *Retraxit*, which is out of the Statute; to which it was anſwered, that a Diſcontinuance can never be objected *pendente placito* before Judgment. *Mich.* 16 *Jac.* 2 *Cro.* 211. *Beecher* verſus *Sir Tho. Shirley.* 8 *Rep.* 58. *S. C.* Retraxit. (A) 2. *S. C.*

6. Error of a Judgment in an Inferior Court in an Action of Debt, in which there was a Judgment againſt the Defendant by *Nil dicit*; the Error aſſigned was, that there was a Diſcontinuance; for after Imparlance Day was given to the Parties *until the next Court Day*, * *and no Day certain when that would be*; adjudged a Diſcontinuance, and the Judgment was reverſed. *Paſch.* 18 *Jac.* 2 *Cro.* 571. *Adams* verſus *Frith.*

* 2 Mod. 58. Crowder v. Goodwin.

7. In Treſpaſs for entering his Houſe *and Cloſe at L.* the Defendant pleaded, that a Warrant was directed to him by the Sheriff, *&c.* upon a *Capias Utlagatum* to execute upon one *W. R.* and it being the Common Voice, that he was in the *Plaintiff's Houſe*, he went in a Foot Path thro' the Cloſe to the Houſe, and asked Leave of the Plaintiff, to enter his Houſe, and to ſearch for *W. R.* and that the Plaintiff *gave him Leave*, whereupon he *entered the Houſe*, *&c.* iſſue was taken *upon the Leave*, and the Plaintiff had a Verdict; whereupon the Defendant moved in Arreſt of Judgment, that the *Entry into the Cloſe* being not anſwered, nor any Iſſue taken upon it, all was diſcontinued; but adjudged, that Judgment ſhall be entered, for that which was found by the Jury, and that the Diſcontinuance of the other was aided by the Statute. *Mich.* 12 *Jac.* 2 *Cro.* 353. *Watts* verſus *King.*

8. Treſpaſs againſt three Defendants, *&c.* for taking a Cupboard, and other Goods; one of the Defendants pleaded Not guilty; and the other two juſtified under an *Extent and a Liberate*; the Plaintiff as to that replied, *Nul tiel Record*, and the Defendants had Day to bring in the Record, until *Craſt. Purificationis*, but failed on that Day; whereupon it was adjudged againſt thoſe two, as to that Matter, and a *Ve. fa.* was awarded *ad inquirendum de executione prædict' quam de damnis*, returnable *Quinque Paſchæ*; and as to the other Defendant, the Record was *poſtea continuatur Proceſſus in præd' placito uſque ad Octab' Michaelis, niſi prius, &c.* and the Cauſe was tried at the Aſſiſes, and the Plaintiff had a Verdict, and upon the Return of the *Poſtea*, had Judgment; and thereupon a Writ of Error was brought, and the Error aſſigned was, that there were not any Continuances, either upon the Plea-Roll or the Iſſue-Roll, from *Eaſter* to *Trinity*-Term, nor from that to *Michaelmas*-Term; and that this was a Diſcontinuance not aided by any Statute; and ſo it was adjudged, and the Judgment reverſed. *Mich.* 10 *Jac.* 2 *Cro.* 303. *Miles* verſus *Prat.* Jeofails. (B) 6. *Mollinex* verſus *Mollineux. S. P.*

9. In Treſpaſs for an Aſſault, Battery, Wounding, and falſe Impriſonment, *&c.* the Defendant as to all *præter three* of thoſe Things, pleaded Not guilty, and as *to two* he juſtified, *&c.* and upon a Demurrer, this was adjudged a Diſcontinuance, becauſe he did not juſtify *all three* of the Things. 1 *Roll. Rep.* 135. *Wilſon* verſus *Dodd.*

10. In Treſpaſs for taking and chaſing his Sheep, Hogs, and Oxen; the Defendant, as to the Hogs, pleads Not guilty, and as to the Reſidue of the Treſpaſs *præter Boves*, he juſtified, *&c.* but ſaid nothing as to the Oxen; the Jury found *for the Defendant*; it was objected, that becauſe of this Omiſſion, he ought not to have Judgment. *Sed per Curiam*, 'tis only a Diſ-

continuance

continuance of that Part of the Treſpaſs (*viz.*) for the Oxen, and the Verdict ſhall ſtand for the reſt; for the Statutes 32 *H.* 8. and 18 *Eliz.* help Diſcontinuances, as well on the Part of the Defendant as the Plaintiff. 2 *Roll. Rep.* 161. *Jennings* verſus *Phriſtow.*

11. In a *Quare Impedit* againſt two Defendants upon the Grant of the next Avoidance; one of them pleaded *Non conceſſit*, upon which they were at Iſſue, and a Verdict was found for the Plaintiff; the other pleaded an ill Plea, to which there was a Demurrer; the *Poſtea* upon the Verdict at the Aſſiſes was returned, *Octab. Michaelis*, and the Entry upon the Demurrer was *Curia adviſare vult*, and Day was given to the Plaintiff, and to that Defendant, who demurred till *Octab. Hillarii*, but no Day to him againſt whom the Verdict was found, who thereupon brought a Writ of Error and aſſigned for Error, that this was a Diſcontinuance; but adjudged, that it was not, becauſe that the Defendant, againſt whom the Verdict was found, *was out of Court*, and therefore could have no Day to plead any Thing. *Mich.* 7 *Car. Cro. Car.* 170. *Lakins* verſus *Sir John Lamb. Popham* verſus *Rowley*, *S. P.* and 3 *Bulſt.* 230. *Elkin* verſus *Weſton. S. P.*

12. The Plaintiff recovered in an Inferior Court, in an Action of Trover by Default, and a Writ of Enquiry of Damages was returnable the next Court, at which Day the Plaintiff appeared, and the Writ was returned, ſerved; but *Jurata ponitur in reſpectu* to the next Court, *&c.* which being on a Day certain, the Plaintiff appeared on that Day, and then *Jurata ponitur in reſpectu* to the tenth of *June*; but the Plaintiff did not appear on that Day, nor had any Day over, and yet *Jurata ponitur in reſpectu again*, to ſuch a Day, at which Day the Jury appeared and gave 20 *l.* Damages, for which the Plaintiff had Judgment, and likewiſe for his Coſts; thereupon the Defendant brought a Writ of Error, and aſſigned for Error, that the Plaintiff not appearing on the tenth of *June*, the Court ought not *ex officio* to have made any farther Continuance of the Jury, for that ought always to be *ex petitione* of the Plaintiff; and for this Reaſon the Judgment was reverſed; for tho' by the Judgment by Default, the Defendant was out of Court, yet 'tis no compleat Judgment till the Damages are aſſeſſed upon the Writ of Enquiry; therefore the Plaintiff ought to attend *de die in diem*, which he having omitted, the Proceedings are diſcontinued. *Hill.* 4 *Jac. Yelv.* 97. *Harrington* verſus *Launſdon. Poſtea* Judgment. (B) 3. *S. C.*

13. It was ruled, that in Actions of Debt or Covenant, after a Demurrer and Joinder in Demurrer, the Court will give Leave to diſcontinue, if there is an apparent Cauſe; as for Inſtance, if the Plaintiff, thro' his own Negligence, is in Danger of loſing his Debt; but if the Demurrer is once argued, then he ſhall not have Leave to diſcontinue; nor where he brings another Action for the ſame Cauſe, and this is pleaded in Abatement of the firſt Action. *Sid.* 84. *The Lord Howard's* Caſe.

14. Debt upon a Charter-Party, in which there were ſeveral Covenants, and at the End each bound himſelf to the other in 1000 *l.* for the Performance of Covenants; there being ſeveral Miſtakes in the Declaration; upon a Demurrer to it the Plaintiff deſired Leave to *diſcontinue*; but it was not allowed, unleſs the Defendant would conſent, it being an Action of Debt for the Penalty; and for that the Plaintiff is not without his Remedy; for he may bring a new Action upon the Covenant. 2 *Lev.* 118. *Rea* verſus *Barnes. See* Amendment. (C) 19. *S. C.* but afterwards he had Leave to diſcontinue upon Payment of Coſts. 2 *Lev.* 124.

15. Debt for Rent on a Leaſe of Lands, Part Freehold, and Part Copyhold; the Defendant pleaded an Eviction from all by the Plaintiff's Teſtator; the Plaintiff replied *Proteſtando*, that the Defendant was not evicted *from the Copyhold*, for Plea ſaith, that the *Freehold was entail'd*, and therefore the Deviſe void; the Defendant traverſed the Entail, upon which they were at Iſſue, and the Plaintiff had a Verdict for the whole Rent; it was objected againſt him, that here was a Diſcontinuance, as to the *Copyhold*, and it may be, that the greater Part was Copyhold; if ſo, then the Defendant is charged with the whole Rent for the Freehold, which is the leſſer Part; 'tis true, the Rent iſſues out of the whole, and that this was a Diſcontinuance as the Copyhold, but 'tis cured by a Verdict, as to the Reſidue. 3 *Lev.* 39. *Randall* verſus *Brees.*

Raym. 94. 1 Mod. 42, 289. 1 Lev. 300.

16. Debt upon Bond conditioned to perform an Award, ſo as it be ready to be delivered, *&c. upon the firſt Day of May*; the Defendant pleaded *no Award*; the Plaintiff replied, and ſhewed an Award, and aſſigned a Breach, but miſtook the Day of the Delivery, for he averred, that it was *ready to be delivered on the* 20*th Day of May*; and upon Demurrer joined, the Record was read, and the Plaintiff had Judgment *niſi*; but in the Beginning of the next Term this Miſtake was ſhewed to the Court; whereupon *Saunders* prayed, that the Plaintiff might diſcontinue upon Payment of Coſts, which the Counſel for the Defendant oppoſed; becauſe this was an Action upon a Penal Bond, and the Plaintiff having put it upon the Judgment of the Court, and having obtained a Rule for Judgment before he made this Objection, therefore he prayed Judgment for the Defendant, and that the Plaintiff might be barred from an Action on the Bond, and that if he would have any Remedy, he might bring an Action upon the Award; but the Defendant refuſing to bring the Money awarded for him to pay into Court, the Plaintiff had Leave to diſcontinue, *&c.* 2 *Saund.* 73. *Roberts* verſus *Marriot.*

17. Afterwards an Action was brought upon the ſame Bond, between the ſame Parties, and the Defendant pleaded the ſame Plea, (*viz.*) no Award made; the Plaintiff replied, and ſhewed an Award before the *firſt Day of May*, (viz.) 1 *die Februarii*, and ſets it forth, and avers,

that it was ready, and tendered to be delivered in Writing, under the Hands and Seals of the Arbitrators, between the Hours of Two and Five in the Afternoon, on the firſt Day of *February*, (naming the Place) and that neither the Defendant, or any one in his Behalf, was there to receive it, and in like Manner he avers the Award to be ready, and tendered on the firſt Day of *May*, as before he had averred it to be ready, and tendered on the firſt Day of *February*, and then aſſigns a Breach; the Defendant rejoins, that the Award was not tendered upon either of the Days, *modo & forma prout, &c. & hoc paratus eſt verificare*; and upon Demurrer to this Rejoinder, it was adjudged to be ill, becauſe it was a *Departure* from the Plea, for that was *nullum arbitrium* made, and the Rejoinder ſays it was not tendered, *&c.* which implies that it was made; now, tho' the Condition of the Bond required both making and tendring the Award; yet the Defendant cannot inſiſt on both, becauſe one is ſufficient to bar the Plaintiff from this Action, for if the Defendant ſhould inſiſt on both, his Plea would be double; therefore if the Truth of the Fact had been, that the Award was not ready and tendered to be delivered on the Day, the Defendant ſhould have inſiſted on it in his Plea, and not have pleaded *Nullum arbitrium*; beſides, his Rejoinder is ill concluded, for the Plaintiff in his Replication ſets forth, that the Award was ready, and tendered to be delivered on ſuch a Day, which is a direct Affirmative; and the Defendant in his Rejoinder ſays, that the Award was not tendered *modo & forma prout, &c.* which is a plain Negative, therefore he ſhould have concluded to the Country, and not to the Court, as he had done by *hoc paratus eſt verificare*. 2 *Saund.* 188. *Roberts* verſus *Mariott*. *Keilw.* 175. a. *S. P.*

18. The Plaintiff brought an Action for 400 *l.* for ſo much Money had and received of him by the Defendant, who pleaded an Attainder of High Treaſon in Abatement; the Plaintiff replied, that after the Attainder, and before the Action brought, he was pardoned, *unde petit judicium & damna ſua*; and upon Demurrer, *per Curiam*, the Replication is ill concluded, for the Words *Damna ſua* ſhould have been left out, and therefore a Rule was made, that he might diſcontinue without Payment of Coſts. 3 *Mod.* 280. *Biſſe* verſus *Harecourt*.

19. The Plaintiff being a Steward brought an Action againſt the Defendant for *ſix Years* Salary, and had a Verdict, and only 7 *l.* Damages at the Aſſiſes in *Berks*; he now moved for Leave to diſcontinue the Action, and that the *Poſtea* might not be returned; but adjudged, that 'tis never done after a general Verdict, nor after arguing a Demurrer, but it hath been allowed to diſcontinue after a Special Verdict, and ſo likewiſe upon a Demurrer before it is argued; 'tis true, at Common Law, if the Plaintiff did not like his Damages he might diſcontinue; but now by the Statute 2 *H.* 4. *cap.* 7. 'tis enacted, that *after a Verdict a Plaintiff ſhall not be nonſuit*. 5 *Mod.* 208. *Keat* verſus *Barker*.

20. In Replevin for Taking his Cattle in a *certain Place called* C. and alſo in a Place *called* H. the Defendant avowed the Taking in the *aforeſaid Place, &c.* for that he was ſeiſed thereof, *&c.* and upon a Demurrer to this Avowry it was adjudged a *Diſcontinuance*, becauſe it did not anſwer both Places in the Declaration: And *Holt* Ch. Juſt. took this Difference, (*viz.*) where a Plea begins with an Anſwer to the Whole, and yet 'tis an Anſwer but to Part, 'tis demurrable; but if it begin with an Anſwer to Part, and anſwers no more, 'tis a Diſcontinuance; and the Plaintiff muſt take Judgment by *Nil dicit* for what is not anſwered; but if he demur, or plead over, the whole Action is diſcontinued. 1 *Salk.* 139. *Weeks* verſus *Peach*.

21. Debt upon Bond of 500 *l.* the Defendant as to 225 *l.* Part of it, pleads Payment, *&c.* and upon Demurrer to this Plea, it was adjudged, that here being no Anſwer to the Reſidue, 'tis a *Diſcontinuance*, and as to that the Plaintiff ought to take Judgment by *Nil dicit*. 1 *Salk.* 180. *Markett* verſus *Johnſon*.

22. Debt upon Bond, the Defendant pleaded, *&c.* and there was a Demurrer to the Plea, and Judgment for the Defendant *niſi cauſa*, afterwards this Rule was abſolute, and then the Plaintiff moved for Leave to diſcontinue; but it was denied, as never being done after a peremptory Rule for Judgment. 1 *Salk.* 179. *Turner* verſus *Turner*.

23. It was ruled, that upon a Motion to diſcontinue, upon Payment of Coſts, the Court may give Leave after a Special Verdict, but never after a general Verdict; and even in the firſt Caſe 'tis a Favour, tho' a Special Verdict is not compleat and final. 1 *Salk.* 178. *Price* verſus *Parker*.

24. *Indebitatus Aſſumpſit, &c.* the Defendant pleaded, that the Plaintiff was attainted of Treaſon; the Plaintiff replied a Pardon, as by the Exemplification thereof it appeared, *& petit judicium & damna ſua*; and upon Demurrer to this Replication it was adjudged, that this wrong Praying of Judgment in the Concluſion of the Replication made a Diſcontinuance. 1 *Salk.* 177. *Biſſe* verſus *Harecourt*. 3 Mod. 281.

25. Debt in an inferior Court, upon a Bond, conditioned to perform Articles; the Defendant pleaded Performance; the Plaintiff in his Replication aſſigned a Breach, upon which they were at Iſſue, and an Entry was made, that the Mayor of the Corporation was removed and another choſen, but no Day was given to the Parties, *nor any Court held*, but the Iſſue was tried, and a Writ of Error brought in *B. R.* where it was objected, that the Statute 32 *H.* 8. *cap.* 30. did not extend to inferior Courts, and that it only helped Diſcontinuances in Pleas and in Proceſs, but not of the Court; adjudged, that this Statute is a remedial Law, and ſhall therefore extend to all Diſcontinuances. 1 *Salk.* 177. *Walwin* verſus *Smith*. 4 Mod. 86.

26. In Debt the Declaration was of *Michaelmas-Term*, and the *Plea-Roll of Eaſter-Term*, and no *Continuances* entered; and upon Demurrer this was objected as a Diſcontinuance, but *B. R.* held,

held, that Continuances are never entered in that Court till the Plea-Roll is made up. 1 *Salk.* 179. *Curluis* verſus *Padley.*

27. Debt upon a Judgment was brought in *Trinity-Term*, the Defendant imparled to *Michaelmas*, and then pleaded in Bar, that the Plaintiff *die Lunæ prox' poſt. feſtum Sancti Martini* was outlawed; and upon Demurrer to this Plea it was objected, that all Matters which happen after the Action brought, and which go in Diſcharge thereof, ought to be pleaded *Puis darrein Continuance*; but adjudged, this is like a Judgment confeſſed by an Executor after an Action brought, which is never pleaded *Puis darrein Continuance.* 1 *Salk.* 178. *Moor* verſus *Green.* See *Yel.* 140.

Diſpenſation.

(A)

For retaining two Benefices. See *Inſtitution.* (A) 1. *Licenſe. Plurality* per totum.

1. BY the Statute 21 *H.* 8. *cap.* 13. The King, Queen, Prince, and other the King's Children, are not limited how many Chaplains they may retain; but Archbiſhops, Biſhops, Dukes, Earls, Barons, Counteſſes, and Officers of Honour, and Place mentioned in the Statute, are limited to a certain Number.

2. If an Earl or Baron retaineth a Chaplain, and is attainted before the Chaplain is advanced to a Benefice, he cannot by Virtue of that Retainer have a Diſpenſation to hold two Benefices, becauſe by the Attainder the Retainer was determined. 4 *Rep.* 119. *The Earl of Weſtmorland's* Caſe.

Diſpenſations by the King. See **Licenſe.**

Diſſeiſin.

(A)

What is a Diſſeiſin, what not, and who is the Diſſeiſor.

1. DIſſeiſin is an unlawful Diſpoſſeſſing any one of Lands, Tenements, *&c.* for which Wrong doing there were formerly Writs of Aſſiſe brought, which, together with *Rediſſeiſin* and *Poſt-diſſeiſin*, made a large Title in the Law-Books; but theſe Writs being now diſuſed, and the feigned Action of Ejectment introduced, I ſhall only mention ſome of the moſt remarkable Caſes I find concerning Diſſeiſors and Diſſeiſin.

2. Adjudged, that where Tenant at Will makes a Leaſe for Years, and the Leſſee entereth, he is the only Diſſeiſor, and that a Releaſe or Confirmation made to the Tenant at Will, is void, becauſe the Privity is deſtroyed. *Paſch.* 43 *Eliz. Cro. Eliz.* 830. *Shaw* verſus *Barber.*

So where Leſſee for Life made a Feoffment, and a Letter of Attorney to another to deliver Seiſin, the Attorney is the Diſſeiſor. 4 *Leon.* 7. *King* verſus *Tucker.*

3. Feoffment in Fee, upon Condition to redemiſe the ſame Lands to the Feoffor for Life, Remainder to his eldeſt Son and his Heirs; the Feoffee entered and took the Profits, without any Agreement of the Feoffor, and made a Leaſe for Years to *W. R.* adjudged, this was a Diſſeiſin, tho' the Intent of the Parties by the Feoffment was, that the Feoffee ſhould redemiſe to the Feoffor, for his Entring by Wrong and Taking the Profits is a Diſſeiſin. 2 *Rep.* 59. *Julius Winnington's* Caſe.

W. Jones 397. Fitzherbert *v.* Leech.

4. Tenant for Life, Remainder in Tail to his Son and Heir apparent, the Father *by Covin* made a Leaſe for Years to *W. R.* who made a Feoffment in Fee to *R. R.* to whom the Father made a Releaſe *with Warranty*, and died, this Warranty deſcended on the Son; adjudged, that he ſhould not be barred by it, becauſe the Feoffment being made by the Leſſee for Years, was a Diſſeiſin, and the Father by agreeing to it made himſelf *Particeps criminis*, and his Warranty being after the Diſſeiſin, by Conſequence it muſt begin by Diſſeiſin; and tho' he was the Perſon diſſeiſed, yet he conſenting to it, the Warranty ſhall begin by Diſſeiſin; 'tis true, it was done immediately to the

Son, who was to be bound by the Warranty, but ſtill it began by Diſſeiſin. 5 *Rep.* 19. *Fitzherbert's* Caſe.

5. In a Special Verdict in Ejectment, the Caſe was, *ſſ.* Bargain and Sale of Lands in Fee to *W. R.* for 300 *l.* Proviſo, if the Bargainor paid 10 *l. per Annum* to the ſaid *W. R.* for five Years, *&c.* and at the End thereof paid 250 *l.* then the Bargain, *&c.* to be void: Provided alſo, that the Bargainee *W. R.* ſhould not intermeddle with the Poſſeſſion, or receive the Rents till Default was made in Payment, *&c.* he did not enter or receive the Profits; but afterwards the Bargainor made a Leaſe of theſe Lands for ſix Years, and at the Expiration thereof he entered again; the Money was not yet paid, and the Bargainee neither entered on the Leſſee during the ſix Years, nor on the Bargainor after they were ended, but deviſed the Lands to *T. P.* and died; the Queſtion was, whether the Bargainee was diſſeiſed by this Leaſe for ſix Years, for if he was, then the Deviſe to *T. P.* was void; adjudged, that it was no Diſſeiſin, but admitting it was, 'tis purged when the Bargainor became repoſſeſſed as before he made the Leaſe, for then the Inheritance was reveſted in him, and by Conſequence his deviſe of the Lands was good. 2 *Cro.* 659. *Powſley* verſus *Blackman.* 2 Roll. Rep. 241; 285. Palm. 201. Bridgm. 12. W. Jones 316. S. C. Cro. Car. 304. S. C. Bridgm. 12. S. C.

6. The Teſtator deviſed the Whole, when by Law he could only deviſe two Parts, and the Third ought to come to the Heir, yet the Deviſee entered and made a Leaſe for Years of the Whole, and afterwards the Heir at Law, without making any *actual Entry*, levied a Fine of the third Part; the Conuſee made a Leaſe, *&c.* one Queſtion was, whether the Entry of the Deviſee into the Whole, or his Leaſe made for the Whole, or either of thoſe Matters, was a Diſſeiſin to the Heir before Entry into the third Part, ſo that he had only a Right at the Time of the Fine levied, and adjudged no Diſſeiſin, becauſe there was no Expulſion; but if the Deviſee had made a Leaſe for Life, with Livery, that had been a Diſſeiſin. *Moor* 546. *Hemley* verſus *Brice.* Cro. Eliz. 639. S. C.

7. The Father being Tenant in Tail, had Iſſue two Sons, and in Conſideration of the Marriage of his eldeſt Son, he *covenanted to ſuffer a Common Recovery* to the Uſe of his ſaid eldeſt Son and his Wife, and to the Heirs Males of the Body of the Son, Remainder over; the Marriage took Effect, the Recovery was not ſuffered, but the Son, with the Conſent of the Father, entered, and was poſſeſſed of the Lands *at Will*, and afterwards *leaſed the ſame to* W. R. *for twenty-one Years, rendring Rent*; the Leſſee entered by Vertue of the Leaſe, and was poſſeſſed, and paid the Rent to the Son as often as it became due, and afterwards both Father and Son joined in a Fine to the Uſe of the Son, and of his Wife for Life, *for her Jointure*, Remainder to the Heirs Males of the Body of the Son, with ſeveral Remainders over, and this was declared by them to be in Purſuance of the Covenant before the Marriage, to ſuffer a Common Recovery; the Son died without Iſſue Male, *W. R.* the Leſſee for twenty-one Years, bargained and ſold the Lands to the next Brother, who was now Heir apparent upon the Death of his elder Brother; then the Father died, and the Queſtion was, whether this Leaſe made by the eldeſt Son, was a Diſſeiſin of the Father, or not; for if it was, then his Levying the Fine, and the Declaring the Uſes to the Wife for her Jointure is void; adjudged, that it was no Diſſeiſin, becauſe the Leaſe was made by the Son, by the Father's Conſent, and the Leſſee doth not claim any Freehold by Virtue of the Leaſe, but only a Term for Years in the Lands paying the Rent, ſo there was no Manner of Intention, either of the Father, or of his Son, to make this Leaſe a Diſſeiſin of the Father; but admitting that it was, yet 'tis plain that it was not the Father, but the Son, who made the Diſſeiſin, for he being *Tenant at Will*, and taking upon him to make a *Leaſe for Years*, which is a greater Eſtate than he can do by Law, that act is a Diſſeiſin, and the Son is the Diſſeiſor, but he having the Reverſion expectant upon the Determination of the Leaſe, the Jointure made to the Wife is good. *Hill.* 7 *Car. Cro. Car.* 221, 303. *Blunden* verſus *Baugh.* Latch 53. *cited* W. Jones 315. S. C. Litt. Rep. 97. 370. S. C.

8. *Formedon in Deſcender* by the Iſſue in Tail, the Defendant pleaded in Bar, and confeſſed the Eſtate-tail, but farther ſaid, that before the Death of the Tenant in Tail *W. R. was ſeiſed of the Lands in Fee*, and that he levied a Fine to the Defendant, and five Years paſſed without any Claim, and then the Tenant in Tail died; the Queſtion was, whether upon this general Plea, that *W. R. was ſeiſed in Fee*, he ſhall be intended to be in, either by a Feoffment of the Tenant in Tail, or by Diſſeiſin; adjudged, that he ſhall be intended to be in by *Diſſeiſin*, tho' a Feoffment and a Diſſeiſin, are both againſt the Plaintiff, for the Fine levied by the Diſſeiſor, and five Years paſſing is a Bar to him, and a Feoffment is a Diſcontinuance of the Eſtate-tail. *Paſch.* 18 *Car. March* 195. *Tayler's* Caſe.

Diſſenter. See **Recuſancy.**

Diſtreſs.

Who may diſtrain, what Things, and for what. (A)
Diſtreſs, how to be uſed when taken, and when to be impounded. (B)
Of Diſtreſſes for Rent, and Damage-feaſant, good, and not good. (C)
Of reſerving a Diſtreſs, and where it eſcapes. (D)
Pleadings in it, good, and not good. (E)

(A)

Who may diſtrain, what Things, and for what. See *Avowry*. (A) per totum. *Fences*. (A) per totum.

1. DIſtreſs in the legal Acceptation of the Word, ſignifies the Thing diſtrained, the Effect whereof is to compel the Perſon, whoſe Goods or Chattels are taken, to replevy them, and ſo to bring his Action of Treſpaſs againſt him who diſtrained them; but there are ſeveral Things which a Man cannot diſtrain, as Clothes in a Tailor's Houſe, or Cloth in the Houſe of a Fuller, Sheerman, or Weaver, for thoſe being common Artificers, 'tis preſumed that thoſe Things do not belong to them, but to others; Victuals are not diſtrainable, nor Corn in Sheaves, nor any Thing which the Sheriff cannot deliver again in as good a Condition as it was at the Time of Taking.

2. A Man may diſtrain for Homage, Fealty, or other Services, and for Fines and Amerciaments aſſeſſed in a Court-Leet, but not in a Court-Baron, and for Damage-feaſant, but not for Rent, except upon the Land with which 'tis charged, and when a Diſtreſs is taken, it muſt be brought to the common Pound, or the Diſtrainor may keep it in ſome open Place, but then he muſt give Notice to the Perſon or Owner.

3. In a ſecond Deliverance of a Barge taken at *Graveſend* in the River *Thames*, the Defendant pleaded, that he was ſeiſed of an Inn called the *George* in *Milton*, and preſcribed to repair Part of the Bridge at *Graveſend*, and in Conſideration thereof to have 4 *s.* every Year of the Ferryman, and for one Year due at *Michaelmas*, *&c.* he avowed the Taking the Barge, and averred, that the Bridge was in Repair, and that the Barge was the Ferryman's Barge; to this Plea the Plaintiff demurred, and the Queſtion was, whether a Barge upon the River was diſtrainable; it was not reſolved. 3 *Mar. Dyer* 117.

4. In Replevin, the Defendants made Conuſance as Bailiffs of *W. R.* for Rent arrear; the Plaintiff replied, that a Stranger entered on the Place where, *&c.* and that the Defendant, by his Command, entered and took the Cattle, and traverſed, that he took them as *Bailiff to W. R.* to this Replication the Defendants demurred; adjudged, that where a Man diſtrains as Bailiff to another, who in Truth is neither Bailiff, or Servant to him, if he in whoſe Right he took the Diſtreſs doth aſſent to it afterwards, he ſhall not be a Treſpaſſer; but here the Defendants diſtrained in the Right of a Stranger who had no Title, and in ſuch Caſe they can never excuſe themſelves, by ſaying, that they were Bailiffs or Servants. *Mich.* 29 *Eliz.* 1 *Leon.* 50. *Butler's* Caſe. *Godb.* 110. *S. C.*

5. Where Rent and Services are behind, and the Lord comes to ſeiſe the Cattle, and ſees them to be within his Fee, if in ſuch Caſe the Tenant drives them out of his Fee, the Lord may freſhly purſue and diſtrain them, and the Tenant cannot reſcue them; but if he did not ſee them to be in his Fee, and the Tenant drive them out of the Fee, the Lord cannot diſtrain them, if he doth, the Tenant may reſcue his Cattle. 9 *Rep.* 22. In the Caſe of Avowries.

6. In Replevin, the Defendant avowed for Damage-feaſant; the Plaintiff replied, that he was ſeiſed in Fee of a Cloſe adjoining to the Cloſe of the Defendant, and preſcribed, that the Defendant, *&c.* ought to encloſe, *&c.* the Defendant rejoined, that the Cloſe mentioned in the Replication was the Freehold of *W. R.* and *traverſed*, that the Plaintiff was ſeiſed of it *in Fee*, to this Rejoinder the Plaintiff demurred; adjudged, that the *Traverſe of the Eſtate in Fee* was good, becauſe the Plaintiff had given the Defendant that Advantage, but whether he had the Fee, or not, was not material; for if he had but an Eſtate for Years, at Will, or at Sufferance, if his Cattle eſcape into his Cloſe, who ought to make the Encloſure, he cannot diſtrain them. 22 *Eliz. Dyer* 285.

7. Homage and Fealty are Services ſo much regarded by the Law, that who ever is ſeiſed of them, is ſeiſed of all other Services, and no Diſtreſs for them is exceſſive in Judgment of Law, for tho' the Lord ſo often diſtrained that the Tenant could not manure his Land, yet he cannot have an Aſſiſe of *Sovent Foits Diſtreſs*. 4 *Rep.* 8. In *Bevill's* Caſe.

3 Lev. 261. S. C. *cited.*

8. In Replevin, *&c.* the Caſe was, a Clothier delivered Wool to a Spinner, and afterwards came with his Horſe to carry away the Yarn, but the Spinner having neither a Beam or Weights, they both went to a Neighbour's Houſe to weigh the Yarn, and whilſt the Clothier and his Horſe were there, the Horſe was diſtrained and the Yarn likewiſe, for Services due to the Lord of the Manor, from the Owner of that Houſe; adjudged, that they were not diſtrainable; it was agreed on

all Sides, that if the Yarn had been in the Spinner's Houſe, it could not be diſtrained; now, becauſe the Trade of a Clothier is for the Publick Good, the Law will protect him in every Thing which is neceſſary, for the accompliſhing it: Now, as Spinning is neceſſary, ſo likewiſe is the Weighing the Yarn when ſpun; therefore, when 'tis brought to another Houſe for that Purpoſe, both the Yarn and the Horſe upon which it was brought, are privileged, and not diſtrainable. *Mich.* 40 *Eliz. Cro. Eliz.* 549, 599. *Read* verſus *Burley. See poſtea. pl.* 15. *contra.*

9. There is a Statute, that Beaſts of the Plough ſhall not be diſtrained, ſo long as any other reaſonable Diſtreſs may be had; the Plaintiff brought an Action of Treſpaſs, in which he declared againſt the Defendant for taking his Cattle of the Plough, and concluded *contra formam Statuti*; it was objected, that this Declaration was not good, becauſe the Plaintiff did not alledge that he had other ſufficient Diſtreſs to be taken; but adjudged, that it was good, for it ſhall be intended, that he had other Diſtreſs ſufficient, becauſe he concluded the Taking to be *contra formam Statuti*, and if he had not a ſufficient Diſtreſs, that ought to be ſhewed on the *other Side. Paſch.* 14 *Eliz. Dyer* 312.

10. Adjudged, that whereas an Entry, Authority, or Licenſe is given by the Law, and the Party doth any Thing which he ought not to do, he is a Treſpaſſer *ab initio*; as where he who diſtraineth for Rent, or for Damaſe-feaſant, works the Cattle diſtrained; but the not doing a Thing which he might do after Entry, ſhall not make him ſuch a Treſpaſſer; as where after the Diſtreſs taken, the Tenant tenders the Rent and Demands his Cattle, and the Landlord refuſes to deliver them, in ſuch Caſe he is not a Treſpaſſer *ab initio*; 'tis true the Tenant ſhall recover Damages, not for taking the Diſtreſs, but for detaining it after a Tender of the Rent: 'tis true likewiſe, that a Tender of the Rent upon the Lands before the Diſtreſs taken, makes the Taking it afterwards unlawful; but if the Tender be after the Diſtreſs, and before the Impounding, that makes the Detainer, and not the Diſtreſs, unlawful; but if after the Impounding, then neither the Taking or Detaining are unlawful. 8 *Rep.* 146, *In the ſix Carpenters* Caſe.

11. If one Coparcener hath a Rent granted to her, to make the Partition between them equal, ſhe may diſtrain for the ſame of Common Right, tho' there is no Clauſe of Diſtreſs in the Grant, and ſo ſhall her Grantee, becauſe in ſuch Caſe the Diſtreſs is not only annexed to her Perſon, but to the Land and Eſtate. 3 *Rep.* 22. *In Walker's* Caſe.

12. In Treſpaſs, the Defendant pleaded, that the Dean and Chapter of *P.* was ſeiſed in Fee of the Manor of *C. &c.* and being ſo ſeiſed, King *Ed. 4th* granted to them all Fines *pro licentia concordandi*, of all Tenants, *&c. within their Fee, &c.* and that in the 29th Year of *Eliz.* a Fine was levied in the Common Pleas Court, between the Plaintiff and one *W. R.* of 11 Acres of Land, and the Poſt-Fine was aſſeſſeſſed to 15 *s.* and that *W. S.* the Foreign Oppoſer, did allow the ſaid 15 *s.* to them, becauſe the Land was *within their Fee*; and afterwards the Defendant demanded the 15 *s.* of the Plaintiff, which he refuſed to pay, and thereupon the Defendant, in Right of the ſaid Dean and Chapter, *did diſtrain* for the ſame: Upon a Demurrer to this Plea, it was objected, that it was ill, becauſe the Defendant did not aver, that the Lands of which the Fine was levied, was *within their Fee*; but only, that the Foreign Oppoſer had allowed it to be ſo; but adjudged, that the Defendant could not legally *diſtrain* for this Poſt-Fine, for the proper Remedy had been to ſue for it in the Exchequer; beſides, the Grant of Fines *pro licentia concordandi* doth not extend to the Poſt-Fine; for that is a Grant of the Queen's Silver, but not of the Poſt-Fine. *Paſch.* 31 *Eliz. Leon.* 249. *Stroud* verſus *Bragg.*

13. The Owner of the Cattle ſuffered them to eſcape into his Neighbour's Ground, the Fences being out of Repair, which his Neighbour ought to make, and the Cattle being there Levant and Couchant, without any freſh Purſuit made after them, were diſtrained for Rent due from the Neighbour; and *per Curiam*, the Diſtreſs is lawful; for tho' the Fault was in the Neighbour for not repairing the Fences, yet there was a Fault likewiſe in the Owner of the Cattle, to ſuffer them to be Levant and Couchant on his Neighbour's Lands, without making freſh Purſuit after them; and Rent is due of Common Right, and the Land is the Debtor, where the Landlord muſt reſort for his Rent, and is not to enquire whoſe Cattle they are which he finds there. 2 *Roll. Rep.* 124. *Gill* verſus *Gawen.*

14. Where Cattle, without any Fault of the Owner, eſcape into another Man's Ground, thro' his Negligence in not making the *Fences*, and the Owner freſhly purſues them, in ſuch Caſe they are not diſtrainable, becauſe they are ſuppoſed to be always in his View and Poſſeſſion; and if they are diſtrained, they muſt be firſt *Levant and Couchant on the Land*, becauſe otherwiſe the Owner cannot be preſumed to know, that they were there; but if the Owner of the Cattle is bound to maintain the *Fences*, in ſuch Caſe, if they eſcape into another Man's Ground, he may diſtrain them before they are *Levant and Couchant*, and notwithſtanding a freſh Purſuit; as for Inſtance, In an Avowry for Rent, the Plaintiff replied, and conveyed a Title to himſelf, to 10 Acres adjoining to the Place where the Diſtreſs was made, and that he put his Cattle into that Ground, and that they eſcaped into the Ground charged with the Rent; that he freſhly purſued them, to drive them out, but that they diſtrained them before he could come to the Ground; adjudged, that the Diſtreſs was unlawful, becauſe of the freſh Purſuit; for in ſuch Caſe, 'tis not to be ſuppoſed, that the Cattle were *Levant and Couchant. Hob.* 265. *Reynolds* verſus *Oakley.* 1 *Brownl.* 170. *S. C. Cro. Eliz.* 550. *S. C.*

15. Replevin, *&c.* for taking his Cattle, *&c* the Defendant made Cogniſance, for that he was *poſſeſſed* of the *George Inn in Barnet*, and of eight Cloſes of Paſture-Ground, of which the Place where, *&c.* was Parcel for the Term of 8 Years, and being *poſſeſſed*, as aforeſaid, he leaſed the 2 Vent. 50.

ſame to one *John Willis* for 7 Years, rendring Rent, which being in Arrear, he diſtrained, *&c.* the Plaintiff replied, that he was poſſeſſed of the Cattle, and that one *A. G.* and ſome other of his Servants, by his Command, were travelling from a certain Vill in *Lieceſterſhire* thro' *Barnet* towards *London*, *ad proficuum averiis faciend'* (*but did not ſay to Market*) and that the Defendant *Joyce*, knowing them to be the Plaintiff's Cattle, *&c.* ſeiſed them; the Defendant rejoined, that the Cattle were *Levant and Couchant* in the Place where, *&c.* the Plaintiff traverſed, that they were *Levant and Couchant*, to which the Defendant demurred; the Queſtion was, whether theſe Cattle coming towards *London* for Proviſion for ſo great a City, could lawfully be diſtrained for the Rent of a Cloſe in which they lay but one Night? and adjudged, that they might; for 'is unreaſonable, that Cattle coming from all Parts of the Kingdom to *London*, ſhould be privileged all the Way from Landlords. 3 *Lev.* 260. *Fowkes* verſus *Joyce.* 2 *Lutw.* 1161. *S. C.* *See antea pl.* 8. *contra.*

16. In Treſpaſs for taking his Horſe, the Defendant juſtified the Taking for Rent arrear; the Plaintiff replied, that the Horſe was not *Levant and Couchant*, *&c.* and thereupon they were at Iſſue, and the Plaintiff had a Verdict; it was objected, that this Trial was had upon an *immaterial Iſſue*; but adjudged, that it was not. *Hill.* 20 *Car.* 2. *C. B. Rot.* 1770. *Colwell* v. *Milner.*

17. In Treſpaſs, *&c.* the Defendant juſtified the Diſtreſs taken for Rent arrear, upon a Leaſe for Years; the Plaintiff replied, that his Cloſe adjoined to another of the Defendant's, who was to repair the Fences, and that for want of repairing them, the Plaintiff's Cattle eſcaped into the Defendant's Ground, and that the Defendant diſtrained them before the Plaintiff could have *any Notice* that they were there; 'tis true, the Court held, that Notice was not material, and the Defendant had Judgment, tho' it did not appear, that the Cattle were *Levant and Couchant* on his Lands; which ſeemed a very hard Judgment, becauſe by the Replication it appeared, that the Cattle eſcaped into the Defendant's Land thro' his own Negligence, in not repairing the *Fences.* 2 *Saund.* 289.

Raym. 218. S. C. 18. In Treſpaſs for taking two Horſes from his Cart, the Defendant juſtified as a Diſtreſs for *Rent*, and upon Demurrer it was inſiſted, that he could not take the Horſes without the Cart; beſides, it appeared in the Caſe, that the Servant of the Plaintiff was on the Cart, by Reaſon whereof both the Cart and the Horſes were privileged, *&c.* 1 *Vent.* 36. *Welſh* verſus *Bell. Sid.* 422, 440. *S. C.*

19. In Treſpaſs *&c.* the Defendant juſtified the Taking the Cattle as a Diſtreſs for Rent arrear, upon a *Leaſe for Years*; the Plaintiff replied, that the Cattle were not *Levant and Couchant*, *&c.* the Defendant rejoined, that they were *Levant and Couchant*, and thereupon they were at Iſſue, and the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that this Trial was upon an *immaterial Iſſue*, becauſe the Defendant might diſtrain for *Rent*, tho' the Cattle were not *Levant and Couchant* on his Ground; which is very true, if it be for *Rent* due in Reſpect of an *Old Tenure between Lord and Tenant*, becauſe the Law favoureth the Antiquity of the *Seigniory*, or in the Caſe of a Grantee of a Rent-Charge, but not where a Rent is reſerved upon a *Leaſe for Years*; for there the Iſſue of *Levant and Couchant* is not immaterial, becauſe the Defendant in his Rejoinder having affirmed they were *Levant and Couchant*, and the Jury having found, that they were not, it muſt be intended, that they came on the Defendant's Lands for want of his repairing the Fences, and without any Fault of the Plaintiff; and if ſo, then they are not liable to be diſtrained, unleſs they were *Levant and Couchant*; therefore the Defendant ſhould not have taken Iſſue upon the Levancy and Couchancy, but ſhould have ſet forth in his Rejoinder, that the Cattle eſcaped into his Ground, and ſhewed in what Manner, (*viz.*) by the Negligence of the Owner, and without any Default in himſelf. 2 *Lutw.* 1573. *Kimp* verſus *Cruwes.* 3 *Leon.* 7. *Dyer* 317, 318. *S. P.*

20. Mr. *Siderfin*, who reports the Caſe laſt mentioned, tells us, that after ſeveral Debates Judgment was given, that the Horſes might be ſevered; 'tis certain they might, if the Diſtreſs had been taken *Damage-feaſant*, becauſe every Horſe commits a ſeveral Treſpaſs, and for ſuch Treſpaſſes ſeveral Actions may be brought. *Cro. Eliz.* 7, 8.

But it has been queſtioned, if the Horſes might be ſevered where they where diſtrained for *Rent*, becauſe in ſuch Caſe the Diſtreſs is intire, and the Perſon diſtraining may have only an Intereſt in the Rent, and none in the Land itſelf. *Cro. Eliz.* 8.

Where 'tis well made.

1. Grant of a Rent-Charge to *T. S.* for Life, afterwards the Grantor made a Feoffment to *T. S.* to the Uſe of himſelf, and his Heirs, ſo long as he ſhall pay 100 *l.* every Year to the King till 7000 *l.* be paid, and after the Breach of the Condition, then to the Uſe of the King, his Heirs and Succeſſors, untill the ſaid 7000 *l.* be paid, or ſo much thereof as ſhould be then unpaid; afterwards the Condition was broken, and by Inquiſition found, the King became entituled, who granted the Lands to *R. H.* and his Heirs *habendum* till the ſaid 7000 *l.* be paid: Now, tho' the Land were privileged from any Diſtreſs, whilſt they were in the King's Hands, yet the Court inclined, that when the Poſſeſſion was transferred to *R. H.* the Diſtreſs was revived, and might be taken as well for the Arrears incurred before the King ſeiſed, as for the Rent afterwards due. *Savill* 125.

Stat. 2 W. cap. 5. 4 Mod. 390. 2. *Trover* for ſix Hogs, in which a Special Verdict was found, that Lands were leaſed, lying in two Counties, *Part in the Hundred of* A. *in* Wilts, *and Part in the Hundred of* B. *in Hampſhire*, and a Diſtreſs was made for Rent arrear in both Hundreds, and not being replevied in five Days after

after *Notice was given to the Owner of the Hogs*, of the Cauſe for which they were taken, the Perſon diſtraining with the Conſtable *of the Hundred of A.* cauſed the Goods to be appraiſed by two Men, to whom the Conſtable adminiſtred an Oath for that Purpoſe; and then in the Preſence of the *Conſtable of B.* he ſold them in *the Hundred of B.* adjudged, that Perſonal Notice is ſufficient, tho' the Statute ſays, that Notice ſhall be left at the Manſion-Houſe, or other notorious Place charged with the Rent; and that in Caſe of Trover, Notice is ſufficient to the Owner; but if it had been in Replevin brought by the Tenant, Notice muſt be given to him alſo; and tho' the Statute requires, that the Oath ſhould be adminiſtred, *by the Conſtable of the Hundred where the Goods were taken*, and here the Conſtable of *A.* adminiſtred the Oath in the Hundred of *B.* where he had no Authority, yet 'tis good; becauſe the Diſtreſs was entire, and could not be ſevered, and the Hundreds were contiguous, ſo that the Driving the Cattle out of one Hundred into the other, was but a Continuance of the firſt Taking. 1 *Salk.* 247. *Walter* verſus *Rumbald.*

3. In Replevin, for taking three Cows, *&c.* the Defendants avow, and juſtify the Taking, ſetting forth their Title as Coparceners of a Rent-Charge in Tail, and that the Rent was in arrear, for which they diſtrained; the Plaintiff Demands *Oyer* of the Deed and Grant to *them in Tail*, and then replied, that before the Taking, *&c.* the Avowants levied a Fine of the ſaid Rent-Charge to the Uſe of them and their Heirs; and upon a Demurrer to this Replication, the Queſtion was, if after the Fine levied they could diſtrain for Rent due in Arrear before the Fine, and by the Opinion of three Judges againſt *Vaughan* Ch. Juſt. they could not; but the Ch. Juſt. held, they might: The Reaſon why they could not diſtrain was, becauſe ſince the Fine the Cogniſors were in Poſſeſſion of a different Eſtate than what they had before; and this was by the Alienation of the Rent-Charge to the Cogniſee, who by the Fine had a ſeparate Poſſeſſion of the Rent-Charge, and diſtinct from that of the Cogniſors, out of which the New Uſes (*viz. to them and their Heirs*) were raiſed, and therefore the *Privity* to diſtrain, for the old Arrears was deſtroyed, and they inſiſted on *Andrew Ognell's* Caſe, as an Authority in Point, *ſſ.* That where a Man is ſeiſed of a Rent-Charge in Fee, and grants it over to another, and his Heirs, and the Tenant attorns to ſuch new Grant, the Grantor is without Remedy for the Rent arrear before the Grant, for he cannot diſtrain; becauſe by the Attornment to the Grantee, all *Privity* between the Grantor and Tenant is deſtroyed, and after the Transferring the Rent by the Grant, he hath no Right to come upon the Land: The Ch. Juſtice, that a *Privity* is neceſſary by the Common Law to diſtrain and avow between the Diſtrainor and the Diſtrained; and the Reaſon is, becauſe the Tenant may know to whom the Rent ought to be paid, that this Privity is created by Attornment; but he inſiſted, that this Privity was not deſtroyed by the Fine, becauſe the Cogniſors had always an actual Seiſin of the Rent, and the Cogniſee had no more than an imaginary Poſſeſſion of it; for if the old Privity ſhould be diſtroyed, then this Abſurdity would follow (*viz.*) that a Man hath a Right to the Rent, for which he hath no Remedy by Law; beſides, this is not like *Ognell's* Caſe; for in that Caſe, he who was ſeiſed of the Rent intended to transfer it to the Grantee, and it was accordingly transferred by the Attornment of the Tenant to the Grant, and thereby the Grantee became actually ſeiſed of the Rent, and he being ſo ſeiſed, his Wife might be endowed with it; and it was ſubject to his Debts, and might deſcend to his Heir, and it might be in arrear, and he had a Poſſibility to diſtrain and avow for it: But in the Principal Caſe, the Cogniſors in the Fine did never intend to transfer their Eſtate to the Cogniſee, nor that any Attornment ſhould be made to him; the Seiſin which he had was meerly fictitious, and an invented Form of Conveyance by Fine, and there was no Moment of Time wherein the Cogniſors themſelves were not in the actual and real Seiſin of this Rent-Charge; the Cogniſee's Wife cannot be endowed of it; neither is it ſubject to his Debts; and 'tis impoſſible, that it ſhould deſcend to his Heir, becauſe it inſtantly veſts in the Cogniſors; it can never be in arrear to the Cogniſee, nor hath he any Poſſibility to diſtrain for it. *Vaugh.* 6, 41. *Dixon* verſus *Harriſon.*

What is diſtrainable, what not.

1. Treſpaſs *quare clauſum fregit & herbam pedibus ambulando, &c.* and for taking two Horſes from a Cart loaded with Oates; the Defendant, as to the Force, pleaded Not guilty, and as to the reſt of the Treſpaſs, that *W. R.* had a Rent-Service of ſo much *per Ann*, iſſuing out of the Land, and that ſo much was in arrear, for which the Defendant, by the Command of *W. R.* did enter, and diſtrain *ut ſupra*; and the Queſtion was, whether it was juſtifiable to ſeparate the Horſes from the Cart, or whether they were privileged by drawing a Cart loaded with Corn; it was agreed by all, that it was juſtifiable, if it had been for Damage-feaſant; but *Twiſden* held the Taking to be tortious, becauſe the Horſes were working in drawing a Cart loaded with Corn, but yet, that the Corn could not be pounded; but adjudged, that the Diſtreſs was lawful. *Sid.* 422. *Welch* verſus *Bell.* 440. *Webb* verſus *Bell. S. C. Vent.* 36. *Raym.* 218.

2. In Treſpaſs for taking his Corn, the Defendant pleaded Not guilty as to all, but 350 Sheaves of Wheat made up into Stacks, which he diſtrained for Rent and Services in arrear; and upon a Demurrer to this Plea, it was adjudged ill, becauſe a Diſtreſs cannot be but of what is known, and may be returned in the ſame Condition as when taken, which Corn in Stacks cannot be, for great Part of it may be loſt in carrying home; but this is now altered *per Statute* 2 *Will. cap.* 5. 2 *Mod.* 61. *Wilſon* verſus *Ducket.*

So

So the Law is altered by another Statute. *ſſ.* If a Man take a Diſtreſs to the Value of 40 *s.* for
Moor 7. S. C. 10 *l.* Rent due at ſuch a Day when there was ſufficient to be taken, to ſatisfy the whole, he cannot diſtrain for the ſame Rent again; for it was his Folly to take ſo little, when he might have diſtrained more; this muſt be underſtood where the Rent was arrear on ſuch a Day; but if it was in arrear ſeveral Days on which it ought to be paid, then ſeveral Diſtreſſes may be taken for Rent due on the ſeveral Days on which it became payable. *Cro. Eliz.* 13.

But now by the Statute 17 *Car.* 2. *cap.* 1. 'tis enacted, that where the Value of the Cattle diſtrained ſhall be found not to the full Value of the Arrears, for which the Diſtreſs was taken, the Perſon ſo diſtraining, his Executors or Adminiſtrators, may as often as he will, diſtrain again for the Arrears.

Cro. Eliz. 596. 3. In a Special Verdict in Trover, the Caſe was, the Plaintiff delivered the Goods in *London* to one *Richardſon*, to carry to *Brimingham*, who was not a Common Carrier, but for ſome ſmall Time had brought Cheeſe to *London*, and in his Return took Goods into his Waggon, of all Perſons indifferently, for Hire; and having Cheeſe in his Waggon, he put it into a Barn belonging to a Private Houſe, where it remained two Nights and one Day, and then the Landlord diſtrained the Cheeſe for Rent due for the Houſe; adjudged, that where a Man undertakes for Hire to carry the Goods of any Perſon indifferently, he is as to this Purpoſe a Common Carrier, and the Goods are privileged, and cannot be diſtrained. 1 *Salk.* 249. *Gisbourn* verſus *Hurſt.*

5 Mod. 359. Godb. 67. Moor 214. Dyer 117, 302. Owen 139. 3 Cro. 227, 550. 4. In a Special Verdict in Trover, for an *Anchor and Sails*; the Caſe was, the Mayor and Burgeſſes of *New-Caſtle* Time out of Mind, had repaired a Port there, and in Conſideration thereof had 5 *s. per* Chaldron of the Exporter of Coal, for which, by Cuſtom, they uſed to diſtrain, and that the Defendant being Maſter of a Veſſel loaded with Coal intended to be exported, refuſed to pay, *&c.* for which they diſtrained the *Anchor* and Sails, being Part of the Ship's Tackle, and the Queſtion was, whether it was diſtrainable; adjudged, that the Inſtruments of Trade are not diſtrainable; as a Milſtone, Beaſts of the Plough, a Horſe in a Smith's Shop, *&c.* That in this Caſe the Duty did ariſe from the Goods loaded on board the Ship, with which the Maſter is chargeable, and every Thing there of the Maſter's is chargeable as well as the Goods. 1 *Salk.* 248. *Vinkinſton* verſus *Ebden.*

Dyer 199, 312. 1 Leon. 231, 105. Noy 68. Sid. 348. 2 Roll. Rep. 202. S. P.

(B)

How to be uſed when taken, and where to be impounded. See *Statutes.* (D) 3, 10.

1. IN Replevin the Plaintiff was nonſuit, and the Defendant had a Return of the Cattle; the Plaintiff afterwards ſued out a Writ of *ſecond Deliverance*, and was likewiſe nonſuited in that Caſe, and thereupon a Writ *De Returno irreplegiabili* was awarded to the Sheriff, to make a final Return of the Cattle to the Avowant; in this Caſe it was adjudged, that the Avowant could not work the Cattle, becauſe he had them only as a Pledge, and had no Manner of Property in them, and that he ought to put them in the Pound again, where, if they died, it was at the Peril of the Owner; and then the Defendant might diſtrain *de novo* for the ſame Cauſe. *Mich.* 11 *Eliz. Dyer* 280. 3 *Eliz. Dyer* 189. *S. P. Owen* 123. *Moor* verſus *Conham. S. P.*

2. In Treſpaſs for taking Raw Hides, the Defendant juſtified, as Bailiff of the *Town of Ipſwich*, and by Virtue of a Cuſtom there, that if any Butcher kill Beaſts in that Town, and ſells the Fleſh in the Market, he is to pay 2 *d.* for every Raw Hide, and if he refuſe, that the Bailiff may diſtrain for the ſame, *&c.* The Plaintiff replied, that after the Defendant had taken the Diſtreſs, he *tanned the Hide*; the Defendant rejoined, and confeſſed, that he *tanned the Hide*, becauſe otherwiſe it would putrify and rot; to this Rejoinder the Plaintiff demurred, and adjudged, that it was ill; for tho' in ſome Caſes he who diſtrains may uſe or meddle with the Diſtreſs, where 'tis for the Benefit of the Owner; yet in this Caſe the Tanning the Hide is not for his Benefit, becauſe when 'tis tanned, he cannot know which was his own Hide, and ſo 'tis a Means of depriving him of the Thing it ſelf, and never to have what is his own again. *Mich.* 42 *Eliz. Cro. Eliz.* 783. *Duncomb* verſus *Reeves.*

1 And. 65. 3. By the Statute 1 *&* 2. *Ph. & Mar. a Diſtreſs ſhall not be driven out of the Hundred where taken, except to a Pound-Overt in the ſame County, not exceeding the Diſtance of three Miles from the Place where the Diſtreſs was taken*; the Plaintiff declared of a Diſtreſs taken *in the Hundred* of *W.* in the County of *B.* and that the Defendant drove it ſix Miles *out of the County, &c.* after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was not good; becauſe *an Hundred may extend to two Counties*, (*viz.*) in Length ſix Miles in one County, and one Mile in another County, ſo the Cattle may be diſtrained in one *County* and drove ſix Miles *out of it*, and yet not drove out of the *Hundred* where taken, and for this Reaſon the Judgment was reverſed. *Mich.* 24. *Eliz. Godb.* 11. *Pleydall* verſus *Knap.*

4. Adjudged, that where Cattle are diſtrained Damage-feaſant, he who diſtrains them may impound them in ſome open Place, on his own Land, or in the Common Pound; if he puts them in the Common Pound, and the Cattle die, 'tis at the Peril of the Owner; but if they are impounded in ſome open

Place in his own Ground, and they die for Want of Food, 'tis at the Peril of the Diſtrainer, and in ſuch Caſe he ſhall be accounted a Treſpaſſer *ab initio*. *Hill.* 3 *Jac. Hetley* 75. *Perkins* verſus *Butterfeild.*

5. Treſpaſs for Taking a Gelding, the Defendant juſtified as Bailiff of a Manor, the Lord whereof had Waifs and Eſtrays, and that he took the Gelding coming in there as an Eſtray, and kept and detained the ſame, till afterwards it was reſeiſed by the Plaintiff; the Plaintiff replied, that the Defendant ſeiſed the Gelding 14 *Octob.* 2 *Jac.* and that afterwards 16 *Octob.* 2 *Jac.* before the Reſeiſure, he laboured the ſame by Riding and Drawing; upon a Demurrer to this Replication, it was adjudged for the Plaintiff, that a *Diſtreſs* may not be uſed, becauſe the Party hath it only as a Pledge, and that there was no Difference as to that Matter, between an *Eſtray* and a Diſtreſs, for in both Caſes the Poſſeſſion is not *de jure*, but only by Act in Law; 'tis true, where the Cattle are pawned, the Perſon may uſe them, becauſe he hath a ſpecial Intereſt in them by the Act of the Owner himſelf, and that was *Moor* and *Conham*'s Caſe. *Hill.* 3 *Jac.* 2 *Cro.* 147. *Bagſhaw* verſus *Goddard*. *Poſtea* Eſtray. (A) 6. *S. C.*

6. By the Statute 1 *&* 2 *Ph. & Mar.* 'tis enacted, that *no Man ſhall take for Keeping in Pound, Impounding, or Pounding any Cattle*, &c. *above the Sum of* 4 d. *in Pain of forfeiting what he ſhall take above that Sum, and alſo* 5 l. *to the Party grieved:* In an Action of Debt brought on this Statute, for the Penalty of 5 *l.* the Plaintiff declared, that his Cattle were diſtrained and impounded, *&c.* and that the Defendant took of him 10 *d.* for the Impounding; upon *Nil debet* pleaded, the Plaintiff had a Verdict, and Judgment to recover the 5 *l.* and *Damages*, *ultra & præter* the Money he had taken above what the Statute allowed, and thereupon the Defendant brought a Writ of Error, and aſſigned for Error, that the Action was brought for the *Penalty of* 5 *l.* only, when it ſhould be brought for that, and for the Sixpence which he had taken *ultra & præter* the Money allowed by the Statute, for thoſe Forfeitures ought not to be divided; but adjudged, that the Action was well brought for *the* 5 *l.* only, becauſe where there are two Penalties, as in this Caſe, the Plaintiff may divide them, and bring his Action for one and waive the other; 'tis true, he cannot bring an Action for Part of the 5 *l.* becauſe 'tis entire, but where there are two Forfeitures, he may divide them. *Mich.* 15 *Car. March* 57. *North* verſus *Muſgrave.* Cro. Car. 559. W. Jones 447. *See* Damages. (A) 5. S. C.

7. In Treſpaſs for Taking his Gelding at *C.* in *Norfolk*, and *driving him* to places unknown, ſo that he could not be replevied; the Defendant juſtified for Damage-feaſant in his Freehold, and that he impounded him at *Carrow*, within three Miles where he was taken; the Plaintiff replied, that *Carrow is in the County of the City of Norfolk*; the Defendant demurred and had Judgment, becauſe at Common Law a Diſtreſs might be drove out of the County; 'tis true, the Statute of *Marlbridge*, *cap.* 1, and 1 *&* 2 *Ph. & Mar.* have prohibited ſuch Driving upon Penalties; therefore if the Plaintiff would have any Advantage of theſe Statutes, he ought to bring an Action for the Penalty, that the King may be entituled to a Fine, but he ſhall never do it by Way of Plea. 3 *Lev.* 48. *Woodcroft* verſus *Thompſon.*

(C)

For Rent and Damage-feaſant, good, and not good.

1. LEaſe for Years, rendring Rent at *Michaelmas* yearly, and if it be behind by the Space of ten Days, and *no ſufficient Diſtreſs to be found on the Land*, then the Leſſor to enter; the Caſe was, that on the laſt of the ten Days, at two of the Clock in the Afternoon, the Rent was demanded, and at that Time there was a *ſufficient Diſtreſs* on the Land, but not afterwards; adjudged, that Cattle put on the Land for an Hour, or a Night, ſhall not be a ſufficient Diſtreſs, but there was ſome Difference in Opinon, whether there ought to be a ſufficient Diſtreſs on the Land for all the ten Days, or only for ſuch a convenient Time as the Leſſor might be preſumed to have Notice of it. *Mich.* 29 *Eliz. Godb.* 67.

2. The Lord of a Manor had 200 Acres of waſte Ground, and he made a Feoffment in Fee to *W. R.* of fifty of thoſe Acres lying towards the North; the Feoffee put in his Cattle on the fifty Acres, and they ſtrayed into the other 150 Acres, and were diſtrained Damage-feaſant, and the Diſtreſs was adjudged good, for the Feoffee ought to encloſe his fifty Acres towards the North, and the Lord ought to encloſe the reſt. *Mich.* 23 *Eliz. Dyer* 372. and 14 *Eliz. Dyer* 317. *S. P.* and 6 *Rep. Sir Miles Corbett*'s Caſe. *S. P.*

3. In Trover, the Defendant juſtified by Reaſon of a Rent granted to *W. R.* his Executors and Aſſigns, *for the Life of M. B.* iſſuing out of Black-acre, and ſhewed, that *W. R.* was dead, and that the Defendant, as Adminiſtrator to him, diſtrained for the Rent after the Death of the Inteſtate, and averred, that *M. B. was living*; and upon a Demurrer it was adjudged, that this Juſtification was ill, becauſe by the Death of *W. R.* the Rent was determined, and therefore the Diſtreſs was unlawful, for the Rent could not come to the Executor or Adminiſtaator, becauſe it was not a Thing teſtamentary, but a Freehold for Life. *Mich.* 45 *Eliz. Telv.* 11. *Salter*'s Caſe. *Poſtea* Trover. (D) 4. *S. C.*

4. The Grantor had three Manors lying in three Pariſhes in one County, and granted an Annuity of 20 *l. per Annum* to her youngeſt Son, iſſuing out of the three Manors in the three Pariſhes, *&c. aut alibi* in the ſaid County to the aforeſaid Manors, or to either of them belonging; the Grantor was alſo ſeiſed of one other Acre of Land in *C.* but that was not Parcel of or belonging

ing to either of the ſaid Manors; after the Death of the Grantor, he to whom the Annuity was granted, entered, (*viz.*) the youngeſt Son of the Grantor got the Poſſeſſion of the Acre in *C.* after the Death of the Grantor, and before the Entry of the Heir at Law, and held in by Abatement; and the Queſtion was, the ſaid Acre ſhall be charged with this Rent; adjudged, that it ſhould not, becauſe the Words *Aut alibi* do not enlarge the Grant of the Annuity, ſo as to make the Rent iſſue out of other Lands in the ſame County, which were not Parcel, or did belong to the ſaid Manors, but only enlarged the Towns, Pariſhes, and Places in which the Lands charged with the Annuity did extend. *Hill.* 3 *Jac.* 6 *Rep.* 39. *Henry Finch's* Caſe.

5. In Replevin, *&c.* the Defendant avowed the Taking the Cattle Damage-feaſant *in a Common*, and did not ſhew that he had Common there for his Cattle levant and couchant, nor that he was damnified by the Cattle diſtrained; adjudged, that if one who hath no Right of Common put his Cattle into a Common, he who hath a Right may diſtrain them Damage-feaſant; and in Pleading he need not aver, that he was damnified by them, becauſe he hath ſuch an Intereſt in the Soil, which gave him Authority to remove the Nuſance, but 'tis neceſſary that he make a Title to the Common. *Style* 428. *Bronge* verſus *Moor*.

6. In Treſpaſs, *&c.* the Plaintiff declared for taking and detaining his Cattle until he paid 89 *l.* 10 *s.* *&c.* the Defendant pleaded in Bar, that one *W. Savill* was ſeiſed in Fee of the Rectory of *Mexborough*, and that he demiſed Part of it to the Plaintiff for ſeven Years, *reddendum* half-yearly 77 *l.* 10 *s.* and ſo juſtifies the Diſtraining *ſome of the Cattle for Part of the Rent arrear*, and ſome more of the Cattle, for the *Reſidue* of the Rent; and upon Demurrer this Plea was held ill, becauſe the Defendant cannot take *two Diſtreſſes for one and the ſame Rent*, for he ought to have diſtrained as many Cattle at one Time as would have ſatisfied the whole Rent, and if there had not been enough, then he ſhould have pleaded, that at the Time of the firſt Diſtreſs taken, there were not Cattle enough, *&c.* on the Land, and that he diſtrained for ſo much Rent, *&c.* 2 *Lutw.* 1532. *Wallis* verſus *Savile*. *Moor* 7. *Cro. Eliz.* 13. *S. C.*

(D)

Of reſcuing a Diſtreſs, and where it eſcapes.

1. THE Writ *De parco fracto* lies againſt him who breaks a Pound and takes out Cattle, *&c.* and 'tis no Objection for the Defendant to ſay, that the Plaintiff did not ſhew any Title to diſtrain, for tho' the Diſtreſs was without Cauſe, he cannot juſtify the Breaking the Pound; 'tis true, before Impounding he might in ſome Caſes have reſcued the Cattle, but after Impounding they are in Cuſtody of the Law. 1 *Salk.* 247. *Cotſworth* verſus *Bettiſon*.

2. *Treſpaſs* for Breaking his Cloſe and treading down his Graſs with Hogs; the Defendant as to all but one Hog, pleads Not guilty, and as to that he pleaded, that the Plaintiff had diſtrained it Damage-feaſant for the ſame Treſpaſs, and had impounded it in the common Pound; the Plaintiff replied, that the Hog eſcaped without *his Aſſent*, and that he neither then was, or yet is ſatisfied for his Damage; and upon Demurrer it was held, that it was the Plaintiff's Fault to put the Hog in a Pound which would not hold it; 'tis true, if the Hog had died in the Pound, the Plaintiff might have diſtrained again, but not where it eſcapes, unleſs it be without any Default in him, which in this Caſe it doth not, for 'tis only, that it eſcaped *ſine aſſenſu ſuo*. 1 *Salk.* 248. *Vaſpar* verſus *Eddows*.

3. Caſe, *&c.* for reſcuing Goods which the Plaintiff had diſtrained for Rent; it was ruled by *Holt* Ch. Juſt. that where a Landlord comes into an Houſe and ſeiſes ſome Goods, in the Name of all in the Houſe, this is a good Seiſure of all the Goods, that even at Common Law he muſt remove them in convenient Time; but now by the Statute * 2 *Will.* 3. he muſt remove them immediately, except 'tis Hay or Corn; in the principal Caſe the Landlord diſtrained Barrels of Beer on the *Monday* for Rent, and quitted the Poſſeſſion till *Wedneſday* following, when coming to remove them, the Defendant had in that Interval of Time taken them by Virtue of a Replevin againſt the Leſſee; this being the Caſe, the Plaintiff was nonſuit; for he *not having the Poſſeſſion* at the Time of the Replevin, there could be no *Reſcous out of it*. *Mod. Caſes* 215. *Dod* verſus *Monger*.

*2 Will. 3. cap. 5.

(E)

Pleadings in it, good, and not good. *Departure.* (A) 15. *Toll.* (A) 16.

1. IN Replevin, the Plaintiff declared, that the Defendant *cepit averia apud Lambeth*, and did not ſay *in quodam loco*, *&c.* upon which the Defendant demurred; and the Queſtion was, whether the Omiſſion of the Place where the Diſtreſs was taken did make the Declaration ill, or not; adjudged, that the Effect of this Suit is not the Place where the Cattle were taken, but whether they were taken by the Defendant, or not, let the Place be where it will; for poſſibly the Plaintiff may not know the Place where they were taken, and might be delayed in his Suit, if it was material for him to ſhew in what Place; whereas a Replevin is *feſtinum remedium*, that the Plaintiff may have his Cattle reſtored, which might be the Cattle of his Plough; beſides, in Replevin,

vin, the Avowant is accounted the Actor, and he beſt knows where he took the Cattle. *Trin.* 10 *Jac. Godb.* 186. *Read* verſus *Hawes. Poſtea* Traverſe. (L) 6. *S. C.*

2. In Replevin, *&c.* the Defendant avowed for a Rent-charge, and ſo juſtified the Taking the Cattle, but did not ſay, that they were Levant and Couchant on the Land; and the better Opinion was, that the Cattle of a Stranger cannot be diſtrained, unleſs they were levant and couchant, *&c.* and if they were not, it muſt come on the other Side to ſhew it. 1 *Mod.* 63. *Jordan* verſus *Martin.*

3. Treſpaſs for Taking his Barley *Nomine Diſtrictionis*, for Rent ſuppoſed to be arrear *ſuper dimiſſionem* of a Meſſuage and Lands, when in Truth there was no Rent due; there was Judgment by Default, and it was objected, that the Declaration was ill, for the Statute provides, that where Goods are diſtrained for Rent reſerved, and due upon any *Demiſe, Leaſe, or Contract*, the Perſon diſtraining may ſell the ſame; now here was no Demiſe ſufficiently ſet forth, it was only *ſuper dimiſſionem*, when there ought to be both Leſſor and Leſſee to make a Demiſe; beſides, 'tis not alledged that the Goods were diſtrained for Rent arrear, but that they were taken *Nomine diſtrictionis*, which is not a good Averment that they were diſtrained: *Sed per Curiam*, the Declaration is good. 4 *Mod.* 231. *Salter* verſus *Brunſden.* *Action upon the Statute* 2 Will. 3. cap. 5.

Diſtribution.

(A)

See *Adminiſtration.* (D) per totum.

1. IN a Prohibition, the Caſe was, the Husband made a Will, and deviſed a Shilling to his Daughter, and made his Wife Executrix, who died Inteſtate, without proving the Will, ſo that in Judgment of Law the Husband died Inteſtate; and if ſo, the Queſtion was, whether Diſtribution ſhall be made amongſt the next of Kin of the Husband, or the next of Kin of the Wife, this ſeeming to be out of the * Statute of Diſtribution of Inteſtates Eſtates, for that takes Notice of Caſes where no Will is made, but here the Husband had made a Will: *Sed per Curiam*, Adminiſtration muſt be granted to the next of Kin to the Husband, and he is to make Diſtribution. 2 *Mod.* 101. *Harris*'s Caſe. * 22 & 23 Car. 2. cap. 10.

2. Upon a *Mandamus* to the Ordinary to make Diſtribution, according to the Statute; the Queſtion was, whether the *Grandſon of the Inteſtate's Brother* ſhould have a diſtributive Share with the *Daughter of the Inteſtate's Siſter*; the Words of the Statute being, that there ſhall be no Repreſentation amongſt Collaterals, after Brothers and Siſters Children; and adjudged, that the Grandſon of the Brother ſhall have no Share. 1 *Salk.* 230. *Pett* verſus *Pett.* Raym. 496. 3 Mod. 58. 1 Vent. 307, 316, 325.

Divorce.

Of Divorces *a Vinculo Matrimonii.* (A)
Of Divorces *a menſa & thoro.* (B)
What Alteration it makes in the Eſtate. (C)

(A)

Of Divorces a Vinculo Matrimonii.

1. THere are two Sorts of Divorces one *a Vinculo Matrimonii*, the other is only a Separation *a menſa & thoro*, and in ſuch Caſe the Marriage ſtill continues; the Divorce, which diſſolves the Marriage it ſelf, is grounded upon a Nullity for ſome eſſential Impediment preceding the Marriage, as Conſanguinity within the prohibited Degrees, Impotency, or Precontract on either Side, of which we have theſe Inſtances: A Man was divorced * *cauſa frigiditatis*, yet he married again, and had Iſſue by his ſecond Wife, which Iſſue was pretended to be a Baſtard; but it was ſaid, that a Man may be *Habilis & inhabilis diverſis temporibus*; and adjudged, that this Iſſue was not a Baſtard, for by a Divorce *cauſa frigiditatis*, the * *In* 1 And. 185. *The Libel and Pleadings.* 2 Leon. 169. *affirmed in Error.*

the Marriage it ſelf was diſſolved, and either Party might marry again; if ſo, then this Child was born in lawful Wedlock, but admitting the ſecond Marriage had been voidable (as it was not) yet it was of Force until it was diſſolved, and by Conſequence the Iſſue born during the Coverture was a lawful Iſſue to inherit the Lands of the Father. 5 *Rep.* 98. *Bury's* Caſe. *Moor* 225. *S. C.* by the Name of *Morris* verſus *Webber.*

Moor 169. S. C.

2. There was a Contract of Marriage between a Man and Woman *per verba de præſenti tempore*, and afterwards the Woman actually married another Man; then the Perſon with whom ſhe had contracted Marriage libelled in the Spiritual Court upon that * Contract, and it was decreed, that ſhe ſhould marry him, and that the Marriage with her Husband *de facto* was void; they married, and had Iſſue in the Life-time of the other Husband *de facto*; then the Husband by whom ſhe had this Iſſue died, being ſeiſed of a Copyhold of Inheritance; adjudged, that tho' the Husband whom ſhe firſt married was no Party to the Suit in the Spiritual Court, nor to the Sentence there, by which his Marriage with the Woman was diſſolved, by Reaſon of the Precontract, yet that Sentence ſhould bind him, becauſe that Court having a Juriſdiction in Caſes of Marriage, did by that Sentence declare his Marriage to be void; and if ſo, then the ſecond Marriage was lawful, and the Iſſue capable to inherit. *Mich.* 28 *Eliz.* 4 *Rep.* 29. *Bunting* verſus *Leppingwell.*

* *Before Pope* Innocent *the Third there was no Marriage in the Church, but all the Ceremony then uſed was, for the Man to come to the Houſe where the Woman lived, and to lead her from thence to his Dwelling.* Moor 170.

* 8 Rep. 43. Kenn's *Caſe.* 2 Cro. 186. S. C.

3. Where a Sentence of Divorce is given in the Spiritual Court *cauſa præcontractus*, the Iſſue of that Marriage ſhall be Baſtards, ſo long as that Sentence ſtands unrepealed, and no * Proof ſhall be admitted at Common Law to the contrary, for this Divorce is *a Vinculo Matrimonii*, becauſe they were not *juſtæ nuptiæ.* 1 *Inſt.* 235. a.

But it is not ſo where the Divorce is *a Menſa & Thoro*, becauſe that ariſes from a Cauſe ſubſequent to the Marriage, as Adultery, *&c.* and in ſuch Caſe the Marriage ſtill continues. *Cro. Car.* 462. 1 *Inſt.* 235. a.

And if after a Divorce a *Menſa & Thoro*, either of the Parties marry again, the other being living, ſuch a Marriage is a meer Nullity, and by a Sentence to confirm the firſt Contract they are become Husband and Wife without any formal Divorce. See 2 *Leon.* 173.

* Cap. 38. * 2 & 3 Ed. 6. cap. 23. † 1 & 2 Ph. & M. cap. 8. par. 20.

By the Statute * 32 *H.* 8. it was enacted, that *there ſhould be no Divorce upon any Precontract after a Marriage ſolemnized in the Church, and conſummated with bodily Knowledge or Fruit of Children*, but that Act, as to this Matter, was repealed by the *Statute* * 2 *&* 3 *Ed.* 6. and the whole Act it ſelf was repealed by the Statute † 1 *& Ph. & Mar.* but that Act was revived as to every Thing by the Statute 1 *Eliz. cap.* 1. *par.* 11. except as to what was repealed by the *Statute* 2 *&* 3 *Ed.* 6. ſo as to that Matter, (*viz.*) *That there ſhall be no Divorce upon a Precontract after a Marriage ſolemnized and conſummated by bodily Knowledge*; the Statute 32 *H.* 8. ſtands repealed.

(B)

Of Divorces a menſa & thoro. See *Releaſe.* (C) 12, 21.

1. THIS is only a Separation of the Man and Wife for ſome Cauſes ſubſequent to the Marriage, as Adultery on either Side, Cruelty by the Husband, *&c.* but the Marriage ſtill continues between them, as for Inſtance, the Wife was indicted upon the Statute 1 *Jac.* for Felony, having married a ſecond Husband, the firſt being then alive; the Jury found, that ſhe was lawfully married to her firſt Husband, and that ſhe libelled before the Judge of the Audience-Court, to be divorced from him *propter ſævitiam*; whereupon it was decreed by that Court, that *propter ſævitiam* of her Husband towards her, ſhe ſhould be ſeparated *a Menſa & Thoro*, and ſhe was expreſly inhibited by that Sentence not to marry again during his Life, and that afterwards, ſhe knowing her firſt Husband was living, intermarried with *W. R.* her ſecond Huſband; the Queſtion was, whether this was Felony, and adjudged, that it was, for by this Divorce *a Menſa & Thoro*, the Marriage was not touched, but ſtill continued a good Marriage with the firſt Husband, and by Conſequence the ſecond Marriage was unlawful; and to prove that the firſt Marriage continued, one *Steevens* his Caſe was cited 40 *Eliz.* where the Husband and Wife were divorced *cauſa Adulterii*, and afterwards a Bond was made to the Woman, and the Man releaſed the Bond, and this Releaſe was held good; and after another Divorce *cauſa Adulterii*, the Man died, and the Woman had her Dower. *Paſch.* 12 *Car. Cro. Car.* 333. *Porter's* Caſe. Felony. (A) 6. *S. C. Godb.* 145. *S. P.* The Lady * *Stowell's* Caſe, and 17 *Car. March* 101. *Williams's* Caſe. *S. P.*

* Noy 108. S. C. Godb. 355. S. C.

2. The Husband ſeiſed of a Manor held *in Capite*, had Iſſue by his Wife one Daughter, afterwards the Marriage between them was declared in the Spiritual Court to be void, becauſe they were *infra Annos nubiles*, and for that Reaſon they were divorced; the Husband married a ſecond Wife, afterwards the firſt Marriage was by Sentence in the Eccleſiaſtical Court declared to be lawful, and that he was never lawfully married to the ſecond Wife; ſhe died, and then the Husband married a third Wife, by whom he had Iſſue another Daughter, and then he died; it was found, that this ſecond Daughter was his Daughter and Heir, and within Age

Age; the King granted the Wardſhip, *&c.* and then the Daughter by the firſt Wife exhibited a Bill in Chancery, ſuggeſting, that ſhe was Daughter and Heir of her Father, and that he and her Mother cohabited, and were both of Age of Conſent, and lived together ten Years before the pretended Divorce, during which Time ſhe was born between them; adjudged, that ſo long as the Sentence of Divorce ſtood in Force, the Daughter ſhall not be allowed to aver, that her Father and Mother agreed and conſented to the Marriage, becauſe the Eccleſiaſtical Judge hath declared the ſame to be void; for tho' they were of Age, and did conſent afterwards, yet, if the Original Contract was void, then there is a juſt Cauſe of Divorce, and the Eccleſiaſtical Judge is as well Judge of the Conſent as the Contract. 7 *Rep.* 42. *Kenn*'s Caſe.

3. Two Brothers, the eldeſt married within the Age of fourteen Years, and afterwards at full Age, they cohabited, and were reputed as Man and Wife, and not long afterwards he put her away, and married a ſecond Wife, and had Iſſue by her; the Husband died, and the ſecond Wife publiſhed, that ſhe was his lawful Wife, and that her Iſſue was born in lawful Wedlock; and the younger Brother libelled in the Spiritual Court, to make void that Marriage, and thereupon the ſecond Wife moved for a Prohibition; adjudged, that if the Husband and his firſt Wife had any Iſſue, and they had been unjuſtly divorced, ſo long as the Sentence of Divorce ſtood unrepealed, the Iſſue could have no Remedy at Common Law. *Corbett*'s Caſe, vouched in 7 *Rep.* 44. *Kenn*'s Caſe.

4. The Husband was divorced *a menſa & thoro* from his Wife, by Reaſon of her *Incontinency*; and afterwards married *S. P.* living his firſt Wife; adjudged a void Marriage, and *Archbiſhop Whitgift* declared, that it was the Opinion of moſt of the Divines and Civilians, which he had aſſembled at *Lambeth*. *Moor* 683. *Rye* verſus *Foliamb. Paſch.* 44 *Eliz.*

5. Libel in the Spiritual Court to be ſeparated from the Husband *propter ſævitiam*, and Sentence was given for the Wife, that ſhe ſhould live from him, and that he ſhould allow her 5 *s.* 6 *d. per* Week, tho' the Husband offered Reconciliation, and deſired to cohabit with her, and offered Caution to uſe her well, and thereupon he moved for a Prohibition; but it was denied, becauſe the Spiritual Court hath a proper Juriſdiction in Caſes of Alimony and Divorce. *Hill.* 11 *Jac.* 2 *Cro.* 364. *Hiatt*'s Caſe.

6. The Wife libelled in the Eccleſiaſtical Court, to be ſeparated from her Husband *propter ſævitiam*, and Sentence was given againſt her, but he paid all the Coſts for his Wife; ſhe appealed from the Sentence, and becauſe the Husband would not anſwer the Appeal, and pay for the tranſmitting the Record, he was excommunicated; and now upon ſuggeſting this Matter, he prayed a Prohibition; it was the Opinion of the Court, that it was a very hard Caſe; but the Prohibition was not then granted, only a Rule made to ſtay the Proceedings. *Mich.* 1 *Car. Cro. Car.* 11. *Greeve*'s Caſe.

7. The Wife libelled in the Spiritual Court againſt her Husband, for that he threatned and beat her, and in the End of the Libel ſhe prayed Alimony, thereupon the Husband moved for a Prohibition, ſuggeſting, that the Suit being Force, that Court hath no Juriſdiction, and they cannot give Damages in ſuch Caſe; but a Prohibition was denied, becauſe the Wife cannot have any Remedy at Common Law againſt her Husband for beating her, for as long as they cohabit, ſhe is *ſub Virga viri*; beſides, this Suit is only by Way of Inducement to have a Divorce *cauſa metus*. *Mich.* 11 *Jac. Godb.* 215. *Sir Tho. Seymour*'s Caſe.

8. *Habeas Corpus* to the Husband, to bring his Wife into Court, upon Affidavits of ill Uſage, Confinement, and Danger of her Life; ſhe was brought into Court, and made Oath, that ſhe went in Danger of her Life, upon which he was bound with Sureties for his Good Behaviour; but they could not remove her from him. 2 *Lev.* 128. *The King* verſus *Lord Lee.*

(C)

What Alteration it makes in the Eſtate.

1. THere is a Note in *Dyer*, that upon a Divorce, the Wife ſhall have her Goods again, which were given in Marriage (unleſs they are ſpent) becauſe they were given for her Advancement, and *ceſſante cauſa ceſſat effectus*, 28 *H.* 8. *Dyer* 13. and that, if ſhe knows them, ſhe may have an Action of Detinue to recover them; but if her Husband give them away during the Coverture, without any Colluſion, that ſhall bind the Wife, becauſe 'tis an Act executed during the Coverture; and as for Money, and ſuch Goods, which cannot be known, ſhe muſt ſue for them in the Spiritual Court. *Dyer* 62. *S. P.*

2. The Wife ſhall have *Dower*, but then the Marriage muſt continue till the Death of the Husband; for if they are divorced *a vinculo matrimonii*, the Dower ceaſeth, for *ubi nullum matrimonium ibi nulla dos*, but where the Divorce is *a menſa & thoro*, ſhe ſhall be endowed, becauſe notwithſtanding ſuch Divorce, the Marriage ſtill continues. 1 *Inſt.* 42. *Noy* 108. *Powell* verſus *Weeks*, *S. P.*

3. If Husband and Wife are Joint Purchaſers, and afterwards are divorced, they ſhall hold by Moieties; but where Lands were given to them in *Frank-marriage*, the Effect of which Words was, that they ſhall have the Lands to them, and the Heirs of their Bodies, and which was frequent in former Days, before Jointures came in Uſe, in ſuch Caſe, if they had afterwards been divorced, the Wife ſhall have the whole Land, becauſe it was given for her Advancement. *Paſch.* 26 *Eliz. Godb.* 18. *Webb* verſus *Potter*. Frank-marriage. (A) 1. *S. C.*

Dogs. See **Trover.** (B) 17.

Donative.

(A)

1. THIS is a Benefice given and collated by the Patron to a Clerk, without any Preſentation to the Biſhop, or Inſtitution by him, or Induction by his Order; the Original of theſe Donatives was, that the King by Letters Patents, gave Licenſe to a Common Perſon to found a Free Chapel, and to make it Donative, and not preſentable, and that the Clerk ſhall be ſubject to Deprivation by the Founder, or his Heirs, and not by the Biſhop.

2. In a Prohibition, the Plaintiff ſuggeſted, that the Church of *B.* was a Donative, and that the King was ſeiſed of the Advowſon, and granted the ſame to *W. R.* from whom the Plaintiff derived a Title to preſent, and that one *R. R.* pretending that it was Preſentative, and that he was the true Patron, preſented the Defendant, who libelled in the Spiritual Court *to have Induction*, and cited the Incumbent, who had it of the Plaintiff by Donative, and pending the Suit, the Clerk died, and now the Plaintiff came in *pro intereſſe ſuo*, and pleaded his Title to the Church as a Donative; which Plea being there refuſed, he prayed a Prohibition, but it was denied, becauſe the Defendant claimed nothing but *Induction*, and that could not be prejudicial to the Plaintiff; for if it was a Donative, then his Induction would be to no Purpoſe; and if it was Preſentative, then the Defendant could have no Title to the Profits, nor try his Right till Induction. *Hill.* 41 *Eliz.* 2 *Cro.* 653. *Quarles* verſus *Fairchild.*

Yelv. 60. Moor 765.

3. In Treſpaſs for taking his Tithes, the Jury found a Special Verdict, that the Defendant was collated to the Church of *B.* being a Donative by *two Perſons*, who were the true *Patrons*, and that the Church was exempted from the Juriſdiction of the Ordinary, and that afterwards the Defendant reſigned it to *one of the Patrons*, and to another, who had no Manner of Right to the Patronage, which was afterwards veſted in *R. R.* who collated the Plaintiff, by Reaſon whereof he was ſeiſed of the Tithes in Queſtion, and that the Defendant took them away; then they conclude, that if this Reſignation was good, they find for the Plaintiff, if not, then for the Defendant; adjudged, that this being a Donative, the Reſignation muſt be to the Patron, and that the Incumbent ſhall not be compelled to keep it, if the Patron will not accept the Reſignation; and that where there are two Patrons, as in this Caſe, the Reſignation to one and a Stranger, is good to both; but when *R. R.* had a Title of both Patrons, and he collated the Plantiff, 'tis good to entitle him to the Profits, ſo the Action is well brought. *Paſch.* 5 *Jac.* 1 *Brownl.* 201. *Fairchild* verſus *Gayre Poſtea* Reſignation. (A) 1. *S. C.*

4. The Incumbent on a Donative was ſued in the Spiritual Court, for marrying without a Licenſe; and upon a Motion for a Prohibition, it was denied; but *Twiſden* doubted; 'tis true, they may puniſh him *pro reformatione morum*, but they cannot deprive him. 1 *Mod.* 22. *Maddox*'s Caſe.

5. The Incumbent of *St. Mary le Bone* in *Middleſex*, which is a Donative was cited into the Spiritual Court, to take a Licenſe from the Biſhop to preach, pretending that this was a Chapel, and that the Parſon was a Stipendiary; it was ruled, that if it was a Donative, and if the Biſhop viſit, *B. R.* will grant a Prohibition. 1 *Mod.* 90.

1 Mod. 22.

6. Libel in the Spiritual Court againſt a Parſon for marrying a Couple with out Licenſe, in the Church of *Bedleſton*, he ſuggeſted for a Prohibition, that the Church was a *Donative*, and that the Donor *ex jure communi* might appoint Viſitors, and that the Ordinary had no Juriſdiction; and *Twiſden* held this Suggeſtion to be good; but a Prohibition was denied by the reſt, becauſe the Parſon had another Benefice Preſentative. *Sid.* 432. *Maddox* verſus *Chancellor of Peterborough.* See 2 *Cro.* 63.

7. Ruled, that a Donative may be with Cure of Souls, as the Chapel of the Tower of *London*; that there are Churches which are neither Preſentative or Donative, and yet have Cure of Souls, (*viz.*) thoſe which are *Dative* and Stipendiary; as where an Impropriator gives an yearly Stipend to one to ſerve the Cure, there being no Vicarage. *Mod. Caſes* 230. *In the Caſe of Jacob* verſus *Dallow.*

8. A Donative is created by Letters Patents, by which Lands are ſettled upon the Parſon and his Succeſſors, and he is to come in by the Donation of the King and his Succeſſors, and for that Reaſon, tho' there may be ſome Preſentations to this Donation, and the Incumbent come in by Inſtitution and Induction, yet that will not deſtroy the Donative. 2 *Salk.* 541. *Ladd* verſus *Widdows.*

Double Plea.

(A)

What Pleadings ſhall be double, what not. See *Pleas.*

1. IN Debt upon the Statute 32 *H.* 8. of pretended Titles, the Plaintiff declared, that the Defendant had granted, bargained, *and to Farm let*, a Meſſuage and eleven Acres of Land, in which he, nor any of his Anceſtors were ever in Poſſeſſion, *&c.* for a Year before the Bargain, Grant and *Leaſe thereof* made, the Court was divided in Opinion, whether the Words *to Farm let* coming after the *Bargain and Grant*, did make the Declaration double, the better Opinion ſeemed to be, that thoſe Words did not comprehend a double Title, but were added as an Aggravation of the Offence. *Hill.* 7 *Ed.* 6. *Plow. Com. Partridge* verſus *Strange. Antea* Declaration. (A) 1. *S. C.*

2. In Aſſiſe, *&c.* for a Portion of Tithes, ſeveral Exceptions were taken to the Writ and Count, which did comprehend the Plaintiff's Title, and amongſt the reſt, that the Title was double, becauſe the Demandant alledged, that the late Prior of *S. was ſeiſed in Fee* in Right of the Church, and that he, and all his Predeceſſors were ſeiſed, *&c.* Time out of Mind, ſo that this Preſcription made it double; but adjudged, that it did not not; for *Seiſin* alone is not a ſufficient Title of a Profit *apprender in alieno ſolo*, therefore the Preſcription was induced to make out the Title, but was not a Title of it ſelf. *Paſch.* 7 *Ed.* 6. *Dyer* 85. *The Serjeant's* Caſe.

3. Debt upon Bond by an Executor conditioned, that if the Plaintiff's Teſtator ſhall quietly enjoy a Meadow to him and his Heirs, to hold of the Land by the Services due after the Cuſtom of the Manor, that then, *&c.* the Defendant pleaded, that the Meadow was Copyhold, and that there is a Cuſtom in the Manor, *&c.* that if Copyhold Tenants *fail in Payment of their Rents*, then the Lord may enter for a Forfeiture; that the Plaintiff's Teſtator held the Meadow by Copy, *&c.* and quietly enjoyed the ſame during his Life, and died ſeiſed; that the Meadow deſcended to his Son and Heir, who entered, *without Admiſſion by the Lord, contrary to the Cuſtom*, and becauſe the *Rent was arrear* ſuch a Day, the Lord entered into the Meadow, as forfeited; to this Plea the Plaintiff demurred, and it was inſiſted for him, that it was double, becauſe the Defendant alledged, that the Son and Heir of the Obligee *entered without Admiſſion*; and afterwards he ſets forth, that the Lord *entered for Rent arrear as forfeited*, and this made the Plea double; but adjudged, that it did not, for the Allegation, that the Son entered without Admiſſion, is but Surpluſage. *Mich.* 30 *H.* 8. *Dyer* 42.

4. Double Plea is, where ſeveral Matters are alledged, the one not depending on the other, and where one alone had been ſufficient, in ſuch Caſe, if the Party demur, he ſhall have the Advantage of it; but if he paſs it over, and they proceed upon another Point in Pleading, there the Duplicity is gone. *Mich.* 39 *Eliz. Poph.* 113. *Holmes* verſus *Gee.*

5. In a *Quare Impedit* againſt the Biſhop, and two Defendants, the Plaintiff declared, that *W. R.* was ſeiſed and preſented *R. R.* and afterwards left the Manor to which the *Advowſon was appendant* to the Plaintiff; that the Church became void *by the Reſignation of R. R.* by Reaſon whereof it belonged to the Plaintiff to preſent; the Biſhop pleaded, that he claimed nothing but as Ordinary; one of the Defendants entitled himſelf to it by a Preſentation, as to an *Advowſon in Groſs*, and traverſed the *Appendancy*, upon which the Plaintiff took Iſſue; the other Defendant pleaded as Parſon Imparſonee of the Preſentation of the King, and confeſſed the Title to *W. R.* and the letting the Manor to the Plaintiff, but pleaded over, that *W. R.* preſented the ſaid *R. R.* by Simony, and pleaded the Statute 31. which makes ſuch Preſentation void, ſo that it belonged to the King to preſent, who preſented him, this Defendant, and that he was admitted, inſtituted and inducted *abſque hoc*, that the Church became void by the Reſignation of *R. R. &c.* to which Plea the Plaintiff demurred, and ſhewed for Cauſe, that the Traverſe had made the Plea double; for the Title of the Plaintiff to preſent to the Church being confeſſed, and his Preſentation being avoided by the Simony, the Defendant ought not to have *traverſed the Reſignation* of the Preſentee, becauſe the Church was void by ſimoniacal Preſentation; therefore to confeſs and avoid the Preſentation, and afterwards to traverſe the Reſignation, makes the Plea double; but adjudged, that it did not, becauſe the Plea made the Traverſe argumentative; for if the Church was void by the ſimoniacal Contract, as this Plea is; therefore it was not void by the Reſignation, as Traverſe is. *Hill.* 22 *Jac. Cro. Car.* 44. *Sir Gregory Fenner & al'* verſus *Pasfield. Poſtea* Traverſe. (C) 7. *S. C.*

6. In a *Quare Impedit*, the Biſhop pleaded, that he claimed nothing but as Ordinary, and confeſſed the Title of the Plaintiff to preſent, and the Death of the laſt Incumbent; but farther pleaded that he died 1 *Jan.* 12. and becauſe the Church being void after his Death, and no Perſon being preſented by the Plaintiff by the Space of ſix Months, he, as Ordinary, after the ſix Months, collated the other Defendant, *&c.* the Plaintiff replied, and confeſſed, that the Church was void 1 *Jan.* 12 *Jac.* by the Death of the laſt Incumbent, and that the Church being void after the 1ſt of *Jan.* he, within ſix Months, *viz.* 19 *May*, 1615. did by Writing under his Hand and Seal, preſent

ſent *W. R.* to the Biſhop, praying him to admit him, *&c. which he refuſed*, and afterwards, 30th of *May*, did collate the other Defendant, and he pleaded the ſame as to him; upon which Replications the Defendants did ſeverally demur, and for Cauſe ſhewed, that they were double; for the Plaintiff having alledged, that he preſented a Clerk to the Biſhop within the ſix Months, that was a perfect Anſwer to the Biſhop's Plea, and he ought not to have pleaded, that *the Biſhop did refuſe him*; for that puts the Matter upon another Foot, and makes the Replication double; but adjudged it did not; 'tis true, the Subſtance of the Plea is, that the Plaintiff did not preſent his Clerk within ſix Month; to which the Plaintiff replied, that he did preſent within ſix Months; ſo that here was a Negative and an Affirmative, which made a compleat Iſſue; but yet the Plaintiff ought to have alledged a Refuſal of his Clerk, as he did, for that makes the Diſturbance as he had laid in his Declaration, and the Replication is not compleat without it. *Mich.* 15 *Jac. Hob.* 197. *Birkhead* verſus *Archbiſhop of York, & al'.*

Cro. Car. 419. 7. Treſpaſs for an Aſſault, Battery and Impriſonment until *he paid* 7 *l.* 10 *s.* as a Fine; the Defendant pleaded Not guilty as to all beſides the Aſſault and Impriſonment, and as to that he juſtified under a Warrant to Arreſt the Plaintiff for 6 *l.* 13 *s.* 4 *d.* the Plaintiff demurred, for that this was a double Plea, becauſe he pleaded *Not guilty as to all*; beſides the Aſſault and Impriſonment, which muſt be Not guilty *as to the Fine*, and yet he juſtifies the Aſſault and Impriſonment by Virtue of a Warrant to arreſt the Plaintiff for the Fine: *Sed per Curiam*, the Plea of Not guilty goes only to the Battery, and not to the Payment of the 7 *l.* 10 *s.* for that is a ſeveral Offence, and thoſe are ſeveral Treſpaſſes; beſides the Plea of a Warrant to arreſt, *&c.* for 6 *l.* 13 *s.* 4 *d.* is not a good Plea as to the 7 *l.* 10 *l.* being different Sums, and therefore the Plea is not double. *W. Jones* 367. *Hitchman* verſus *Potter*.

Dove-cote.

(A)

See *Ac. Caſe.* (V) per totum. See *Warren* (A) per totum.

2 Roll. Rep. 3. 30. 1. A Freeholder in the Manor of *Thiſtleworth* built a Dove-cote upon his own Land, which was preſented at the Leet for a Common Nuſance, and he was there amerced 40 *s.* and commanded to amove it, under the Penalty of 10 *l.* which he neglected, and thereupon the Bailiff of the Lord of the Leet diſtrained; the Freeholder replevied, and the Defendant juſtified as Bailiff, and ſet forth a Preſcription to make By-Laws to redreſs Common Nuſances, and to diſtrain for a Breach thereof, *&c.* the Queſtion upon the Pleadings was, whether it was a Common Nuſance, puniſhable in the Leet, for a Freeholder to build a Dove-cote on his own Lands, and to ſtore it with Pidgeons? and adjudged that it was not; for the Freeholder had *jus proprietatis & privilegii* in Doves, and a Man may preſcribe to have a Dove-cote, which could not be, if it was a Common Nuſance; beſides there are particular Statutes made to preſerve Doves, and to puniſh thoſe who kill them, and this ſhews, that they are not a Common Nuſance; 'tis true, in *Boulton*'s Caſe, in the * 5th *Rep.* 'tis adjudged, that no Man may build a Dove-cote but the Lord of a Manor, and that if he doth he is puniſhable in the Leet, but not in an Action on the Caſe, becauſe of the Multiplicity of ſuch Actions; but that Caſe is not Law. *Trin.* 17 *Jac.* 2 *Cro.* 492. *Dewell* verſus *Earl of Northumberland.* * *Bond*'s Caſe, *Moor* 238. *contra.*

1 Roll. Rep. 126, 200. 2. The like Caſe came in queſtion about ſix Years before, and there *Coke* Chief Juſt. held, that it was a Common Nuſance, but the other Judges doubted, which Doubt is now reſolved in *Dewell*'s Caſe beforementioned; but becauſe in this Caſe the Preſentment was, that he had erected a Dove-cote, and ſtored it with Pidgeons, but did not ſay, that it was *ad commune nocumentum, &c.* it was adjudged inſufficient. *Hill.* 11 *Jac.* 2. *Cro.* 382. *Pratt* verſus *Stern.*

3. A *Præcipe quod reddat* lieth of a Dove-cote, which ſhews, that 'tis an Inheritance, and it ſhall be demanded next a Houſe; alſo an *Aſſiſe* lieth of a Dove-cote, and a Woman ſhall be endowed of it. 15 *Ed.* 3. 22.

Dower.

What it is, and who ſhall be endowed, and in what Caſes. (A)
Where a Woman ſhall not be endowed, and where ſhe ſhall be barred of her Dower, and by what Acts. (B)
Of what ſhe ſhall be endowed, and of what not. (C)
Of Proceedings in Dower, and of Executions and Writs of Error in Dower. (D)
Pleas in Dower, good. (E)
Pleas in Dower, not good. (F)

(A)

What it is, and who ſhall be endowed, and in what Caſes. See *Sheriff.* (F) 12.

Dower by the Common Law is a third Part of ſuch Lands and Tenements whereof the Huſband was ſole ſeiſed in Fee during the Coverture, and this his Widow was to enjoy during her Life.

Dower by Cuſtom is that Part of the Eſtate, to which the Widow is entituled after the Death of her Husband, by the Cuſtom of any Manor or Place, ſo long as ſhe lives Sole and Chaſte, but this is more than the third Part; for in ſeveral Manors where the Husband dies ſeiſed of Copyhold Lands, the Widow ſhall have the Whole during her Life, which is called her free Bench; and in ſome Places ſhe ſhall have half, ſo long as ſhe lives Sole, and that is where the Cuſtom of Gavelkind prevails, but as Cuſtom may enlarge, ſo it abridges Dower to a fourth Part. 1 *Inſt.* 33. b.

There was likewiſe Dower *ad oſtium Eccleſiæ*, and this was made by the Husband himſelf in the Church, immediately after the Marriage, who named ſuch particular Lands of which his Wife ſhould be endowed, and this differed from Dower at Common Law, becauſe the Demand in one was certain; for immediately upon the Death of her Husband ſhe may have a Writ of Dower of ſuch particular Lands, and there muſt be theſe Words in the Writ, *unde Vir meus dotavit me ad oſtium Eccleſiæ*; but Dower by the Common Law was of a third Part of the Lands, which is incertain before Aſſignment made by the Sheriff *per metas & Bundas.*

There was likewiſe Dower *ex aſſenſu Patris*, this likewiſe was of certain Lands named by the Son, with the Conſent of his Father, and always put in Writing as ſoon as the Son was married.

There was alſo Dower *de plus Bells*, which was where the Wife was endowed with the faireſt Part of her Husband's Eſtate, but moſt of theſe Writs of Dower are now diſuſed, and by Conſequence the Writs *De Dote aſſignanda*, *de admenſuratione Dotis*, *De Dote unde nihil habet*, and many more, which made a great Title in the old Books; and even Dower at Common Law is almoſt diſuſed, ſince Settlements by Way of Jointure came in the Place thereof: But of this Sort of Dower I ſha l mention ſome Things.

1. A Woman recovered Damages in a Writ of Dower, and died, her Executor brought a *Scire facias* to have Execution of the Damages, to which the Defendant pleaded, that he had brought a Writ of Error upon the Judgment in Dower; and the Error aſſigned was, that it was obtained againſt an Infant by Default, and pending the Writ the Woman died, at whoſe Suit the Judgment was obtained; thereupon he brought a new Writ of Error *quod coram vobis reſidet* againſt the now Plaintiff as Executor, and demanded Judgment, whether he ought to have Execution pending that Writ; adjudged, that Dower is favoured in Law, and that the Demandant in that Action ſhall not be prejudiced by the Infancy of the Defendant. *Trin.* 19 *Eliz. Cro. Eliz. Williams* verſus *Williams. Hill.* 3 *Jac.* 2 *Cro.* 111. *Smith* verſus *Smith. S. P. Mich.* 40 *Eliz. Cro. Eliz.* 638. *Harby* verſus *Wroth. S. P.*

2. The Husband made a *Feoffment* of two Parts of his Lands to the Uſe of himſelf *and his Wife*, and their Heirs, upon Condition, that if ſhe ſurvived, ſhe ſhould pay ſuch Sums as he ſhould appoint by his Will, not exceeding 200 *l.* afterwards he made a Will, and appointed ſeveral Sums to be paid to ſeveral People, amounting to 150 *l.* and no more, and deviſed the Reſidue of his Lands to ſome of his Kindred, and died, the Widow married again, and ſhe, together with her Husband brought a Writ of Dower againſt the Deviſee, who pleaded the Feoffment made as aforeſaid, and averred, that it was *for her Jointure*; adjudged, that there being no Circumſtances to verify this Averment, it ſhall not be intended that it was made for her Jointure. *Mich.* 32 *Eliz.* 1 *Leon.* 311. *Tracy* verſus *Ives.* See Statute 27 *H.* 8. *cap.* 10. *Moor* 148. *S. C.*

3. Where a Jointure is made to a Woman *before Marriage*, ſhe cannot, after the Death of her Husband, waive that and have Dower, as ſhe might if the Jointure had been made *after Marriage*;

riage; but if Lands are ſettled on a Woman before Marriage, *as Part of her Jointure*, and other Lands are ſettled on her *after Marriage*, in full for her Jointure, and in Satisfaction for her Dower, ſhe may waive the Land ſettled after Marriage, and keep that which was ſettled before her Marriage, and have her Dower alſo. *Aſhton*'s Caſe, in 4 *Rep.* 1. *Vernon*'s Caſe.

4. In Dower, the Caſe upon a Demurrer was, the Husband was ſeiſed in Fee of the Manor of *Chidham* and *Thorney*, *&c.* and by Will he deviſed the ſame to his Son and the Heirs of his Body, and died ſeiſed, and *Elizabeth Bickley*, his Widow, demanded Dower, *Thomas Bickley*, the Defendant and Deviſee had Iſſue a Son, and granted to the Widow a *yearly Rent of* 50 *l.* iſſuing out of the dowable Lands *during her Life*, *if he or any Son of his Body ſhould ſo long live*, in Recompence of her Dower; and it was agreed between him and the Widow, that if ſhe could not lawfully have the ſaid yearly Rent, that then ſhe ſhould have her Dower again, as if the Grant of this Rent had never been made; the Grantor had afterwards a Son named *Thomas*, the now Tenant, and died, the Widow married again, and the Demandant diſtrained on the entailed Lands for this Rent, and the Tenant replevied; the Queſtion was, whether the Tenant, who was the Iſſue in Tail, could avoid this Rent; and it was inſiſted that he could, becauſe otherwiſe the Tenant in Tail might charge the Lands with more than a third Part, and therefore the Iſſue in Tail ſhall not be obliged to pay this Rent; but adjudged, that the Acceptance of the Rent ſhall bind the Widow, becauſe it iſſued out of the entailed Lands, and likewiſe out of Lands which deſcended to the Tenant in Fee; and ſo long as the Rent continues ſhe ſhall be barred of her Dower; but if ſhe had accepted of a Rent *for Years*, *or for the Life of another*, who granted the Rent, ſuch Acceptance ſhall not bar her of her Dower, becauſe not of equal Duration with that Eſtate which ſhe might have in Dower, which Eſtate the Law appoints *for her Life*. 1 *And.* 117. *Bickley* verſus *Bickley*.

5. In Dower, the Iſſue was, *ne unques ſeiſie que Dower*, and the Evidence for the Plaintiff was, that a *Feoffment* was made to the Husband and *Wife* in Fee; the Tenant proved, that before that Feoffment was made, the Husband was ſeiſed to him and his firſt Wife in *ſpecial Tail*, and that afterwards the Husband diſcontinued the Eſtate-tail, and took back to himſelf an Eſtate in Fee-ſimple by the aforeſaid Feoffment, for which his Heir, who is now Tenant in Tail, was *remitted*, and if ſo, then the ſecond Wife is not dowable; 'tis true, if this had been pleaded ſpecially, it had been ſo, but the Jury were directed to find for the Demandant; for upon this *Iſſue* they are not to take Notice of the Remitter, the only Queſtion being, whether the Husband was ſeiſed of ſuch Eſtate of which his Widow was to be endowed. *Paſch.* 30 *H.* 8. *Dyer* 41.

6. *Scire facias* to execute a Judgment obtained in Dower; the Defendant pleaded, that the Plaintiff had *accepted a Rent* after ſhe obtained the Judgment in Satisfaction of her Dower; adjudged, that the Acceptance of a Rent out of other Lands than what was in Demand, is no Bar to her Dower, but if it had been iſſuing out of the ſame Land, 'tis a Bar. *Mich.* 1 *Mar. Dyer* 91.

7. In a Writ of Dower, the Tenant pleaded, that the Plaintiff had accepted a Rent for Life, iſſuing out of the ſame Lands of which ſhe demanded Dower; but becauſe he did not ſhew, that at the Time of the Aſſignment of the Rent he was ſeiſed of the ſaid Lands, it was adjudged, that the Demandant ſhould recover her Dower. *Hill.* 20 *Eliz. Dyer* 361.

8. In Dower, the Defendant, who was only *Tenant for Life*, vouched to Warranty the Heir of the Husband, who being within Age, and in Ward to the King, and ſet forth the Deed, by which the Husband of the Demandant had granted to him an Eſtate for Life, with Warranty againſt him and his Heirs, and for that the Heir was within Age, and in Ward to the King, he prayed in Aid of the King and had it; afterwards the Demandant brought a *Procedendo in placito prædicto ac in redditione judicii in eodem placito cum ea celeritate*, *&c.* upon which the Court being in Doubt what to do, afterwards, upon great Advice, gave Judgment for the Demandant, that ſhe ſhould recover againſt the Tenant, and that he ſhould recover over in Value againſt the Heir. *Mich.* 9 *Eliz. Dyer* 256. *Michael* verſus *Netherlate*.

9. At Common Law, if the Husband was attainted of *Felony*, the Wife ſhould not be endowed, but now by ſeveral Statutes, the Wife of a Perſon attainted of Miſpriſion of Treaſon, Murder, or Felony, is dowable. 1 *Ed. 6. cap.* 13. 6 *Ed. 6. cap.* 11. 13 *Eliz. cap.* 1.

10. Husband and Wife brought a Writ of Dower on the Endowment made on her by her firſt Husband; the Defendant pleaded in Bar, that an Annuity was granted to her firſt Husband and to her ſelf, in Recompence of her Dower which ſhe accepted after his Death: *Anderſon* Ch. Juſt. held, that if ſhe diſagreed to it afterwards, 'tis a good Refuſal, and in ſuch Caſe her Acceptance of the Annuity, and Agreement, ſhall not bar her of her Dower. *Paſch.* 28 *Eliz. Goldſ.* 4. *Aſcough*'s Caſe. 2 *Rep.* 135. *S. C.*

11. Tenant in Fee-ſimple, in Conſideration of 100 *l.* paid to him by *W. R.* bargained and ſold the Lands: Proviſo, that the Bargainee ſhould redemiſe to him and his Wife for their Lives, rendring a Pepper-Corn, and that if he paid the 100 *l.* at the End of twenty Years, then the Bargain and Sale to be void; he redemiſed it accordingly, and died, and his Wife brought a Writ of Dower, and adjudged good, becauſe by the Bargain and Sale the Land was veſted in her Huſband; and tho' he immediately made a Redemiſe, according to the Agreement between them, yet thoſe to whom the Redemiſe was made ſhall hold it ſubject to Dower; and when a Woman is dowable by Act in Law, a Court of Equity ſhall not relieve againſt her Claim, tho' it was ſaid this Caſe was in Nature of a Mortgage, and that the Wife of a Mortgagee, if the Mortgage is redeemed, ſhall not be endowed, no more than the Wife of a Conuſee of a Fine, upon a Grant

and Render, becauſe the Eſtate is in him, and out again immediately *quaſi uno flatu*. *Paſch.* 6 *Car. Cro. Car.* 190. *Naſh* verſus *Preſton.*

12. Tenant for Life, Remainder in Tail to his Son, Remainder to the right Heirs of the Father, he and his Son (who had no Iſſue) were both attainted of Felony, and both executed at one Time; and if the Father ſhould be now ſeiſed of an Eſtate in Fee, ſo as his Wife might be endowed, was the Queſtion; upon a Writ of Dower brought by the Wife, the Tenant pleaded *Ne unques ſeiſie que Dower*, it was given in Evidence, that the Father moved his Feet after his Son was dead, and thereupon the Jury found, that he died ſeiſed of an Eſtate of which the Wife might have Dower, and ſhe had Judgment accordingly. *Trin.* 38 *Eliz. Cro. Eliz.* 502. *Broughton* verſus *Randall. Noy* 64. *S. C. Moor* 528. *S. C. Poſtea* Tales. (A) 11. *S. C.*

13. A Writ of Dower was brought in the County of *Northumberland*, the Pariſh-Church where the Lands lie was in *Newcaſtle*; the Queſtion was, where the Proclamation of Summons ſhould be by the Statute 31 *Eliz.* adjudged, that it ought to be at the Door of the Pariſh-Church, tho' it was in another County than where the Writ was brought. *Paſch.* 38 *Eliz. Cro. Eliz.* 472. *Ragſter's* Caſe. See *Moor* 349. 1 And. 278.

14. The Sheriff upon an *Habere facias Seiſinam* returned a Recovery in Dower *de tribus Maneriis*, and that he had rendered to the Widow one Manor; this Return was adjudged ill, for ſhe ſhall have the third Part of each Manor, but if the Writ of Dower had been of all the Lands and Tenements of the Husband, and he had both Meadow and Paſture, the Sheriff might aſſign all the Paſture Lands for her Dower. *Moor* 12, 15. *S. P.*

15. Tenant in Tail, Remainder in Tail, Reverſion in Fee to the Tenant in Tail, who bargained and ſold the Lands by Deed inrolled to *W. R.* and his Heirs, and levied a Fine with Proclamations to him; afterwards the Bargainee made a Feoffment in Fee, then he in Remainder in Tail died, leaving Iſſue, and Tenant in Tail died without Iſſue; adjudged, that by the Bargain and Sale *W. R.* had an Eſtate deſcendible to his Heirs upon the Death of the Tenant in Tail, and the Reverſion in Fee expectant upon the Death of the Remainder-man in Tail, and that in ſuch Caſe his Wife ſhall be endowed. 10 *Rep.* 96. *Sir Edw. Seymour's* Caſe.

16. Husband and Wife, Tenants *in ſpecial Tail*, had Iſſue a Son, the Wife died, then the Huſband made a Feoffment to the Uſe of himſelf for Life, Remainder to the Uſe of his Son in Tail, with a Letter of Attorney to make Livery, but before that was made, he married a ſecond Wife, and then Livery was made according to the Uſes in the Feoffment, then the Husband died; and the Queſtion was, whether this ſecond Wife was dowable, and adjudged that ſhe was not, becauſe, before the Feoffment made, the Husband was ſuch a Tenant *in ſpecial Tail*, that the Iſſue by his ſecond Wife could not inherit, and by the Feoffment before, and Livery after the Coverture, he did not gain any new Eſtate or Seiſin of which the Wife might be endowed, for what was done by that Feoffment was immediately drawn out of him again by Virtue of the ſpecial Entail; like the Caſe where the Husband levied a Fine to the Uſe of himſelf in Fee, and by the ſame Fine rendered the Lands to another in Tail, that in ſuch Caſe his Wife ſhould not be endowed, for tho' he took it in Fee, it was inſtantly out of him. *Paſch.* 19 *Jac.* 2 *Cro.* 615. *Amcotts* verſus *Cotherick.*

17. In Dower againſt the Heir of her Husband, the Tenant pleaded, that *T. S.* was ſeiſed in Fee of the Tenements out of which Dower is now claimed, and deviſed the ſame to the Husband, and to two more, *equally to be divided*, and ſo demands Judgment of the Writ, ſuppoſing that Dower would not lie of a third Part of a third Part, before Partition between Tenants in Common, but upon Demurrer adjudged, that it would lie. 3 *Lev.* 84. *Sutton* verſus *Rolfe.*

18. *In Dower*, the Tenant pleaded *Ne unque ſeiſie que Dower*, and a Special Verdict was found wherein the Caſe was, *William Duncomb*, the Husband of the Demandant, was *Tenant for Life*, the Remainder *to* T. S. *and his Heirs, during the Life of* William, Remainder in Tail to *William*, Remainder to *George Duncomb*, the now Tenant; *William* died without Iſſue, and the Queſtion was, whether his Widow ſhould have Dower; it was inſiſted, that ſhe ſhould not, becauſe this Limitation of a *Remainder to* T. S. *and his Heirs, during the Life of* William, is ſuch an interpoſing Eſtate, between his Eſtate for Life and Eſtate-tail, that his Widow ſhall not be endowed; but adjudged, that the whole Eſtate was executed in *William*, and that the Remainder to *T. S.* and his Heirs, during the Life of *William*, was only to preſerve the Remainders during his Life, upon a *Poſſibility, that he might commit Forfeiture*, as in *Lewis Bowles's* Caſe, the whole Eſtate was executed in the Father till the Birth of the firſt Son; but Serjeant *Levinz*, who reports the principal Caſe, tells us, this was a haſty Judgment. 3 *Lev.* 437. *Duncomb* verſus *Duncomb.*

19. In a Special Verdict in Dower, the Caſe was, the Father being ſeiſed in Fee, ſettled his Lands by Leaſe and Releaſe, upon the Marriage of his Son, to Truſtees, *&c.* to the Uſe of his Son for Life, then to his ſaid Truſtees *for ninety-nine Years*, to raiſe Portions for Daughters; then to the Uſe of the *Heirs Males of the Body of the Son*, lawfully to be begotten, Remainder to the right Heirs of the Son, who had Iſſue one Son, and no more, the now Defendant, his Mother being dead, and his Father having married another Woman, and he being likewiſe dead, which Woman now brought a Writ of Dower; and it was inſiſted, that ſhe ſhould not have Dower, becauſe the Freehold and Inheritance were never in her Husband *ſimul & ſemel*, by Reaſon of the Interpoſition of the *Eſtate for Years*, ſo that the *Eſtate-tail* was never executed in him in Poſſeſſion, and if not, then his Widow cannot be endowed; but adjudged, that the Eſtate-tail was actually veſted in him, becauſe the *Freehold to him for Life*, and the *Inheritance* being of the ſame Nature were ſo entirely in him, that the Interpoſition of ſo ſmall an Eſtate (as an Eſtate for Years is) can-

not divide it, therefore the Demand of Dower being properly out of the Freehold and Inheritance, and both thoſe Eſtates being always in the Husband, his Widow ſhall be endowed; it might have been otherwiſe, if the intermediate Eſtate had been for Life. 1 *Lutw. Rep.* 719. *Bates* verſus *Bates*. *See* Fines. (A) 19. *S. P.*

(B)

Where ſhe ſhall not be endowed, and where ſhe ſhall be barred of her Dower, and by what Acts. See *Dower.* (A) 16, 18.

1. SO where a Common Recovery is had againſt Husband and Wife, ſhe ſhall be barred of her Dower, and yet ſhe hath not any Recompence in Value; 'tis true, this is hard to be maintained in Strictneſs of Reaſon, yet it being the common Uſage, and the Intent of the Parties, it ſhall be a Bar to her Dower. *Plow. Com.* 514. *Trevilian's* Caſe. *Dyer* 143. *S. C. Poſtea* Publication. (A) 2. *S. C.* 2 *Rep.* 74 and 78, in *Lord Cromwell's* Caſe. *S. P.*

2. In a Writ of Dower, the Defendant pleaded the Attainder of the Husband for High Treaſon, the Woman replied, that before the Attainder and Committing the Treaſon, and after the Coverture her Husband was ſeiſed of ſuch Lands in Fee, and made a Feoffment thereof to *W. R.* whoſe Eſtate the Defendant now hath, *&c.* and upon Demurrer to this Replication it was adjudged, that the Woman ſhould be barred of her Dower; for by the Statute 5 *&* 6 *Ed.* 6. *cap.* 11. 'tis enacted, that the Widow of any Man attainted of Treaſon ſhall not be received to ask or demand her Dower, or have Dower of any of her Husband's Lands, whilſt the Attainder is in Force. *Hil.* 4 *Mar. Dyer* 142. *Paſch.* 1 *Mar. Dyer* 97. *S. P.*

3. In Dower brought by the *Lady Powes*; the Defendant pleaded in Bar, that the ſaid Lady *Sponte reliquit* her Husband at *Bednall-Green*, and went from him with one *W. R.* to the Pariſh of *St. Clement Danes* in the County of *Middleſex*, and there continually lived with the ſaid *W. R.* during the Life of her Husband *abſque hoc quod ipſa in Vitâ Mariti, &c. reconciliata fuit, &c.* the Demandant replied, that after her ſaid Departure from her Husband, ſhe was willingly, and without Compulſion, reconciled to him, and he ſuffered her to cohabit with him; and the Evidence to prove this Reconciliation was, that after the Separation, they at ſeveral Times and Places demeaned themſelves as Husband and Wife; adjudged a ſufficient Evidence of their Reconciliation, and that by this Elopement ſhe ſhould not loſe her Dower, unleſs ſhe had afterwards eloped again. *Mich.* 1 *&* 2 *Mar. Dyer* 196. *The Lady Powes's* Caſe.

4. Adjudged, that where a Woman releaſeth *all her Right* to him in Reverſion, her Dower is now extinguiſhed, for when the *Right*, which is the Principle, is gone, by Conſequence the Action to recover that Right muſt likewiſe be gone, therefore if ſhe bring a Writ of Dower, this Releaſe may be pleaded in Bar. 8 *Rep.* 151.

5. Where Husband and Wife join in a Fine, ſhe ſhall be barred of her Dower, becauſe all thoſe who have any Claim to the Land join, for 'tis not the Death of the Husband which is the Cauſe of Dower, 'tis the Marriage and Seiſin of the Husband which are the fundamental Cauſes, and his Death is only the Execution thereof. 10 *Rep.* 49. In *Lampitt's* Caſe.

6. Leaſe was made to the Husband for Life, Remainder to *W. R.* for Life, Remainder to the Wife for Life; now, tho' *W. R.* die in the Life-time of the Husband, ſo that in Execution this happens to be a Jointure, yet this ſhall not bar the Wife of her Dower, becauſe in the Foundation it was void for a Jointure. 4 *Rep.* 1. In *Vernon's* Caſe. *See* Reſervation. (B) 2. *S. P.*

7. By the Statute of *Merton, cap.* 1. the Wife ſhall recover Damages in Dower where her Huſband died ſeiſed, the Caſe was, the Husband made a Feoffment in Fee, and afterwards took back an Eſtate to himſelf for Life, Remainder over, and died; adjudged, that the Wife ſhall not recover Damages upon this Statute, for tho' the Husband died ſeiſed, yet it was not of ſuch Eſtate of which ſhe was dowable, and ſo not within the Intent of the Statute. *Hill.* 14 *Jac.* In *Huſſey* and *Moor's* Caſe. 3 *Bulſt.* 278. *Poſtea* Jeofails. (A) 4. *S. C.*

8. Adjudged in a Writ of Dower, that if the Tenant plead *Ne unque ſeiſie que Dower*, and in Truth the Husband of the Demandant had an Eſtate by Diſſeiſin, which was avoided by the Entry of him who was diſſeiſed, and who had a Title Paramount, that this is no Title by which ſhe may have Dower. *Paſch.* 22 *Jac. Counteſs of Berkſhire* verſus *Sir Peter Vanlore. Winch* 77.

(C)

Of what ſhe ſhall be endowed, and what not.

1. THE Husband being ſeiſed of a Manor in which there were ſeveral Freehold and ſome Copyhold Tenements, married, and died, the Widow demanded a third Part of the Manor for her Dower, by the Name of 100 Meſſuages, 100 Gardens, ſo many Acres of Land, Meadow, and Paſture, *&c.* the Sheriff aſſigned her Part of the *Demeſnes*, and Part of the *Services*; adjudged, that in this Caſe a Manor did not paſs to her, and that ſhe could neither hold Court, or grant Copies by Virtue of ſuch Aſſignment; but if a Manor to which an Advowſon is appendant had been aſſigned to her by the Name of a Manor *cum pertinentiis*, the Advowſon had paſſed, but not

if it had been aſſigned by the Name of ſo many Acres of Land, Meadow and Paſture. *Mich.* 28 *Eliz. Owen* 4. *Bragg* verſus *Brooks.*

2. A Widow ſhall be endowed of a Caſtle that is maintained for the private Uſe and Habitation of the Husband, but not of a Caſtle which was maintained for the Defence of the Realm; therefore the *Statute de Magna Charta cap.* 7. *niſi Domus ſit Caſtrum*, is to be underſtood a Caſtle for the Publick Defence of the Kingdom. *Trin.* 17 *Eliz.*

3. The Husband made a *Leaſe* before Marriage, and afterwards he married and died; adjudged, that his Widow ſhall have Dower of the third Part of the Reverſion expectant upon the Determination of the Leaſe, and likewiſe a Third Part of the Rent reſerved upon the Leaſe immediately, becauſe 'tis incident to the Reverſion, and ſhe ſhall not wait for that till the Leaſe expires, but the Sheriff ſhall put her in Poſſeſſion immediately upon the Death of her Husband. *Winch* 80. *Cro. Eliz.* 564. *S. C.*

4. In Dower the Demand was of the Third Part of the Honour of *C.* and of 600 Meſſuages, *&c.* and of the Advowſon of *C. &c.* there was Judgment by Default, and an *Habere facias ſeiſinam* awarded to the Sheriff, who returned, that *Habere fecit ſeiſinam de tertia parte* of the Honor, *tenementorum & advocationis & de uno tenemento ſive firma de* C. *& de bonis & catallis felonum, &c.* upon this a Writ of Error was brought, and the Errors aſſigned were in the Return of the Sheriff in executing the Judgment, (*viz.*) that the Return *de uno tenemento ſive firma*, was not good, becauſe it was incertain; then his Return *de tertia parte Advocationis & de Bonis & Catallis felonum*, is not good, for thoſe are *Franchiſes* of which the Woman is not Dowable; but adjudged as to the firſt, the Return is good, and that no Error can be aſſigned in the Sheriff in giving *Seiſin*, and in the Return thereof; as to the other, that the Return is likewiſe good, for ſhe is dowable of an *Advowſon*, whether appendant or in Groſs, and the Franchiſes may be appendant to the *Honour*. *Mich.* 18 *Jac.* 2. *Cro.* 621. *Sir Cha. Howard* verſus *Sir William Cavendiſh.* Palm. 264. *See* Style 69. S. P.

5. Error to reverſe a Judgment in Dower, the Error aſſigned was, that the Writ and Demand was of a Meſſuage, and ſo many Acres of Land, Meadow and Paſture, *& de communi paſtura pro omnibus averiis cum pertinentiis*; now this ſhall be intended a *Common in Groſs without Number*, of which a Woman is not dowable; adjudged, that was very true, but this ſhall be intended *Common appendant* or *appurtenant* to the Lands, of which ſhe ſhall be endowed; and the rather, becauſe 'tis after a Verdict, in which the Jury found, that the Husband was ſeiſed *que Dower*; but if it had been a Common in Groſs, without the Number, the Judge, before whom the Cauſe was tried, would have directed the Jury to find for the Defendant; the Judgment was affirmed. *Paſch.* 8 *Car. Cro. Car.* 219. *Pruett* verſus *Drake.*

6. In Dower, the Demand was of a Meſſuage, Lands, Meadow, Paſture, and *Common of Paſture*, with the Appurtenances in *H.* and the Cauſe coming to Trial, the Demandant had a Verdict and Judgment; and upon a Writ of Error brought in *B. R.* it was objected, that Dower doth not lie of *Common in Groſs incertain*, which is very true: *Sed per Curiam*, it may be taken for *Common in Groſs or Appendant*; and if ſo, then ſuch Expoſition ſhall be made of it, that 'tis ſuch Common of which Dower is demandable, eſpecially after a Verdict, and that is Common appendant. *W. Jones* 315. *Brewood* verſus *Drake.* Cro. Car. 300.

7. In a Writ of Error to reverſe a Judgment in Dower, the Errors aſſigned were, that the Demand was *de tertia parte decimarum garbarum* in *C.* which is ill, becauſe the Word *Garba* admits of divers Conſtructions, and ſignifies any Thing bound up in *Bundles*, ſo that 'tis incertain what Kind of Tithes are demanded by that Word, there is alſo a Demand *de Rectoria de C.* which is likewiſe incertain, for it ſhould be *de Rectoria Eccleſiæ de C.* but adjudged, as to the firſt Error aſſigned, that it was certain enough, for the Word *Garba* is taken at Common Law to be Corn bound up, and here the Demand was of the third Part of the Tithes *Garbarum Granorum*; and as to the other Objection, 'tis not neceſſary to ſay *de Rectoria Eccleſiæ*, becauſe it muſt be ſo intended, and cannot be otherwiſe; it might have been neceſſary in a *Præcipe*, but in a Writ of Dower there is not ſo much Certainty required. *Style* 237. *Fairfax* verſus *Fairfax.*

8. In Dower of a Third Part of a Meſſuage, and of an Hundred, *&c.* the Tenant as to Part confeſſed the Action, and Judgment was in *C. B. quod ſit in miſericordia*; and as to the Reſt he pleaded, that the Meſſuage in Demand had been, Time out of Mind, called as well *Gerrard's Bromley* as *Bromley Hall*, of which Sir *Tho. Gerrard* was ſeiſed in Fee, and being ſo ſeiſed, was by King *James* created *Baron of Gerrard Bromley*, and that he dwelt with his Family in the ſaid Capital Meſſuage, ſo that it became *caput Baroniæ*, and derives a Title to himſelf by ſeveral Deſcents, and prays Judgment, if the Demandant ſhould have Dower of the Third Part thereof; and upon a Demurrer Judgment was given in *C. B.* that ſhe ſhould be endowed, and upon a Writ of Error brought in *B. R.* that Judgment was affirmed; 'tis true, if this had been a *Feudal Barony*, (*i. e.*) a Barony by Tenure, it had been otherwiſe, of which there was but one left in *England*, and that was *Arundel in Suſſex*; thoſe Baronies were when the King in the Creation of them, gave Lands and Rents to hold of him for the Defence of the Kingdom, and it was ſaid, that the Reaſon of this Privilege of a Capital Meſſuage of a Barony by Creation, is the ſame as of a Barony by Tenure, (*viz.*) Decency and Order, and the Honour of the Realm; then it was objected, that upon this Judgment in Demurrer, another *miſericordia* was entered, and that a Man ought not to be twice *amerced* in the ſame Action; but adjudged, that both the Judgments in this Caſe were final and independant on one another; that here were two Delays, which are two ſeveral Offences, and therefore ſeveral Judgments; that *Specott's* Caſe was not againſt this, becauſe the 5 Mod. 64. 5 Lev. 401.

ſecond Judgment there was erroneous, there being no Delay in the Defendant, and in *Peytoe's* Caſe, there is nothing againſt it but a Saying of the Counſel. 1 *Salk.* 353. *Gerrard* verſus *Gerrard.*

(D)

Of Proceedings in Dower, and of Judgments, Executions and Writs of Error in Dower. See *Summons and Severance.* (C) 3.

1. IN Dower againſt 8 Defendants, two of them confeſſed the Action, and the other pleaded in Bar, and Judgment was immediately given againſt thoſe two who had confeſſed the Action, that the Demandant ſhould recover againſt them the Third Part of two Parts into eight Parts to be divided; and afterwards the Plea in Bar being ill, the Demandant had Judgment to have Seiſin againſt the other ſix Defendants, of the Third Part of ſix Parts, into eight Parts to be divided. *Mich.* 3 *Eliz. Dyer* 187.

2. In Dower there was a Judgment by Default, and a Writ of Inquiry of Damages, and the Jury found, that the Land out of which ſhe ought to have Dower, was of the yearly Value of 8 *l.* and that 8 Years were paſſed ſince the Death of the Husband *ante inquiſitionem*, and ſo they aſſeſſed Damages to the *Time of the Inquiſition*; upon this a Writ of Error was brought, and the Error aſſigned was, that Damages ſhould have been aſſeſſed to the Time of the Judgment obtained, and not to the Time when the Inquiſition was taken; and ſo it was adjudged, and the Judgment reverſed. *Paſch.* 29 *Eliz.* 1 *Leon.* 56. *Waldo* verſus *Nevill.*

3. In Dower *de tertia parte Rectoriæ, &c.* and the *Grand Cape* was, *Capere tertiam partem, &c.* by Virtue whereof the Sheriff took the Tithes ſevered from the nine Parts, and *carried them away*; adjudged, this was not ſuch a Seiſure as was intended by the Writ, for he ought to *ſeiſe only*, and not to carry away, but to leave the Tithes where he found them. *Mich.* 30 *Eliz.* 1 *Leon.* 92. *Michell* verſus *Hide. Poſtea* Wager of Law. (A) 5. *S. C.*

4. In Dower, the Tenant made Default after Default, and *W. R.* prayed to be received to defend an Eſtate which he had for Term of Years in the Land, made by the Husband before Coverture, and he was received accordingly, and his Term ſaved; then the Queſtion was, how the Judgment and Execution ſhould be for the Widow? for if it ſhould be *Ceſſat executio* during the Term, then ſhe could not have the Rent reſerved upon the Leaſe; adjudged, that the Judgment ſhould be entered *generally*, (viz.) that ſhe ſhould recover a Moiety (for the Lands were *Gavelkind*) and that the Writ of Execution ſhould be Special, (*viz.*) that he ſhould turn the Termor out of Poſſeſſion, but come upon the Land and demand Seiſin for the Widow, and by that Means ſhe ſhould have a Moiety of the Lands, with the Rent. *Paſch.* 39 *Eliz. Cro. Eliz.* 564. *Wheatly* verſus *Beſt.*

Hutt. 71. S. C. 5. In Dower againſt *W. R.* brought by the Wife of *R. R.* her late Husband; the Tenant *W. R.* vouched the Son and Heir of *R. R.* to Warranty, who appeared and entered into Warranty, and pleaded, that he had nothing by Deſcent from his Father; thereupon the Widow had Judgment againſt *W. R.* with a *ceſſat Executio*, till the Voucher was determined; afterwards, and before the Day of *Niſi prius*, the Son died; the Queſtion was, whether at the Day the Tenant might revouch the Heir of him who was dead? it was inſiſted for the Tenant that he might, becauſe it was impoſſible, that the Son, who was vouched, ſhould looſe by Default, for he was dead; 'tis true, the Return of the *Poſtea* was, that the *Tenant loſt by Default*, but that is wrong, for it muſt be intended of the *Vouchee*, and that could not be, becauſe he was dead; but it was anſwered, that the Tenant in Dower could not revouch in this Caſe, for there being a Judgment againſt him, with a *Ceſſat Executio*, till the Voucher is determined, 'tis plain 'tis now determined by the Death of the Vouchee; adjudged, that by the Return of the *Poſtea* it ſhall be intended, that the Tenant in Dower made Default, therefore it would have been more adviſeable for him to have appeared at the Day of *Niſi prius*, and pleaded the Death of the Vouchee after the laſt Continuance, and then to pray the Advantage of his Warranty; but now, there being Judgment againſt him, he hath no Day in Court; then it was objected, that the Judgment was not good, becauſe it was *abſolute*, with a *Ceſſat Executio*, when it ought to be *conditional*; but adjudged good either way. *Paſch.* 19 *Jac. Goldingham* verſus *Stroud. Winch* 81. 2 *Cro.* 688. *S. C.*

6. Error of a Judgment in Dower, the Error aſſigned was, that by the firſt Declaration, the Demand was, *De tertia parte unius Meſſuagii Acrarum terræ Acrarum paſturæ, &c.* with Blanks for the Number of Acres, but in the Declaration, after the Imparlance, it was all perfect; adjudged to be Error, becauſe the firſt in the material Declaration, and the ſecond is but a Recital. *Paſch.* 15 *Jac.* 2 *Cro.* 489. *Lawly* verſus *Gatacre.*

1 Roll. Rep. 326. 7. In Dower Judgment was given by Default, and a Writ of Error brought, and the Error aſſigned was, that the Tenant was within Age; adjudged not Cauſe of Error; for *Fleta* tells, *Hæres minor* 20 *Annis non reſpondebit niſi in caſu dotis. Moor* 848. *Harvey's* Caſe. *See* Infant. (F) 3.

8. In Dower the Defendant pleaded, *Ne unques accouple en loyal matrimony*, thereupon a Writ was awarded to the Biſhop, who certified, that ſhe was accoupled *in vero matrimonio*, and that the Husband and Wife lived together till the Death of the Husband *participatione menſæ & thori*; upon this a Writ of Error was brought, and the Error aſſigned was in this Certificate of the Biſhop, for

that it did not anſwer the Iſſue, which was, that the Woman *nunquam fuit copulata in legitimo matrimonio*, and he ought to have certified that *copulata fuit in legitimo matrimonio*, but he certified, that *copulata fuit vero matrimonio*, which might be true, and yet the Marriage may be clandeſtine, and then 'tis unlawful, that *verum matrimonium*, tho' 'tis *clandeſtinum*, ſhall be intended the ſame as *legitimum matrimonium*; for tho' 'tis clandeſtine, 'tis ſtill a good Marriage. *Mich.* 8 *Car. Cro. Car.* 256. *Wickham* verſus *Enfield.*

9. The Court was moved for a *Superſedeas*, to ſtay Proceedings on the *Grand Cape*, for that the Writ *Erronice Emanavit*, becauſe the Return of the Summons was not according to the Statute 31 *Eliz. cap.* 3, it being in the Pariſh Church of *Hallifax*, and it doth not appear by the Return, that the Land was in that Pariſh; beſides it was *proclamari feci ſecundum formam Statuti*, and 'tis not returned to be made on the Land; ſo the *Grand Cape* was ſuperſeded. 1 *Mod.* 197. *Furnis* verſus *Waterhouſe.*

10 Judgment in Dower by Default, and a Writ of Inquiry of Damages, and a Writ of Error brought, and pending that Writ *the Tenant in the Original Action died*; afterwards the Judgment was affirmed, and Execution againſt the Lands, and a *Scire facias* againſt the Heir, to ſhew Cauſe why the Demandant ſhould not have *Damages*; adjudged, that ſhe ſhall have no Damages, becauſe the *Tenant died before they were aſcertained*, and the Judgment was only compleat againſt the Lands; for that is a different Judgment from the Judgment to recover Damages. *Sid.* 188. *Aleway* verſus *Roberts.* *See pl.* 12. *S. P.* Lev. 38.

11. Error of a Judgment in Dower of the Third Part of a *Mill and Kiln*, and two Acres of Land, and the Judgment was to recover Seiſin of the Third Part of the aforeſaid Tenements, *&c. per metas & Bundas*, and the Error aſſigned was, that it could not be *per metas & bundas of a Mill*, for if it ſhould, neither of the Parties could uſe his Part; the Judgment was reverſed. 1 *Lev.* 182. *Gilpin* verſus *Cookſon.*

12. The Demandant obtained a Judgment in Dower in *C. B.* which was afterwards affirmed in Error in *B. R.* and then the *Demandant died* Inteſtate, and Adminiſtration was granted to the Plaintiff, who brought a *Scire facias* againſt the Tenant, to ſhew Cauſe why he (the Plaintiff) ſhould not recover Damages, *&c.* and alſo the Coſts in the Writ of Error; the Tenant pleads, that no Damages were adjudged to the Demandant in her Life-Time, nor for Coſts in the Writ of Error; and upon Demurrer to this Plea, it was inſiſted for the Plaintiff, that tho' Damages and Coſts were not aſſeſſed to the Demandant in her Life-time, by Reaſon the Tenant had delayed it, by bringing a Writ of Error, yet they were due, and veſted in her; for ſhe had a Right to receive them, but was prevented by the Writ of Error, therefore they ſhall go to the Adminiſtrator, and be taxed upon this *Scire facias*, but the Court inclined, that in this Caſe Damages are to be given in Satisfaction of an Injury, which is in Nature of a Treſpaſs, and therefore ſhall die with the Perſon if he dies before the Judgment is compleated. 3 *Lev.* 275. *Mordant* verſus *Thorold.* *See pl.* 10. *S. P.* 1 Salk. 252. 8 & 9 W.

13. In Dower the Tenant made Default, whereupon a *Grand Cape* iſſued, in which the Demandant ſuggeſted, that her Husband died ſeiſed, *&c.* and thereupon a Writ of Inquiry of the Value of the Lands, and 60 *l.* Damages were returned on the Inquiſition; it was moved to ſtay the filing this Writ of Inquiry, becauſe the Tenant had no *Notice* of it; but it was inſiſted, that it might be filed, becauſe in Real Actions perſonal Notice is never given, and the Reaſon is, becauſe the Writs (*viz.*) the Summons are executed on the Lands; but adjudged, that perſonal Notice ought to be given of the Writ of Inquiry, and of the Execution thereof, for the *Grand Cape* is a Judgment, and thereby the Suit is determined at Common Law; the Damages for the Value of the Land, is an Addition, and given by the Statute of *Marlbridge*, and therefore for want of Notice, the Inquiſition was diſcharged, and Reſtitution was awarded of the Damages levied. 3 *Lev.* 409. *Perkins* verſus *Lamb.*

(E)

Pleas in Dower good.

1. IN Dower, *&c.* the Heir pleaded Detinue of Charters by the Widow; adjudged, that in ſuch Caſe the Charters ought to concern the very Lands out of which Dower is demanded, and the Reaſon is, becauſe if they were in the Poſſeſſion of the Heir, he might be able to plead ſome Plea in Bar of the Dower; now, he who pleads this Plea ought to ſhew what Charters are detained, that Iſſue might be joined upon that Certainty; but no *Stranger* can plead it, tho' he is Tenant of the Land, and the Charters are claimed by him by ſome Conveyance, becauſe this Plea is purely in Privity for the Heir of the Husband only; therefore a Guardian in Knights Service, could not plead it; 'tis true, he may plead, that the Heir is detained, and that he is always willing to render Dower, if the Heir be delivered to him; but he cannot plead, that he is always ready to render Dower, if the Charters are delivered to him, becauſe they concern the Inheritance, and ought not to be delivered to him; but if the Heir plead, that he was always ready to render Dower if he had the Charters, this is a Confeſſion of the Action, and if the Demandant deliver the Charters, ſhe ſhall have Judgment immediately. 9 *Rep. Anne Bedingfield's* Caſe. 4 Leon. 87. 9 Rep.

2. Dower againſt an Infant, who appeared by his Guardian, and pleaded, that his Father, who was the Husband of the Demandant, was ſeiſed of a Meſſuage and Lands, and deviſed them to her

her for *her Jointure*, and that after the Death of his Father, ſhe entered into the ſaid Meſſuage and Lands, and was ſeiſed by Virtue of the Deviſe, *&c.* the Widow replied, and confeſſed the Seiſin of her Husband, and her Entry, but that ſhe entered as Guardian in Soccage to the Infant, and diſagreed to accept the Land by Virtue of a Deviſe, and traverſed, that ſhe did agree to accept it, *&c.* adjudged, that the Plea in Bar was good, tho' it had been more pregnant to have pleaded, that the Widow entered *Virtute legationis*, and ſo was ſeiſed, than to plead, that ſhe entered and was ſeiſed by Virtue of the Deviſe. *Mich.* 22 *Jac. Winch* 100. *Baker* verſus *Baker. Poſtea* Traverſe. (E) 2. *S. C.*

3. Dower, the Tenant pleaded, as to Part of the Lands demanded, he was ſole ſeiſed for his Life, and traverſed, that the Husband had any Thing in thoſe Lands, and then he concluded this Part of his Plea, *Et hoc paratus eſt verificare, Et petit judicium de Breve*, and vouched to Warranty one *Peter Johnſon*; and as to the Reſidue he pleaded, that the Demandant ought not to be endowed, for that her Husband was not ſeiſed thereof at the Time of his Marriage, or at any Time afterwards, and ſo concludes to the Country; this was held a good Plea. *Lutw. Abr.* 6.

4. In Dower *unde nihil habet*, the Tenant demanded the View, *&c.* the Demandant Counterpleaded the View; for that her Husband had *alienated* the Tenements to the Tenant, *& hoc, &c.* the Tenant demurred generally, and it was inſiſted for him, that the Counter-Plea was ill, for it ought to have been *Feoffavit*, and not *Alienavit*; for by the Word Alienation it doth not appear what Eſtate he had *aliened*, for a Leaſe for Years is an *Alienation*; but adjudged, that *alienavit* implies the Whole Eſtate; and by the Statute *Ed.* 2. 48, the Tenant is ouſted from the View of the Lands which the Husband *aliened* to him, or to any of his Anceſtors. 3 *Lev.* 220. *Bernes, & Ux'* verſus *Rich. See* (F) *pl.* 6.

(F)

Pleas in Dower not good.

1. THE intended Husband, in Conſideration of Marriage, ſettled an Eſtate on his intended Wife *for Life*, in full Recompence of her Dower; afterwards they married, and the Husband died, and the Widow brought a Writ of Dower againſt the Heir, who pleaded the *Acceptance of this Eſtate for Life* in Bar; adjudged an ill Plea, for ſuch an Acceptance did not bar the Woman of Dower at *Common Law*; becauſe when it was made ſhe had no Title of Dower; beſides, at the Common Law, no collateral Acceptance can bar a Right to an Eſtate of Inheritance or *Freehold*. 4 *Rep.* 1. *Vernon's* Caſe.

2 And. 30. 2. In Dower, the Tenant pleaded, that he by a Deed executed by him *dedit & conceſſit* to the Demandant, a Rent iſſuing out of the Land in Recompence of her Dower, which ſhe accepted; the Woman replied, and confeſſed the Grant of the Rent, and her Acceptance, but farther pleaded, that there was a Condition in the Deed, that if the Rent was in arrear, by the Space of a Month, *&c.* that it ſhould afterwards ceaſe, and that the Deed ſhould be void, and averred, that the Rent was behind, *&c.* to this Replication the Defendant demurred; it was adjudged, that the Dower being abſolute, that the Rent coming in Recompence thereof, ought to be of the ſame Nature, and therefore the Annexing a Condition to it made the Deed void; beſides, the Condition was not annexed to the Land, but to the Grant; ſo that ſhe was to have no Land, if the Condition was broken, therefore ſhe ſhall be reſtored to her Action to have and demand her Dower; beſides, the Pleading the Grant was ill, for it ſhould be *dedit & aſſignavit*, and not *conceſſit*. *Mich.* 38 *Eliz. Cro. Eliz.* 451. *Wentworth* verſus *Wentworth.*

3. In Dower the Defendant pleaded, that before the Husband of the Demandant had any Thing in the Land, one *W. R.* was ſeiſed thereof in Fee, and made a Leaſe for Years, rendring Rent, and then granted the *Reverſion* to the Husband, who died ſeiſed of the ſaid *Reverſion*, and ſo demands Judgment, if the Plaintiff ſhall have Dower; adjudged, this is no good Plea in Bar of her Dower; for it proves that ſhe hath a Title, only 'tis charged with this Leaſe, ſo ſhe ſhall have Judgment of the Reverſion. *Paſch.* 22 *Jac. Winch* 80.

4 Leon. 198. 4. In Dower, the Tenant pleaded in Abatement, that as to Part of the Lands he is not Tenant of the Freehold, but ſuch a one, (naming him) and was not at the Time of the Writ brought; and as to the Reſidue he pleaded Detinue of Charters; the Demandant maintained her Writ as to Part, *&c.* and as to the Reſidue ſhe replied *Nil detinet*, upon which they were at Iſſue, and ſhe had a Verdict, and that the Demandant received Part of the Profits from the Death of her Huſband, as Guardian to her Son, and that the Tenant had the Profits of the other Part, whereupon ſhe had Judgment from the Death of her Husband. *Moor* 80. *Belfield* verſus *Rous.*

5. Error of a Judgment in Dower in *Durham*, where the Tenant craved View, and it was entered, *quia ſatis conſtat Curiæ* that the Husband died ſeiſed, *negatur Viſus*; then the Tenant pleaded, *ne unque ſeiſe que Dower*, upon which they were at Iſſue, and a Verdict for the Demandant, but the Jury gave no Damages; the Error aſſigned was, that the Demandant ſhould have counterpleaded the dying ſeiſed, and that a View ought not to be denied upon this *conſtat Curiæ*; but adjudged, that where View of Dower is counterpleaded, it muſt be in a *Writ of Right of Dower*; for in Dower *unde nihil habet* (as this is) a View was not grantable at Common Law; the Judgment was affirm'd. 2 *Lev.* 117. *Aſtmall* verſus *Aſtmall.*

6. In Dower, the Demand was of three Meſſuages and fifty Acres of Land, &c. The Tenant demanded the View, &c. The Demandant counterpleaded the View, for that her Husband died ſeiſed *& hoc paratus eſt verificare & proinde petit judicium & dotem ſuam, &c.* The Tenant *Proteſtando*, that the Husband did not die ſeiſed, demurred ſpecially, and for Cauſe ſhewed, that the Counterplea was ill concluded, for it ſhou'd be *petit judicium*, and that the *Tenant de viſu excludatur*, becauſe this being only a dilatory Plea, it ought not to conclude peremptorily to *final Judgment*; but then it was objected, that the Count was ill, for it was a Demand of *three Meſſuages*, when it ought to be only of a *third Part of three Meſſuages*, and this is not amendable by any of the old or new Statutes, it being not after a Verdict. 3 *Lev.* 169. *Whelpdale* verſus *Whelpdale*. See (E) *pl.* 4.

7. In Dower, the Defendant pleaded, that after the Marriage the Husband ſettled other Lands on the Plaintiff for her Life, for her Jointure, and that ſhe entered after his Death; the Plaintiff replied, that it was a voluntary Settlement made to her by her Husband, and traverſed, that it was for her Jointure, and Iſſue being taken upon the Traverſe, the Defendant, at the *Niſi prius*, made Default, whereupon a *Petit Cape* iſſued againſt him, and being returned, Judgment was had, that the Plaintiff ſhould recover Seiſin, and thereupon a Writ of Inquiry of Damages iſſued, and the Sheriff returned, that he had delivered Seiſin, and alſo that he had taken an Inquiſition, which finds, that the Lands are of the yearly Value of 114*l.* 11 *s.* and that her Husband had been dead ſix Years and three Quarters of an Year, and that ſhe had *ſuſtained Damages occaſione detentione Dotis ultra valorem præa'*, &c. 195 *l.* and for Coſts 20 *s.* upon this ſhe releaſed the 195 *l.* and prayed Judgment only for the Coſts, which was given accordingly, that ſhe ſhould recover *tam valorem tertiæ partis, &c.* from the Death of her Husband (which came to 257 *l.*) and the 20 *s.* Coſts, and 11 *l. de incremento*, in all 269 *l.* and thereupon a Writ of Error was brought; and there being a Variance between the Writ of Seiſin, and the Inquiſition, that Writ and the Execution thereof was held erroneous, whereupon a new Writ of Inquiry iſſued, which found the Value of the Land; and it was objected, that this Writ ought not to be, becauſe the Plaintiff had releaſed the Damages; but adjudged, that was only the Damages *occaſione detentionis Dotis*, and not of the third Part of the Profits of the Land, for theſe are two diſtinct Things, and Judgment was affirmed. *Raym.* 366. *Harvey* verſus *Harvey*.

8. Dower of 300 *Acres of Land*, 200 Acres of Paſture, &c. upon Non-tenure pleaded, the Jury found him Tenant as to 320 *Acres of Land*, and as to the reſt, that he was not Tenant; and the Judgment was, that the Demandant ſhould recover Dower out of the 320 *Acres*; and upon a Writ of Error brought, the Error aſſigned was, that the Verdict was for more than the Demandant had declared; for tho' Land is a general Word, and may include Paſture and Meadow, and in a Grant will ſignify both, yet in Pleading it ſignifies only arable, and eſpecially in this Caſe, becauſe the Demandant had diſtinguiſhed between Land and Paſture, ſo the Judgment was reverſed for the Whole. 1 *Vent.* 260. *Silly* verſus *Silly* 262. *S. C.*

9. In Dower, the Defendant pleaded, that the Husband made a Leaſe for ninety-nine Years, reſerving Rent, before any Title of Dower accrewed, which Leaſe was ſtill in Being, and that afterwards he granted the Reverſion to *T. S.* and died, and that *T. S.* granted it to the Defendant for Life; and upon a Replication and a Demurrer, the Defendant had Judgment both as to the Form and Matter of this Plea; firſt as to the Form, 'tis true, he who claims under a Deed muſt ſay *Hic in Curia prolat'*, which was not done by the Defendant in this Caſe, who pleaded a Grant of the Reverſion by Deed, omitting thoſe Words, but he did not defend himſelf by any Title from the Deed, for it was the Leaſe for Years which ſecured him, and that was the moſt ſubſtantial Part of his Plea, and he might well plead ſuch Leaſe, becauſe by the *Statute of Merton*, Damages are given in Dower where the Husband died ſeiſed, which he did in this Caſe, and he may well plead this Plea to ſave himſelf from Damages of the Whole, but only for the third Part of the Rent, and the third Part of the Reverſion. 2 *Mod.* 17.

10. In Dower, the Defendant, after an Imparlance, pleaded Detinue of Charters; and upon a Demurrer to this Plea it was adjudged ill, becauſe the Defendant ought to have pleaded, that from the Time of the Death of his Anceſtor *paratus fuit & adhuc paratus exiſtit*, to aſſign Dower, if ſhe (the Demandant) would deliver the Charters. 1 *Salk.* 252. *Burdon* verſus *Burdon*.

11. In Ejectment, the Plaintiff made a Title by a Recovery in Dower, and produced in Evidence the Record of the Judgment, and the *Habere facias poſſeſſionem*; the Defendant offered to prove a Term of ninety-nine Years ſubſiſting, and precedent to the Title of Dower; but it was not allowed; for if he had pleaded it in Bar to the Writ of Dower it ſelf, yet the Plaintiff muſt have recovered with a *Ceſſat executio*, and the Defendant had a proper Time to plead it then; beſides, a Recovery in a real Action ſhall bind a chattel Intereſt, and this at Common Law. 1 *Salk.* 291. *Lindſey* verſus *Lindſey*.

Dutchy-Court. See **Seal** (B) and **Palatine.**

Eaſement. See **Treſpaſs.** (K) per totum.

Ejectment.

Of what it will lie. (A)
Where it will not lie. (B)
Where the Declaration is good. (C)
Where the Declaration is not good. (D)
By whom it may be brought, and by whom not. (E)
Pleadings and Verdicts and Judgments in Ejectment, good, and not good. (F)

(A)

Of what it will lie.

Cro. Car. 555. S. P. Hardres 57. S. P.

1. IT lieth *de Cottagio*, for 'tis a ſufficient Deſcription of the Thing whereof the Sheriff may deliver Poſſeſſion. *Cro. Eliz.* 818. *Hill* verſus *Giles*. Style 215. Hammond *v.* Ireland. S. P.

* Moor 237. S.C. 1 Roll. Rep. 68. S.C.

2. It will lie for ſo many Loads of *Tithe Wheat and Barley* ſevered from the nine Parts. *Cro. Car.* 219. *Prieſt* verſus *Wood*. *W. Jones* 321. *S. C.* reported by the Name of *Baldwin* verſus *Wine*. But it will not lie generally of *Tithes*, without ſhewing the Kinds of them. 11 *Rep.* 25. * *Harpur's* Caſe. *Bendl.* 3 *&* 4 *Mar. Counteſs of Oxford's* Caſe. *S. P.*

1 Sid. 161. S. P. 1 Lev. 114. S.C. * Noy 121. S.C. Palm. 337. Hardr. 55. 1 Lev. 58.

3. It lies of a *Boilery of Salt*. 2 *Cro.* 150. *Wild's* Caſe, and *ibid.* 150. *Smith* verſus *Barrett*. *S. P.* and alſo of a *Coal-mine*, and the Judgment affirmed upon a Writ of Error. 2 *Cro.* 150. * *Cummins* verſus *Kingſton*. 2 *Cro.* 215. *Harbottle* verſus *Pocock*. *S. P.* *Sanders* verſus *Partridge*. *S. P.*

4. It lieth *de una domo & uno pomario*, for this Action is in Nature of an Action of Treſpaſs, and Treſpaſs lies *Quare domum fregit, &c.* ſo that both *Domus* and *Pomarium* are ſufficient Deſcriptions of what the Sheriff may deliver Poſſeſſion. 2 *Cro.* 654. *Royſton* verſus *Eccleſton*.

* Cro. Eliz. 854. S.C.

But it will not lie *de uno Domo ſive Tenemento*, becauſe that is incertain. 2 *Cro.* 124. *Noy* 37. * *Wright* verſus *Wheatley*.

5. It was brought for *two Cloſes*, called the higher and lower *Gullwell*, containing *three Acres of Land*, and held good, becauſe the *Quantity of Land* is expreſſed, tho' not the Quality; ſo it will lie of a *Site of a Manor-houſe*, and three Cloſes by Name. 2 *Cro.* 435. *Wikes* verſus *Sparrow*. *Poſtea* (B) 4. *S. C.*

1 Roll. Rep. 55. S.C. *by the Name of* Hammond *v.* Savill.

But in *Savill's* Caſe, which was *de uno Clauſo, vocat. a Dovecote*, neither the Quantity or Quality of the Land was expreſſed, and that was held ill, for an Ejectment will not lie of *a Cloſe*, but it muſt be of a certain Number of Acres, and the Nature of them muſt be expreſſed. 11 *Rep.* 55. *Savill's* Caſe. See *pl.* 12.

2 Roll. Rep. 166. 189. S.C. Palm. 100. S.C.

6. It lies of an 100 Acres of Land, 100 Acres of Paſture, and 100 *Acres of Bogg, &c.* (this being in *Ireland*, where the Word Bogg is well known) *in Villis & Territoriis R. T.* which Words are Surpluſage, and ſhall be rejected. *Cro. Car.* 512. *Mulcary* verſus *Eyres*. See *Poſtea* (B) 4.

It lieth de Culiculo. 3 Leon 210. *and of* Underwood. 2 Roll. Rep. 482.

7. It lieth of a *Manor*, but the Jury found the Defendant guilty of Entring and Ejecting the Plaintiff out of a *Meſſuage and Curtilage*, Part of the Manor, and Judgment was ſtayed, becauſe the Plaintiff muſt recover the Manor in Demand, (*viz.*) the *Demeſnes*, as where an Ejectment was brought of a *Rectory*; upon Not guilty pleaded, the Evidence was, that the Defendant took the *Tithes*, but it could not be proved that he entered on the *Glebe*, and the Taking the Tithes was not an Ejectment out of the *Glebe*, ſo that a *Manor being a Thing entire* as well as a *Rectory*, the Defendant muſt be found guilty of the Whole or nothing. *Latch* 61. *Hemmings* v. *Stroud*. Warren *v.* Wakeley. *See* (F) 3. S. C.

8. In Ejectment of a *Meadow*, upon Not guilty pleaded, the Evidence was, that the Leſſor of the Plaintiff had only *primam Tonſuram* of the Meadow, and that *T. S.* had the Profits for the reſt of the Year; but adjudged, that the Freehold is in him who hath *primam Tonſuram*, becauſe that is the moſt beneficial Part, and they who have the After-paſture have it in the Nature of a Common. *Cro. Car.* 263. *Ward* verſus *Pettifer*.

Cro. Car. 301. pl. 2. S.C.

9. The Plaintiff declared upon a Leaſe of Years made to him of the Tithes of Corn and Hay belonging to the Rectory of *Diddlebury* in *Rowton* and *Anelſtone*, and that the Defendant entered and took one and twenty Loads of Wheat, and twenty Loads of Hay, being Tithes ariſing from the nine Parts in *Rowton* and *Anelſtone* aforeſaid, and ſo *a firma ſua ejecit*; after a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that an Ejectment would not lie of Tithes: *Sed per Curiam*,

Curiam, it will; yet Judgment was given againſt the Plaintiff, that the Declaration was ill, for he had declared, that the Defendant took the Tithes in *Rowton*, *&c.* and did not ſay, that it belonged to the Rectory of *Didlebury*. *W. Jones* 321. *Baldwyn* verſus *Wine*.

10. It lieth *pro uno* * *Meſſuagio ſive Burgagio*; this was adjudged after Verdict, and in Arreſt of Judgment, becauſe of the Incertainty; but the Court held, that *Meſſuagium* and *Burgagium* ſignified the ſame Thing in a Borough. *Hardres* 173. *Danvers* verſus *Wellington*. *See* (B) pl. 12.

11. It lieth *de uno Stabulo*, and tho' it will not lie *de uno Crofto*, yet with an Addition it will, as *de uno Crofto, vocat.* Black-acre. 1 *Lev.* 58. *Lady Dacre*'s Caſe.

12. It lieth *de uno loco, vocat. a Veſtry*, tho' it was objected, that this is very incertain, but 'tis as certain as an Ejectment *de una Domo*, and that was held good: See *pl.* 5, and as an Ejectment of two Cloſes, called higher and lower *Gullwell*, and that was held good, ſee *pl.* 6. both which were ſince *Savill*'s Caſe. 3 *Lev.* 97. In *Hutchiſon* and *Puller*'s Caſe. *See* pl. 4. S. P.

13. In an Ejectment for *Empty Houſes*, a Leaſe was ſealed on the Land, and a Declaration delivered to the caſual Ejector, and Judgment and Execution was had, yet becauſe the Plaintiff did not move for a peremptory Rule to plead, the Judgment was ſet aſide: *Nota*, In this Caſe there muſt be an Affidavit of the Sealing the Leaſe and the Entry. 1 *Salk.* 255. *Smartly* verſus *Henden*.

14. Ejectment *de mineris Carbonum*, without ſhewing the Number of *Mines*, this being brought in *Durham*, and a Judgment there for the Plaintiff, and a Writ of Error brought in *B. R.* it was objected, that this was incertain; but adjudged, that ſuch Ejectments being uſual in *Durham*, this Judgment ſhall be affirmed like an Ejectment for ſo many Acres of *Mountain* brought in *Ireland*, it being the uſual Practice there. 1 *Salk.* 255. *Whittingham* verſus *Andrews*. 4 Mod. 143.

(B)

Where it will not lie.

1. IT will not lie *de curſu aquæ*, the Plaintiff having declared *de quodam rivulo & aquæ curſu*, and having Judgment, it was reverſed by Error for this Reaſon, becauſe the Sheriff cannot deliver Poſſeſſion of it. 1 *Brownl.* 142. *Challoner* verſus *Thomas*. Yelv. 143. S. C. Poph. 167. S. C.

2. Nor of a Cloſe by the Name of a * Cloſe only, as *Dovecote Cloſe*, but it ought to be of certain Acres, and the Quality of the Land ſhould be ſet forth. 11 *Rep. Savill*'s Caſe. *Humphrie*'s Caſe. Forcible Entry. (A) 5. *contra*.

* *He muſt give it a Name, or declare of what Nature the Land is.* Cro. Eliz. 116. March 96.

3. It will not lie *de una pecia Terræ*, tho' it was explained thus, *vocat.* half an Acre of Land, becauſe he ought to ſhew the Length and Breadth of it. *Hetley* 170. *Moor* 422. *S. C.* by the Name of *Palmer* verſus *Humfries*. See *Poſtea* (D) 4. *S. C. Moor* 702. *S. C.* W. Jones 400.

4. Ejectment of two Cloſes *called Gullwell, containing three Acres of Land*, and did not ſet forth how much each Cloſe contained; one Judge held it ill for that Reaſon, but three other Judges held it well, becauſe the Quality of the Land was mentioned. 2 *Cro.* 435. *Weeks* verſus *Sparrow*. *Antea* (A) 5. *S. C.*

It will not lie *de Pannagio*, for 'tis no more than a Privilege to take Pannage. 1 *Lev.* 212. *Pemble* verſus *Stern*. 1 Sid. 416. S. C.

It will not lie *de* 50 *Acris Montani*, for that may contain any *Species* of Land; adjudged on a Writ of Error out of *Ireland*. 1 *Roll. Rep.* 166. *Stafford* verſus *Macdonogh*. *See* Antea (A) 6.

5. Neither will it lie *de Piſcaria* in ſuch a River, becauſe 'tis only a Profit *apprender*, it ſhould be *terra aqua cooperta*. *Cro. Car.* 354. *Herbert* verſus *Langbain*. Cro. Car. 492.

6. Nor *de uno Repoſitorio*, becauſe 'tis a Word of ſeveral Significations, and therefore incertain, in this Caſe it was put for a *Warehouſe*. *March* 96. *Sprig* verſus *Rawlinſon*. *Cro. Car.* 555. *S. C.* W. Jones 454.

7. Neither will it lie *de uno Crofto*, becauſe 'tis a Word of incertain Signification, and therefore the Plaintiff perceiving the Court to be of that Opinion, releaſed Damages as to the Croft, and prayed Judgment for the reſt of the Lands, and had it. *Style* 30, 364. *Aſhworth* verſus *Staley*. 1 *Roll. Rep.* 2. *S. P.*

8. Nor *de una Coquina*, *Anglice* a Kitchen, becauſe the Demand is incertain, for any Room may be made a Kitchen by Uſage. *Noy* 109. *Ford* verſus *Lock*. See 1 *Roll. Rep.* 55.

9. Ejectment amongſt other Things for 300 *Acres of Waſte*; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that an Ejectment would not lie of Waſte, and ſo it was adjudged, becauſe of the Incertainty what it means, ſo the Plaintiff releaſed the Waſte and the Damages, and took Judgment for the Reſidue. *Hardres* 57. *Hancocke* verſus *Price*.

10. Ejectment for *five Cloſes of Arable and Paſture*, called *M.* containing *twenty Acres* in *D.* upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe an Ejectment will not lie of *twenty Acres of Arable and Paſture*, without ſhewing how many of each, that *Clauſum* is incertain how much it is, but *Furlinga*, *Bovata*, *Hida*, *Caruca*, are known Meaſures and Quantities in Law. 1 *Salk.* 254. *Knight* verſus *Symms*. See *Cro. Car.* 573. *Martin* verſus *Nichols*. *S. P. Hardres* 59. *S. C.* 4 Mod. 97. 2 Cro. 453. contra.

11. The Impropriation of *Aldgate* was granted by K. *James* I. to *B.* and his Heirs, reſerving the Right of Patronage, *&c.* and there was a Covenant on the Part of the Grantee to pay the Chaplain 10 *l. per Ann.* there being no Vicarage endowed out of the Impropriation; the Aſſignee of the Grantee

tee brought an Ejectment and delivered the Declaration to the *Chaplain* or *Curate*, and had Judgment by Default, and upon an *Habere facias poſſeſſionem* had the Poſſeſſion, and kept him out from Preaching; and upon a Motion, that he might be reſtored, it was inſiſted for him, that the Judgment was irregular, becauſe the Declaration was not delivered to the Tenant in Poſſeſſion, and that the *Church* was not demandable by the Name of a *Meſſuage*, that the Chaplain to whom the Declaration was delivered had no Right to the Poſſeſſion, but only a Power to enter in order to perform Divine Service; but adjudged, if he had no Right to the Poſſeſſion, he could not complain that the Judgment was irregular, he ſhould have moved for a Special Rule to defend only *quoad* a Right of Entry to perform Divine Service, and a Church is a Meſſuage, and by that Name may be recovered in a *Præcipe*. 1 *Salk.* 256. *Hollingſworth* verſus *Brewſter*.

See Poph. 197. S. P. 1 Sid. 295. S. P. * *See* (A) pl. 10.

12. It will not lie *de uno Meſſuagio ſive Tenemento*, becauſe *Tenementum* is a Word of incertain Signification; it may be an Advowſon, or a Houſe or Land, but 'tis good in Dower; ſo 'tis with an Addition, (*viz.*) *Tenementum* called the *Black Swan*, for the Addition makes it certain; for this Reaſon the Judgment for the Plaintiff was reverſed. 3 *Mod.* 238. *Hexham* verſus *Coniers*.

(C)

Where the Declaration is good.

1. THE Plaintiff declared on a Leaſe made 8 *May* by Virtue whereof *poſtea*, *ſcilicet* the ſame Day, he entered, this is good, for the Word *Poſtea* ſhews, that he did not enter before the Leaſe made, and therefore it ſhall be intended after the Delivery. *Dyer* 286. 4 *Leon.* 144. *Higham* verſus *Cook*. *S. P.*

2. In Ejectment, the Plaintiff declared on a Leaſe made to him 8 *May*, to hold for twenty-one Years *extunc* next following, by Virtue whereof *poſtea*, that is to ſay, *on the ſame Day*, he entered; adjudged, that he did not enter as a Diſſeiſor before the Leaſe began, but that the Declaration was good, for the Word *Extunc* muſt be underſtood immediately after the *Delivery* of the Leaſe, and not *after the Day of the Date*, and the Word *Poſtea* ſhews that he entered after, and not before the Leaſe was made. *Mich.* 11 *Eliz.* *Dyer* 286.

3. Ejectment of eleven Cloſes, naming them all by particular Names; upon Not guilty pleaded, the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that he ought to have declared of a certain Number of Acres, becauſe the Sheriff could not know otherwiſe of how much to deliver Poſſeſſion, when neither the Number of the Acres nor Quality of the Land is expreſſed; 'tis true, if it had been ſo, the Declaration had been better, but adjudged good as 'tis. *Cro. Eliz.* 235. *Jones* verſus *Howell*.

4. Ejectment upon a Demiſe by Husband and Wife, without ſetting forth, that it was by Deed, yet held good. 2 *Rep.* 61. *Weſcott's* Caſe.

5. Ejectment of an Houſe *in Auſtrali parte Vici*, *Anglice*, the High Street in *Wincheſter*; adjudged good. *Godb.* 335. *Hewet* verſus *Bye*.

6. The Plaintiff declared on a Leaſe *6 Sept.* 2 *Jac.* and that he was poſſeſſed until the Defendant *poſtea ſcilicet*, 4 *Sept.* 2 *Jac.* ejected him, which was two Days before the Leaſe, and therefore not good; but adjudged good, becauſe the *Scilicet* was repugnant and impoſſible, and that being rejected, then the Declaration will be on a Leaſe *6 Septemb.* and that he was poſſeſſed until the Defendant *poſtea*, 2 *Jac.* ejected him. 2 *Cro.* 96. *Adams* verſus *Gooſe*.

7. The Plaintiff declared on a Leaſe made 12 *Decemb. habendum a primo die Decemb.* the Jury found the Leaſe to be dated 1 *Decemb. habendum from henceforth*, but that it was delivered on the 12*th of Decemb.* now it was objected, that *from the Day of the Date*, &c. and *from henceforth* were different Commencements of the Leaſe; but reſolved, they are both one, being a Computation from *the Time paſt*; but if the Plaintiff had declared on a Leaſe made 1 *Decemb. habendum a die Datus*, the Ejectment could not be alledged on the ſame Day; but if it had been *habendum from henceforth* it might. 2 *Cro.* 258. *Lewellin* verſus *Williams*.

8. The Plaintiff declared, that whereas his Leſſor did by Indenture 9 *Junii*, 19 *Jac.* demiſe to him, *&c. habendum*, *&c. a die Datus ſigillationis & deliberationis indenturæ præd'*, for three Years, without mentioning either the Day of the Date, or of the Sealing, or of the * *Delivery*; upon Not guilty pleaded, the Plaintiff had a Verdict; it ſhall be intended, that the Indenture was dated, ſealed, and delivered on the ſame Day on which the Demiſe was alledged to be made. 2 *Cro.* 646. *Fenton* verſus *Harteſtone*.

* 4 Leon. 59. Knevitt v. Cope. S. P.

9. Ejectment on a Leaſe made 25 *March*, 6 *Jac. &c.* and that the Defendant *Poſtea ſcilicet*, 6 *Jac.* without mentioning *any Day certain*, ejected him, this was held good, for it appears, that the Ejectment was after the Leaſe made, and the Year of the King was certain. 2 *Cro.* 311. *Merrell* verſus *Smith*.

2 Bulſt. 29. S. C.

10. In Ejectment, the Plaintiff declared, that the Defendants *intraverunt & ejecit*, *&c.* the Plaintiff in the ſingular Number, upon Not guilty pleaded it was found for the Plaintiff; and it was moved in Arreſt of Judgment, that the Declaration was incertain in Point of the Ejection, becauſe the Action being againſt Three, and the Plaintiff having declared in the ſingular Number, that one ejected him, it cannot be known which of the Three it was, and the Jury cannot find all Three guilty, becauſe the Plaintiff himſelf chargeth but one; but adjudged, that the Plaintiff ſhould have Judgment, and that the Declaration ſhould be amended, it being but the Miſtake of the Clerk. *Yel.* 224. *Odingſall* verſus *Jackſon*.

11. In

11. In Ejectment, upon Not guilty pleaded, and the Cauſe coming on to be tried, it appeared, that the Leaſe was dated 8 *May*, 7 *Jac.* and the Ejectment was laid 13 *May* 7 *Jac.* and the Action was brought in *Eaſter*-Term following; adjudged, that if the Ejectment is proved at any Time after the Leaſe, and before the Action brought, 'tis ſufficient, tho' it was laid at a certain Time, which the Plaintiff could not prove. *Paſch.* 9 *Jac.* 1 *Bulſt.* 122. *Hall* verſus *King.*

12. In Ejectment, the Plaintiff declared on a Leaſe of ſo many Acres of Meadow and Paſture, and the Jury found a Leaſe *de Herbagio & pannagio* of ſo many Acres, and whether the Evidence of ſuch a Leaſe would maintain the Iſſue, was the Queſtion; it was inſiſted, that it would, for an Ejectment on a Leaſe made by a Guardian, or on a Leaſe made by a Copyholder, will maintain the Declaration, tho the one is void, as to the Infant, and the other, as to the Lord of the Manor; but adjudged, that this Leaſe will not maintain the Iſſue, becauſe an Ejectment will lie on a Leaſe *de Herbagio.* *Hardr.* 330. *Wheeler* verſus *Toulſon.* *Poſtea* (D) 13. *S. C.*

13. The Plaintiff declared on a Leaſe 22 *May*, in the 20th Year of King *James*, *Habendum a primo die Maii* for 3 Years, by Virtue whereof he entered, and was poſſeſſed until *poſtea ſcil't eiſdem Die & Anno*, he was ejected by the Defendant; after a Verdict for the Plaintiff, it was objected on a Writ of Error brought, that thoſe Words, *eiſdem die & Anno* relate to the laſt Antecedent, (*viz.*) to the firſt Day of *May*; and if ſo, then the Ejectment was laid before the Leaſe commenced, for that was on the 22 of *May*; but adjudged, that the Entry being laid to be *Virtute dimiſſionis*, thoſe Words, *Poſtea eiſdem die & Anno* muſt relate to the Day of the Leaſe made. 2 *Cro.* 662. *Rutter* verſus *Mills.*

14. In Ejectment, the Plaintiff declared on a Leaſe, 1 *Aprilis* 32 *Car.* made by *A. B.* and *C.* of a Meſſuage, *&c.* for 5 Years, *habendum* from 30th of *March laſt*, *Cumq*; *etiam* the ſaid *A. and B.* (omitting *C.*) afterwards, to wit, *on the ſame firſt Day of April*, demiſed to the Plaintiff the *ſame Meſſuage* for 5 Years from the ſaid *30th of March*, *Virtute quarum quidam dimiſſionum* he entered; and after a Verdict and Judgment for the Plaintiff, a Writ of Error was brought, and the Error aſſigned was, that the Declaration was double, being founded on two Leaſes of the ſame Date, of the ſame Thing, and for the ſame Term, and he could not enter by Virtue of both Leaſes; but adjudged, that it was not double; for when three made the Leaſe of the Whole, and afterwards two of them let the ſame again to the ſame Leſſee, by this they ſurrendered the Leaſe as to two Parts, and made this new Leaſe, *quod* thoſe two Parts, and as to the other third Part the old Leaſe ſtill continued, made by *C.* 3 *Lev.* 117. *Turbevill* verſus *Stockton.*

15. Ejectment of a Meſſuage, *&c.* in the Pariſhes of *St. Katharine* and *St. Gabriel*, *&c.* and at the Trial it appeared upon the Evidence to be in the Pariſh of *St. Katharine* only; the Judge, before whom it was tried, was of Opinion, that this Evidence would not maintain the Declaration; whereupon it was made a Caſe for the Opinion of the Court; and it was inſiſted for the Plaintiff, that where a Man has only a Title to Part, and brings an Ejectment for the Whole, he ſhall recover that Part to which he hath a Title; ſo is *Plow. Com.* 429. *b. and* 3 *Cro.* 13. no Judgment. 3 *Lev.* 334. *Goodwin* verſus *Blackman.*

(D)

Where the Declaration is not good. See *Implication in Pleadings*, 1, 2.

1. ERror of a Judgment in Ejectment, wherein the Plaintiff declared on a Leaſe for Years, to begin at *Michaelmas* next, after the Death of *R. B.* and averred, that *R. B.* was dead, and that he *entered*, but did not ſhew *when*, and for this Reaſon the Judgment was reverſed; for he might enter before *Michaelmas*, and then he was a Diſſeiſor. *Dyer* 89. *Clifford*'s Caſe.

2. *Ejectione firmæ de uno meſſuagio ſive tenemento*, and 4 Acres of Land, there was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment, that *meſſuagium ſive tenementum* was incertain, and therefore the Declaration void; for the Sheriff could not tell of which to deliver Poſſeſſion, and ſo it was adjudged; but it was held good for the four Acres, and therefore the Plaintiff releaſed his Damages as to the Houſe, *&c.* and had Judgment for the reſt. *Cro. Eliz.* 186. *Wood* verſus *Paine.* *Mich.* 27 *Eliz.* *Whitton* verſus *Roberts*, *S. P.* *Noy* 86. *Rocheſter* verſus *Kirkhouſe*, *S. P.* *Dyer* 261. *contra in Waſte.* *Yelv.* 118. *S. P.* *Sid.* 295. *Burburg* verſus *Yeoman. S. P.*

3. Ejectment by Husband and Wife, and did not ſay by Deed, and it cannot be the Leaſe of the Wife without a Deed; but adjudged good. *Cro. Eliz.* 481. *Child* verſus *Weſtcot.*

4. Ejectment, in which the Plaintiff did not ſet forth the Quantity of the Land, and having Judgment, it was reverſed for that Reaſon in the Exchequer-Chamber. *Owen* 18. *Palmer* verſus *Humfries.* *Antea* (B) 3. *S. C.*

5. In Ejectment, the Original was *Teſte* 13 *April* 39 *Eliz.* and the Plaintiff declared on a Leaſe made to him 22 *Aprilis*, in the ſame Year; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff had brought this Ejectment before he had any Intereſt in the Land, and for that Reaſon the Judgment was ſtaid; and afterwards the Plaintiff ſhewed, that after the Imparlance he had filed a new Original. *Mich.* 40 *Eliz.* *Goldsb.* 115. *Bacon* verſus *Seeling.* 4 Leon. 98. Griffith *v.* Price. S. P.

6. Error in the Exchequer-Chamber of a Judgment in Ejectment, wherein the Plaintiff declared on a Demiſe of a Meſſuage, four Gardens, *&c.* with the Appurtenances, called *Eaſt-Dizard*, but did not ſhew in what Town, Pariſh or Hamlet it lay; and for this Cauſe it was reverſed. *Hob.* 89. *Rich* verſus *Sheers.*

7. The Plaintiff declared on a Leaſe made by Husband and Wife, who made a Letter of Attorney to ſeal and deliver it on the Land, as it appeared on the Evidence; adjudged, that this Leaſe did not maintain the Declaration, becauſe a Feme Covert could not make ſuch a Letter of Attorney; it being therefore void, the Leaſe was made by the Husband alone, and the Plaintiff had declared on a Leaſe made by the Husband and Wife. 1 *Brown.* 124. *Wilſon* verſus *Rich.* *Yelv.* 1. *S. C.*

8. Ejectment on a Leaſe of Lands in ſeveral Pariſhes, naming them *vel earum aliquibus*, is ill, becauſe where the Poſſeſſion is to be recovered, it muſt be ſhewed in certain where the Land lies. 2 *Cro.* 124. *Matthewſon* verſus *Rowes.* *Contra* in Debt upon a Leaſe for Years, for there the Declaration may be general, it being founded on the Contract.

9. In *Winckworth and Man's* Caſe, the Court held, that if an Ejectment was brought of an Acre in Land in *Reading*, and abutted it *Eaſt*, *Weſt*, *North* and *South*, and upon Not guilty pleaded, the Jury find the Defendant guilty *in dimidio Acræ infraſcriptæ*, this Verdict is not good; becauſe 'tis not certain in which Part of the Acre the Plaintiff ſhould have an *Habere facias poſſeſſionem*; but in Treſpaſs it had been good, becauſe there Damages only are to be recovered, and not the Poſſeſſion. *Yelv.* 114. *Winkworth* verſus *Man.*

10. The Plaintiff declared on a Leaſe of a Meſſuage, ten Acres of Land 20 *Acres* of Meadow, and 20 *Acres* of Paſture, *per nomen* of one Meſſuage, and *ten Acres of Meadow, more or leſs*, when in Truth there were no more than *Ten Acres of Meadow* in the Leaſe; upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment, becauſe upon his own Shewing he could never have Execution of the Quantity of Land found by the Verdict; for a Leaſe of *ten Acres* of Meadow, *more or leſs*, cannot in Judgment of Law extend to 40 *Acres*, and the rather, becauſe the Lands in the Leaſe, and thoſe in the Declaration, are of different Qualities; the one being Meadow, and the other being not only of Meadow, but of Arable and Paſture. *Yelv.* 166. *Day* verſus *Fynn. Mich.* 7 *Jac. Owen* 133. *S. C.* 1 *Brownl.* 145. *S. C.* 2 *Lutw.* 963. *Hunloke* verſus *Petre. S. P.*

11. Ejectment on a Leaſe made on the ſixth of *May*, *Anno* 7 *Jac.* and that the Plaintiff entered, and was poſſeſſed, until the Defendant afterwards, on the ſixth Day *ejuſdem menſis Maii Anno* 6 *ſupradicto*, ejected him; it was objected, that the Declaration was not good, becauſe the Ejectment is alledged a whole Year before the Leaſe was made, for that was on the ſixth of *May*, 7 *Jac.* and the Leaſe was made 6 *May*, 8 *Jac.* but adjudged, it was good, and that the Word *ſexto* was void, for the Day of the Ejectment being laid to be *ejuſdem menſis Maii*, it cannot be intended to be of another Year than that in which the Leaſe was made. *Yelv.* 182. *Davis* verſus *Pardy.*

Cro. Car. 281. 12. Judgment in *C. B.* in Ejectment, and upon a Writ of Error in *B. R.* the Error aſſigned was, for that the *Teſte* of the Original certified was on the 24*th Day of January*, and the Ejectment was 7 *Days* after, (*viz.*) 31 *January*; *& per Curiam*, this was held ill, and not aided by the Statute 18 *Eliz.* as in * *Biſhop's* Caſe it was held. *W. Jones* 304. *Stayner* verſus *Jones.*

* 5 Rep. 37. 13. Ejectment, *&c.* for ſo many Acres of *Meadow*, and ſo many of *Paſture*; upon Not guilty pleaded, the Jury found the Demiſe *de herbagio & pannagio* of ſo many Acres; the Queſtion was, whether this did maintain the Iſſue for the Plaintiff? and it was inſiſted for him, that it did, becauſe an Ejectment will lie * *de Herbagio*; but adjudged, for that very Reaſon it will not maintain the Iſſue, for the Plaintiff ought to have declared upon a Leaſe *de Herbagio.* *Hardr.* 330. *Wheeler* verſus *Toulſon.* *Antea* (C) 12. *S. C.*

* Cro. El. 676. Spark's *Caſe.* Cro. Car. 362. 14. In Ejectment, the Declaration was on a Leaſe bearing Date 24 *Junii* 1640. (which was to commence *a die datus*, and that muſt be the Day after the Date) and that by Virtue thereof the Plaintiff entered 24 *Junii*, and that the Defendant, *poſtea ſcilicet* 24 *Junii*, *&c.* ejected him, ſo that the Entry and Ejectment is before the Commencement of the Leaſe; and for this Reaſon it was adjudged ill; 'tis true, there ſeems to be a contrary Judgment in the Caſe of *Adams and Gooſe*; but that Caſe was not approved. *Sid.* 7, 8. *Goodgaine* verſus *Wakefield.* 3 *Mod.* 198. *Evans* verſus *Crocker. S. P.* *See* 1 *Lev.* 46.

15. In Ejectment, the Plaintiff declared on a Leaſe for five Years, and the Jury found, that he had a Leaſe only for three Years; adjudged againſt the Plaintiff, becauſe he is to recover *Terminum ſuum præd'*, which is five Years. 2 *Lev.* 140. *Roe* verſus *Williamſon.*

(E)

By whom it may be brought, and by whom not.

1. A Leaſe was made of *Copyhold Lands* by the Copyholder himſelf, and Leſſee brought an Ejectment, and held good. *Leon.* 228. *Cole* verſus *Wallis.* 4 *Rep.* 26. *S. P.*

2. The Ch. Juſtice *Anderſon* was of Opinion, that the Leſſee of a Copyholder could not bring an Ejectment, or if he did, he ought to ſhew the Eſtate of the Leſſor, and that he had a Licence from the Lord, or ſome Special Cuſtom, to warrant the Leaſe; for otherwiſe, if 'tis a general Declaration on a Leaſe, it ſhall be intended a Leaſe at Common Law, which a Copyholder cannot make. *Cro. Eliz.* 469. *Wells* verſus *Partridge*, *and* 535. *Goodwin* verſus *Longhurſt. S. P.*

1 Roll. Rep. 3. 3. Leſſee *for Years* made a Leaſe at *Will*, the Tenant at Will was ejected; the Leſſee for Years cannot bring an Ejectment, becauſe he had not the actual Poſſeſſion, but only the Poſſeſſion in Law. 2 *Bulſt.* 209. *Stone* verſus *Grublam.*

(F)

Pleadings and Verdicts and Judgment in Ejectment, good, and not good.

1. THE Defendant pleaded in Bar a Recovery againſt the Leſſor of the Plaintiff in a former Action, and this was held a good Plea; for in this Caſe the Plaintiff is but Leſſee to him who was barred; ſo if two claim by a Leaſe from one Man, and one of them brings an Ejectment, and is barred, the other is without Remedy, becauſe he hath no Right. *Goldſ.* 43. *Cleyton* verſus *Lawſon.*

2. In Ejectment, upon Not guilty pleaded, the Defendant was found guilty for Part, and not guilty for other Part, whereupon Judgment was given for the Plaintiff for Part, and for the other Part, that the Defendant *ſit quietus*; it was objected, that no ſuch Judgment ſhould be given in Ejectment, for 'tis a Judgment in a Writ of Right, which is final; but a Judgment in Ejectment is not final; it ſhould be *quod* the Defendant, *eat inde ſine die*; and ſo it was adjudged. 1 *Roll. Rep.* 51. *Morris* verſus *Cadwallador.*

3. Judgment for the Plaintiff in Ejectment, and upon a Writ of Error brought, the Error aſſigned was, that the Plaintiff had declared on a Leaſe made to him, to commence at a Day to come, *Virtute cujus*, he entered and was poſſeſſed, and did not ſhew when he entered, either before or after the Day on which the Leaſe was to commence. *Sed per Curiam*, *Virtute cujus* he entered, is well enough. 2 *Roll. Rep.* 466. *Wakely* verſus *Warren.* 2 Roll. Rep. 483.

4. *Holt*, Ch. Juſt. 'tis a great Abuſe, that the nominal Leſſees in Ejectments are Perſons not in Being, or not known to the Defendant, and the Attorney who makes ſuch Leſſees ought to pay Coſts, and in this Caſe an Attorney was put to anſwer Interrogatories for ſuch Practiſe. *Mod. Caſes* 309.

5. In Ejectment the Plaintiff declared, that *L. D.* demiſed to him *per quoddam ſcriptum obligatorium, habend' a die datus Indenturæ præd':* Upon Not guilty pleaded the Plaintiff had a Verdict in *Ireland*, and upon Error brought here, it was aſſigned for Error, that there was no Time when this Leaſe ſhould commence; for it was *Habendum* after the Day of the Date of the *Indenture*, and there was no Indenture mentioned before, for it was *ſcriptum obligatorium*, and not *Indenturam*; but adjudged, that after a Verdict *ſcriptum* ſhall be intended *indenturam.* 1 *Vent.* 137. *Tailour* verſus *Fitzgerald.*

6. In Ejectment the Plaintiff declared on a *Leaſe for five Years*, and the Jury found a Leaſe only for *three Years*. *Hale* Ch. Juſt. held, this Verdict was againſt the Plaintiff, becauſe the Judgment muſt be *quod recuperet Terminum ſuum præd'*, which is *five Years*, whereas he had an Intereſt only for *three Years*, and probably the Defendant may have the Reverſion after the three Years; and if ſo, the Plaintiff will have it two Years longer than he hath any Right. 2 *Lev.* 140. *Roe* verſus *Williamſon.*

7. Judgment againſt the Defendant in Ejectment, who brought a Writ of Error in *B. R.* and pending that Writ, the Defendant delivered a new Declaration in Ejectment upon her own Demiſe, and moved for the Common Rule; but it was denied, becauſe ſhe could not bring a new Ejectment till ſhe had quitted the Poſſeſſion, or till the Tenant had attorned to the Plaintiff, who had recovered in the firſt Ejectment; becauſe if ſhe ſhould recover in this new Ejectment, and the firſt Judgment ſhould be affirmed on the Writ of Error, it would be made ineffectual by this riding Judgment. 1 *Salk.* 258. *Fenwick* verſus *Groſvenor.* *Farr.* 70. *S. C.*

8. Judgment in Ejectment, and a Year and a Day afterwards the Plaintiff brought an *Habere facias poſſeſſionem*, without ſuing out a *Scire facias* againſt the Defendant and Tertenants; and it was argued, that there was no Occaſion for a *Scire facias*, as to the Term, tho' it might as to the Damages; for till the Reign of *Car.* 2. it was doubted, whether a *Scire facias* would lie on a Judgment in Ejectment, becauſe the Plaintiff, as in the Caſe of a Real Action, might execute a Judgment in Ejectment by Entry, without a Writ of Execution; but adjudged, that as to the Poſſeſſion this Action was real, for a Recovery therein binds the Right, and makes a Title in the Plaintiff; therefore a *Scire facias* is as neceſſary in Ejectment as any real Action. 1 *Salk.* 258. *Withers* verſus *Harris.* Sid 317, 361.

9. One *Melwiſh* had procured *W. R.* to take upon himſelf to be Tenant in Poſſeſſion, when in Truth he was not, but a meer Stranger to it, and yet he received a Declaration in Ejectment, and upon the Common *Affidavit* the Plaintiff was tricked out of Poſſeſſion, and this Matter appearing to the Court upon the *Affidavits* of the *Comrogues* themſelves, (*viz.*) of him who delivered, and of him who received the Declaration, the Court ordered Reſtitution, and *Melwiſh*, the Plaintiff in Ejectment, attending, was committed to anſwer on *Interrogatories*; for when the Fact is proved, he muſt anſwer in Cuſtody but where he muſt enter into a Recogniſance to be examined; but in either Caſe, if he purge himſelf upon Oath, he muſt be diſcharged, and if he ſwear falſe, he may be proſecuted for Perjury; the Interrogatories muſt be exhibited in four Days, otherwiſe, by the Courſe of the Court they are diſcharged. *Mod. Caſes* 16, 73. *Sanders* verſus *Melwiſh*, *and Holderſtaffe* verſus *Sanders.*

10. In Ejectment, if at the Trial, the Defendant will not appear, and confeſs Leaſe, Entry and *Ouſter*, the Courſe, is to call him, or his Attorney, and then to call the Plaintiff and nonſuit him, and

and upon the Return of the *Poſtea*, Judgment will be given againſt the Caſual Ejector. 1 *Salk.* 250. *Turner* verſus *Barnaby.*

11. Ejectment by the Leſſor againſt the Leſſee upon a Condition of *Re-entry* for Non-payment of Rent; at the Trial it was inſiſted, that an actual Entry and Ouſter was neceſſary; 'tis true, it was formerly; but in the Caſe of *Withers and Gibſon*, 25 *Car.* 2. *Hale* ruled the Law to be otherwiſe; and ſo did *Scroggs* in Sir *Robert Pye and Billing*'s Caſe. 1 *Vent.* 332. And ever ſince it hath been held, that the Confeſſion of Leaſe and Entry is ſufficient. 1 *Salk.* 259. *Little* verſus *Heaton. Sid.* 210, *and* 223. *Langhorne* verſus *Merry. S. P.*

12. Ruled, that the Plaintiff in Ejectment is a meer nominal Perſon, and a Truſtee for the Leſſor, and if he releaſe the Action, he may be committed for a Contempt; ſo likewiſe, if he releaſe an Action brought in his Name for the Meſne Profits. 1 *Salk.* 260.

13. The Plaintiff moved, that the Landlord might be made a Defendant with the Tenant in Poſſeſſion; but it was denied, becauſe they cannot compel him againſt his Conſent; in another Caſe the Motion was made, and the Landlord was Conſenting, who was a Member of Parliament, and it being oppoſed for that Reaſon, yet the Landlord was made a Defendant, and the Court could not compel him to waive his Privilege; 'tis true, a Perſon who is privileged cannot be joined to be a Plaintiff; but he may where he is Defendant; becauſe every one ought to be allowed to defend his Right. 1 *Salk.* 256. *Underhill* verſus *Durham.*

14. The Plaintiff pretending a Title by Marriage, brought an Ejectment, and it was moved, that his Wife might be made a Defendant, and the Court inclined to grant the Motion, becauſe there could be no Inconveniency in it; but ſhe living in *Cheſhire*, and becauſe there muſt be fourteen Days Notice of Trial, and the Defendant would not waive that, the Court perceived it a Trick to put of the Trial; and ſo no Rule was made, 1 *Salk.* 257. *Fenwick*'s Caſe.

15. In Ejectment, the Term was laid for five Years, and the Plaintiff was delayed by an Injunction till that Term expired; it was moved to renew the Term, but it was denied, becauſe it could not be done without altering the Record. *Mod. Caſes* 130.

Election.

Who may have it, and in what Caſes. (A)
Where the Party ſhall not have his Election. (B)
When it ought to be made. (C)
When it ſhall be determined. (D)

(A)

Who may have it, and in what Caſes. See *Tithes.* (E) 8. Sir William Ingoldsby's *Caſe.*

1. AN Executor may bring an Action of Debt upon a Bond made to his Teſtator, either againſt the Heir or the Executors of the Obligor. *Dyer* 204. *Capell*'s Caſe. *Plowd. Com.* 439. *a. S. P.*

2. The Husband made a Jointure to his Wife after Marriage, then they both joined in a Fine *Sur Cogniſance de droit* of the Lands; adjudged, that this was no Bar to her *Dower*, for that ſhe had no Election which to take, till after the Death of her Husband, and then her Title of Dower did accrue. *Trin.* 19 *Eliz. Dyer* 358.

3. *Indebitatus Aſſumpſit* for Wares ſold for ſo many *Ducats*, which amounted to ſo much in *Sterling*, which Sum was demanded in Sterling, and not in Ducats, according to the Contract; and upon Demurrer to the Declaration, the Plaintiff had Judgment, which was affirmed in a Writ of Error in the Exchequer-Chamber; for he had Election to demand his Debt in what Coin he would. *Leon.* 41. *Wilſon* verſus *Davidge.*

4. The Condition of a Bond was, that the Obligor ſhould pay to the Obligee, his Executors, *&c.* 30 *l.* or 20 Kine *at his Election*, within one Month after the Death of *C.* the Defendant pleaded, that the Obligee did not make his Election, and upon Demurrer he had Judgment; becauſe the Obligee at his Peril is to make Election within the Time limited; for the Obligor is not bound to Tender both Money and Kine; but the Election of the Obligee is to precede the Tender of either. 1 *Leon.* 69. *Baſſet* verſus *Kerne. Moor* 241. *S. C.* by the Name of *Kern*'s Caſe. *See Fordley*'s Caſe. *Poſtea* Tender. (B) 3. *contra. See pl.* 13.

Dalli. 73. S. C. 5. A Man aliened a Manor, except one Cloſe, Parcel thereof, called *Newdick*, and there were two Cloſes of that Name, one containing nine, and the other three Acres; in this Caſe the Alienor ſhall have Election which Cloſe ſhall paſs. *Lee Sir Tho.* Caſe. 1 *Leon.* 268.

6. A Man made a Leaſe for Years, and afterwards ſold the Reverſion to another by Deed, and before the Enrollment levied a Fine to the ſame Perſon, afterwards, and within the ſix Months the Deed was enrolled, the Bargainee ſhall have Election to take either by the Deed or Fine. 4 *Rep.* 71. *Hind's* Caſe.

7. Where the Law giveth a Man two Actions to recover his Right, 'tis in his Election to bring which he pleaſeth. *Dyer* 20, 57. *S. P.*

8. Deviſe of Lands to Truſtees and their Executors, until they ſhould raiſe 800 *l.* to be employed for the Preferment of his Daughters; the Heir of the Deviſor entered and received the Profits during his Life, but the Deviſees may have an Action to recover the Sum, or may enter on the Lands, and hold them till the Money is raiſed. 4 *Cook* 81. *Sir Andrew Corbett's* Caſe.

9. A Stranger cut down and carried away a *Timber-Tree* in the Time of the Leſſee for Years; the Leſſor hath Election to ſue the Leſſee for *permiſſive Waſte*, or to bring an Action of Trover againſt him who cut down the Tree, and carried it away, for the general Property is always in the Leſſor; 'tis true, the Leſſee hath a ſpecial Property in it whilſt 'tis growing, but not afterwards. *Cro. Car.* 242. *Berry* verſus *Heard.* 4 *Rep.* 62. 11 *Rep.* 48, and 81. *S. P.* Palm. 327. contra. W. Jones 255.

10. In a *Quare Impedit*, the Plaintiff counted, that *W. R.* was ſeiſed of the Manor of *L.* in Right of his Wife, and being ſo ſeiſed, he and his Wife levied a Fine *Sur cogniſance de droit* thereof to a Stranger, who rendered it by the ſame Fine to the *Husband and Wife, for their Lives*, Remainder to the Heirs of the Body of the Husband, Remainder to his right Heirs; afterwards the Husband alone levied another Fine to a Stranger, who rendered it to the *Husband and Wife in Tail*, Remainder as before; the Husband died ſeiſed, the Wife entered and leaſed the Manor, *&c.* adjudged, that it was in the Election of the Wife, which Eſtate ſhe would have, either by the firſt or ſecond Fine. *Mich.* 30 *Eliz. Moile* verſus *Earl of Warwick.* 1 *Leon.* 65.

11. Leaſe for Years, rendring Rent, with Condition, that if the Rent ſhall be behind, *&c.* then the Leaſe to be void; adjudged, that in ſuch Caſe, if the Rent is behind, the Leaſe ſhall not be void, unleſs it *hath been demanded*, and that 'tis at the Election of the Leſſor and his Heirs, to continue or avoid the Leaſe. *Hob.* 331. *Hanſon* verſus *Norcliffe.* W. Jones 9.

12. Tenant for *the Life of another*, made a Leaſe for twenty-one Years, the Leſſee afterwards made an Under-leaſe to another for fifteen Years, of an annual Rent of 10 *l.* iſſuing out of the ſame Lands, with a Clauſe of Diſtreſs; then he who had the Eſtate *for Life* died, ſo that the Term was determined by the Act of God, but yet the Grantee of 10 *l. per Annum* brought a Writ of Annuity againſt the Grantor for the Arrears of the Rent; and adjudged, that the Action was well brought, becauſe an Intereſt being immediately veſted in him by the Grant, he had an Election to make it a perſonal Thing, and ſo to charge the Perſon of the Grantor in a Writ of Annuity, or to make it a Rent-charge, and ſo to charge the Land; and by this Action he had determined his Election, which ſhall not be taken from him but by his own Act, as where he purchaſes Part of the Land out of which the Rent was iſſuing; 'tis true, the Rent in this Caſe was gone, becauſe the original Term was determined by the Death of him for whoſe Life it was held, but that was by the Act of God, and not by any Default of the Plaintiff. *Poph.* 86. *Fulwood* verſus *Ward.*

13. Debt upon Bond, conditioned, that if the Obligor did pay unto the Obligee 10 *l.* on ſuch a Day, or four Cows at the *then* Election of the Obligee, that the Bond ſhould be void, *&c.* the Defendant pleaded, that he was always ready, *&c.* if the Obligee had made his Election; and upon Demurrer it was adjudged an ill Plea, for the Defendant ought to *tender both* at the Day, becauſe the Word *Then* in the Condition relates to the *Day of Payment.* *Moor* 246. See *pl.* 4.

14. In Treſpaſs, the Caſe was, that the Father levied a Fine of Yard-Lands and an Half, to the Uſe of himſelf for Life, Remainder to his eldeſt Son, and to *Grace* his Wife, and to the Heirs of the Body of the Husband: Proviſo, that if he died, living the Father, then *Grace* ſhould have one Yard-Land and an Half for her Life, in Poſſeſſion, without ſaying what Yard-Land in certain, the Husband died, and *Grace* entered, and elected one Yard-Land and an Half, and the Father entered on her, upon which ſhe brought an Action of Treſpaſs; adjudged, that the Uſe to the Father for Life immediately ceaſed as to this Yard-Land and an Half, upon her Election, and before her Entry, and that ſhe being a *Ceſtui que Uſe*, ſhe ſhall have this Election. *Moor* 602. *Marſſall* verſus *Marſhall.*

15. A Man was indicted for a Felony in entring a Dwelling-houſe and Taking away 250 *l.* and found guilty, and burnt in the Hand; afterwards the Perſon who loſt the Money brought an Action of Treſpaſs againſt the other, for Breaking his Houſe and Taking away the Money; and adjudged, that the Action did lie, for tho' it was at his Election at firſt, either to prefer an Indictment, or to bring an Action, yet by the Indictment he had made no Election, becauſe that was not at the Proſecution of the Party, but of the Crown. *Style* 347. *Dawks* verſus *Covenie.*

16. Debt on Bond, conditioned, that if a Ship at Sea, or the Goods therein, or the Obligor returned ſafe, then to pay ſo much Money; the Defendant pleaded, that the Obligor died before he returned, and the Plaintiff demurred to this Plea, without aſſigning any Breach, becauſe the Defendant having pleaded a collateral Plea, and that being defective, had given the Plaintiff the Advantage of putting himſelf on the Court, without aſſigning a Breach, and the Plea was defective, for the Money was to be paid upon three Contingents, the Return of the Ship, or the Goods, or the Obligor, which being all, the Law ſupplies theſe Words, (*viz.*) *Which ſhall firſt happen*, and ſo the Money is to be paid at that Contingent which firſt happens, and foreclоſes the Election of the Obligor, and gives it to the Obligee to take his Action upon the Contingent firſt happening. 1 *Lev.* 54. *Sayer* verſus *Glean.* Sid. 27.

17. Debt upon Bond for Performance of Covenants, one of which was, that the Plaintiff ſhould chuſe twenty of the Defendant's beſt Trees out of ſuch a Wood, to be taken within eleven Years; the Breach aſſigned was, that the Defendant had felled Trees, *&c.* within that Time; and upon Demurrer it was inſiſted for the Defendant, that the Trees were to be taken at his Election, and not at the Election of the Plaintiff, as in 5 *Rep.* 24. Sir *Tho. Palmer*'s Caſe, who ſold 2000 Cords of Wood to be taken at the Election of the Vendee; it was held, that if the Vendor cuts any Wood before the Vendee hath made his Election, he cannot meddle with what is cut, but muſt ſupply his Bargain out of what remains; but in the principal Caſe it was adjudged for the Plaintiff, becauſe he had eleven Years in which he was to make his Choice, and the Cutting the Trees within that Time by the Vendor, was a certain Abridgment of his Election, and this is not like * *Sir Tho. Palmer*'s Caſe, becauſe if the Vendee in that Caſe could have the Number of his *Cords* out of the Wood remaining, he had the Effect of his Bargain, but Trees differ in Value. 1 *Vent.* 271. *Motteram* verſus *Jolly*. 2 *Lev.* 142. *S. C.*

* *See* (B) pl. 5. S. C.

18. In Covenant, the Plaintiff declared upon a Leaſe, wherein the Defendant had demiſed to the Plaintiff two Houſes, with all Ways and *Paſſages* thereunto belonging, *&c.* and that the Defendant covenanted, that ſhe would permit the Plaintiff at his own Coſts to make a Drain to convey the waſte Water from the ſaid Houſes to the main Shore in Six-Bell-Yard; but that ſhe being poſſeſſed of a Parcel of Land and two Stables, lying between the ſaid Houſes and the main Shore, by which the ſaid Drain ought to run, aſſigned all her Term therein to one *Tomlinſon*, who was poſſeſſed, *&c. & non permiſit* the Plaintiff to make a Drain, *&c.* The Defendant pleaded, that there was a Paſſage belonging to the Premiſſes, thro' which a Drain might be made, and that ſhe did permit him to make a Drain thro' the ſame, *&c.* and upon Demurrer to this Plea it was inſiſted for the Plaintiff, that the Plea was ill; for when the Defendant covenanted to permit him to make a Drain from the Houſes, he had his Election to make it thro' any Part of her Lands, which lay between the Houſes and Six-Bell-Yard, where the main Shore was, tho' it might be inconvenient for her ſo to do, and tho' there might be another Place to do it; but the Court inclined, that if there was another convenient Place to do it, the Plaintiff had not his Election by this Covenant to make the Drain thro' the Lands and Stables demiſed to *Tomlinſon*; for every Agreement ſhall have ſuch reaſonable Conſtruction as may be conſiſtent with the Intention of Parties. 2 *Vent.* 277. *Targett* verſus *Lloyd.*

(B)

Where the Party ſhall not have his Election.

Moor 395. S. C. Cro. Eliz. 396. S. C.

1. THE Condition of a Bond was to deliver to the Obligee certain Writings, or elſe to ſeal ſuch a Releaſe to him *as his Counſel ſhould deviſe*, before *Michaelmas* next; in this Caſe the Obligor had not the Election to do the One or the other, becauſe the Making the Releaſe reſted in the Will of the Obligee, for it was to be ſuch a One as his Counſel ſhould deviſe; therefore he muſt perform the firſt Part of the Condition. *Goldſ.* 142. *Gerningham* verſus *Ewre.* See *Laughter*'s Caſe *contra.*

2. If a Man makes a Leaſe for Years to commence after the Surrender, Forfeiture, or Determination of a former Leaſe, the Leſſee hath not Election to have his Leaſe commence on which he pleaſeth, but on which of them ſhall firſt happen. *6 Rep.* 36. *The Biſhop of Bath*'s Caſe.

3. The Queen granted to the Mayor and Burgeſſes of *Chipenham*, a Moiety of a Yard-Land in a great Waſte called *Rudleſdown*, without any Deſcription by Boundaries, or otherwiſe, and afterwards ſhe granted the Waſte to *Sir Walter Hungerford*; the Mayor, *&c.* made a Letter of Attorney to one, to enter into the Waſte, and make Election of their Moiety; adjudged, that the Grant to the Mayor was void; but if it had been good, he could not make his Election by Attorney. 1 *Leon.* 30. *Sir Walter Hungerford*'s Caſe.

1 And. 11. S. C.

4. In Replevin, *&c.* the Caſe was, the Biſhop of *Salisbury*, in the Reign of *R.* 2. made a Feoffment in Fee of ſeventeen Acres of Wood in a great Coppice, containing 1000 Acres to one *Gilbert Bullock*, and his Heirs, but no Livery and Seiſin was made of any certain Part where theſe ſeventeen Acres ſhould be; afterwards one *Richard Bullock*, who was lineally deſcended from *Gilbert*, in the ſixth Year of the Reign of Queen *Elizabeth*, entered into the great Wood, and there made his Election to have ſeventeen Acres, which he ſet out by Metes and Bounds, and then cut down the Trees; adjudged, that *Bullock* could not have his Election in this Caſe, becauſe that is properly before the Thing is veſted in the Party, and here ſeventeen Acres were veſted in the firſt Grantee, tho' it was not certain where they lay. *Moor* 81. *Bullock* v. *Burdett.* *Dyer* 281. *S. C.*

Cro. Eliz. 819. S. C. 5 Rep. 24. S. C. *by the Name of* Sir Tho. Palmer's *Caſe.*

5. *Sir Tho. Palmer* granted to one *Corneford*, ſo much Wood in *Buxted* Woods in *Suſſex*, which would make 4000 Cord, to be taken by him; but at the Appointment of *Sir Thomas*; before any Appointment was made, *Corneford* aſſigned his Intereſt to *Maynard*, and afterwards *Sir Thomas* granted to one *Baſſett* ſo much Wood out of *Buxted* Woods, which would make 6000 Cord, to be taken at the Choice of *Baſſett*; then *Sir Thomas* appointed *Maynard* to take certain Wood to ſatisfy the firſt Bargain he made with *Corneford*, which Wood *Maynard* cut down, and *Baſſett*, ſuppoſing he had Election to take it where he would in *Buxted* Wood, carried it away, for which *Maynard* brought Trover in *B. R.* where he had Judgment, which was affirmed in the Exchequer-Chamber. *Moor* 691. *Maynard* verſus *Baſſett.*

(C)

When it ought to be made.

1. WHEN nothing paſſeth to the Feoffee before Election, there it ought to be made in the Life-time of the Parties; but where an Intereſt paſſeth immediately by the Grant or Feoffment, there the Election may be made by the Heir. 2 *Rep.* 36. *Sir Rowl. Heyward's* Caſe. *Dyer* 281. *Biſhop of Salisbury* verſus *Bullock. S. P.* 2 And. 202. S. C. Poph. 95. S. C. Hob. 159. S. C. *cited.*

2. *B. G.* the Inteſtate entered into a Bond of 30 *l.* to the Plaintiff, and 80 *l.* to *R. B.* the Adminiſtrator of *B. G.* was ſued, and he being alſo Executor to the other Obligee, pleaded, that the ſaid *B. G.* was indebted to his Teſtator, and that he, as Executor, retained his Goods in Satisfaction of that Debt of 80 *l.* and that he had not Aſſets *ultra*; and upon Demurrer to this Plea it was adjudged, that he ſhould have pleaded he had made his Election to retain the Goods before the Action brought, otherwiſe he ſhall be charged with the other Debt as Adminiſtrator. 2 *Brownl.* 50. *Burdett* verſus *Pix. Plow. Com.* 184. a. *S. P.*

3. In Conſideration the Plaintiff had ſold certain Pieces of Stuffs to the Defendant, he promiſed to deliver the Value of the ſaid Stuffs, in ſuch Pipes of Wine in the Cellar of *R. B.* in *London*, as the Plaintiff ſhould chuſe; adjudged, that the Plaintiff ſhould have made his Election before he brought the Action. *Style* 49. *Parmiter* verſus *Creſſy.*

4. *Trevill* made a Leaſe for ninety-nine Years, if *Joan*, *Anthony*, or *John*, ſhould ſo long live, rendring *an Heriot or* 40 *s.* at the *Election of the Leſſor*, *&c.* at their ſeveral Deaths *ſucceſſive*, as named in the Leaſe; *John* died firſt, and in Replevin the Defendant avowed for 40 *s.* and that he had made his Election to have that Money inſtead of the Heriot, and that the Plaintiff *habuit notitiam* thereof; but did not aver, that *Notice was given to him, and by whom*; and without ſuch an Averment it was impoſſible to take Iſſue upon *Habuit notitiam*; 'tis true, this was one Reaſon why the Plaintiff had Judgment, but becauſe it ſeems hard, that the Plaintiff ſhould determine his Choice meerly by bringing the Action, therefore 'tis reaſonable, that he ſhould do it before the Action brought, for tho' the Defendant knew, that he ought to pay the One or the other, yet he is not bound to tender either of them before the Plaintiff had actually made his Choice which he would have, becauſe he might know which would be accepted, and becauſe the Plaintiff hath not an Intereſt in either of them before he had made his Choice, and then he ought to *give Notice* to the Defendant which he had choſe. 1 *Mod.* 217. *See* Notice. (A) 27. *contra.*

(D)

When it ſhall be determined.

1. WHere the Leſſor hath Election to charge the Leſſee or his Aſſignee, in ſuch Caſe, if he accept the Rent of the Aſſignee, he hath determined his Election, and ſhall never after charge the Leſſee. 3 *Rep.* 24. *Marrow* verſus *Turpin.*

2. A Man granted a Rent-charge out of his Lands, and died, but did not charge his Heirs by the Deed, the Grantee brought a Writ of Annuity againſt the Heir, but diſcontinued that Suit, and then diſtrained; and adjudged, that he might, becauſe his Election to make it an Annuity was determined by the Death of the Grantor. *Dyer* 344.

3. Debt upon Pond, conditioned, that if *E. R.* his Executors or Adminiſtrators, ſhall pay unto *W. O.* his Executors or Adminiſtrators 12 *l.* yearly, at *Michaelmas* and *Lady-Day*, by equal Portions, for ever, *and* 150 *l. at any Time hereafter*, *at one entire Payment*, then the Bond to be void; and the Plaintiff declared, that the Defendant did not pay the 12 *l.* yearly, on the firſt Day limited for the Payment thereof; and upon a Demurrer to the Declaration, the Defendant inſiſted, that he had Election to pay the 12 *l.* yearly, or the 150 *l.* at one Payment, at any Time, when he would: *Sed per Curiam*, it was the Intention of the Parties, that either 12 *l. per Annum* ſhould be paid, or 150 *l.* but there being no Time limited when the 150 *l.* ſhould be paid, the Defendant may never determine his Election as to that Payment; but there is a certain Time limited for the Payment of 12 *l. per Annum*, *viz.* at *Michaelmas* and *Lady-Day*, and therefore he ſhall have Election to pay that, or the 150 *l.* till *Michaelmas* comes; but if he doth not pay at that Day, then his Election ſhall be transferred to the Plaintiff. 2 *Roll. Rep.* 215. *Ognes* verſus *Rockwood.*

Elegit.

Where it lies, and where not. (A)
What may be taken in Execution on an *Elegit*, and where it makes a good Title. (B)
Returns of *Elegits* and Inquiſitions thereon, good, and of an Action of Debt after Part is ſatisfied by an *Elegit*. (C)

(A)

Where it lies, and where not.

1. IT was doubted whether an *Elegit* would lie after an *Outlary* on a Judgment, becauſe upon ſuch Outlary the Crown is entituled to the Profits of the Land; yet the Court held, that after the Outlary the Party might make a Feoffment of his Land for a valuable Conſideration. *Gold.* 180.

2. An *Elegit* lies to the Sheriff of the proper County where the original Action was brought, and not to a Sheriff of any other County, without a Suggeſtion on the Roll of the firſt *Elegit*; but where an *Elegit* is granted to two Counties at firſt, and ſo entered on the Roll, upon a Suggeſtion which is falſe, 'tis not Error, but amendable, becauſe warranted by the Roll. 2 *Brownl.* 209. *Goody* verſus *Jounce.*

3. The Teſtator entered into a Bond, and died, and in Debt brought againſt his Executor, the Obligee recovered, and thereupon a *Fi. fa.* iſſued againſt him, upon which the Sheriff returned a *Devaſtavit*; and upon Motion the Court granted an *Elegit.* 2 *Leon.* 188. *Mead* verſus *Cheyney.*

4. *Sci. fa.* upon a Recognizance taken in the Court of Chancery, and an *Elegit* upon it; adjudged, that the Plaintiff might afterwards waive that Execution, if nothing is done upon it, and bring an Action of Debt, if he thought fit. *Cro. Eliz.* 608. *Langworth's* Caſe. *Moor* 545. *S. C.* by the Name of *Cooper* verſus *Langworth.*

5. Upon a Judgment in Debt, the Plaintiff took out an *Elegit* directed to the Sheriff of *Monmouth*, who returned *Nulla Bona*, *&c.* in his County, *&c.* after a Year and a Day the Plaintiff brought a *Sci. fa.* againſt the Defendant, to ſhew Cauſe why he (the Plaintiff) ſhould not have another *Elegit* into another County, and it was held he might have ſeveral *Elegits* into ſeveral Counties, for the entire Sum recovered, or he might divide his Execution, and have it for Part in one County, and Part in another. *Moor* 24. *The Earl of Worceſter's* Caſe.

(B)

What may be taken in Execution on an Elegit, and where it makes a good Title.

1. WHere there was Judgment *by Default* againſt an *Heir*, on the Bond of his Father, the Plaintiff ſhall have an *Elegit* only of the Lands which deſcended to him in Fee, and of which he was ſeiſed at the Time of the Writ brought. *Dyer* 81. 3 *Rep.* 12. *Sir William Herbert's* Caſe, but in *Hill.* 41 *Eliz. Cro. Eliz.* 692. in *Barker* and *Brown's* Caſe, it was adjudged, that where the Judgment was againſt the Heir *by Default*, *&c.* he ſhall be charged of his own Lands. *Moor* 522. *S. C.*

2. In Debt on a Bond, the Defendant before the Trial, conveyed his Lands to another, *&c.* but he himſelf took the Profits; adjudged, that notwithſtanding this Conveyance a Moiety of his Lands were extendable. *Dyer* 294. 3 *Rep.* 78. *Twine's* Caſe.

3. Debt againſt an Heir on the Bond of her Anceſtor, the Defendant confeſſed the Debt, but that ſhe had nothing deſcended to her but a Reverſion after an Eſtate for Life, the Plaintiff thereupon had Judgment for his Debt and Damages *de reverſione cum acciderit*, and a ſpecial *Elegit* to extend the Moiety, *&c.* *Dyer* 373.

4. The Father had a Man in Execution and ſuffered him to eſcape, and died; adjudged, that the Land which he had at the Time of the Judgment, may be extended by *Elegit*, upon a *Scire facias* brought againſt his Heir as Tertenant. *Dyer* 271.

5. Two Perſons had each of them a Judgment againſt one Debtor; he who had the firſt Judgment, brought an *Elegit*, and had the Moiety of the Lands delivered to him in Execution; then the other Judgment-Creditor ſued out another *Elegit*; adjudged, he ſhall only have a Moiety of that Moiety which was not extended by the firſt Judgment, which is contrary to the Year-Book 10 *Ed.* 2. where 'tis held, that the entire Moiety ſhall be delivered in Execution. *Cro. Eliz.* 483. *Huet* verſus *Cogan.*

6. There was Judgment againſt the Grantee of a Rent-Charge in Fee, and two Parts of the Rent were extended and delivered in Execution to the Creditor; adjudged, that this Execution of two Parts of a Rent-Charge in Fee, is good, and that the Sheriff need not take the Whole in Execution; for tho' after an Execution executed, the Debtor ſhall not be ſubjected by the Act of the Creditor to another Execution, yet by the Act of the Law he may; and here the Act of the Sheriff is an Act of Law, and therefore the other Part of the Rent may be delivered in Execution afterwards. *Cro. Eliz.* 742. *Wotton* verſus *Shirt.*

7. Upon a Judgment in Treſpaſs brought in the *C. P.* Lands in *Antient Demeſne* were extended by an *Elegit* directed out of *C. B.* to the Sheriff; adjudged, that the Sheriff is not to diſpute what Land is liable to Execution, and what not, but is to execute the Writ, and the Plaintiff may keep the Lands delivered to him in Execution, tho' they are *Antient Demeſne*, without being a Treſpaſſer, and the Defendant hath no way to recover them, but by an *Audita querela. Hob.* 47. *Cox* verſus *Barnſly.*

8. A Man had Lands delivered to him in Execution upon an *Elegit*, and afterwards moved the Court for a new *Elegit*, upon Proof, that he had other Lands, not known to the Creditor at the Time when the Execution was taken out; adjudged, that if he hath accepted of the firſt, by the Delivery of the Sheriff, he cannot afterwards have a new Extent; but when the Sheriff returns the Writ, he may waive it, and then have a new Extent. *Mich.* 36 *Eliz. Cro. Eliz.* 310. *Hongar* verſus *Fry.* Moor 351. S. C.

9. A Term for Years was appraiſed by a Jury to 100 *l.* and delivered in Execution to the Creditor for that Value; afterwards the Debtor brought a *Scire facias* to have Reſtitution, ſuggeſting, that the Plaintiff had levied 100 *l.* out of the Rents and Profits of the Defendant's Lands, and therefore he prayed a Reſtitution of the Term; but it was denied; 'tis true, if he had tendered the 100 *l.* before the Term had been delivered, he might in ſuch Caſe have an *Audita querela*; adjudged alſo, that if the Creditor had aſſigned the Term for a valuable Conſideration, after the *Teſte of the Elegit*, it had not been good, becauſe the Property of the Term and Goods is bound from the Time of the awarding the Execution; and they cannot afterwards be ſold to the Prejudice of the Perſon, at whoſe Suit the Execution was had. *Moor* 873. *Comyn* verſus *Brandlin.*

10. The Caſe was, *T. S.* had Judgment againſt B. *B.* in an Action of Debt, *Anno* 3 *Jac.* and *C. C.* had a Judgment in Debt againſt the ſaid *B. B. Anno* 4 *Jac. T. S* brought a *Scire facias* upon his Judgment, againſt the ſaid *B. B.* and had Judgment likewiſe therein, *Anno* 10. *Jac.* and had an *Elegit*, and the Sheriff impanelled a Jury, and delivered the Moiety of the Lands in Execution, but he did not *return his Writ*; thereupon *C. C.* endeavoured to have an *Elegit* upon his Judgment, and to turn *T. S.* out of Poſſeſſion, and moved the Court, that the Writ of *T. S.* might be filed, which the Lord Ch. Juſt. *Coke* ſaid was dangerous; becauſe *Non conſtat* whether it was the King's Writ or not, for there was no Seal to it, neither was it delivered into Court by a proper Officer; thereupon a *Certiorari* was prayed to that Sheriff when the Writ was executed; for tho' a new Sheriff was choſe, yet the old Sheriff muſt return the Writ; but *per Coke*, this is dangerous; yet if *C. C.* ſhould turn *T. S.* out of Poſſeſſion by Virtue of his *Elegit*, *T. S.* may have a new *Elegit*, becauſe his Judgment is prior to the other. 1 *Roll. Rep.* 77. *Brett* verſus *Foſter.*

11. The Plaintiff had a Moiety of the Lands delivered to him in Poſſeſſion by an *Elegit*, upon a Judgment given *Craſtino Trin'*; the Defendant claimed by an Extent on a Statute acknowledged in the ſame Term, but before the Judgment was given; yet adjudged, that the Plaintiff had the better Title, being in Poſſeſſion under a Judgment, tho' ſubſequent to the Statute, becauſe it being in *the ſame Term*, the whole Term it ſelf, in Judgment of Law, is but one Day; ſo that both theſe Judgments ſhall be intended to be given on the ſame Day; and in ſuch, if the laſt be firſt executed, that Creditor hath the beſt Title. *Latch* 53. *Gerrard* verſus *Norris.*

12. It was a Queſtion whether *Tithes* may be extended on an *Elegit* by Virtue of the Stat. *W.* 2. becauſe Proceſs is uſually directed to the Biſhop for a Sequeſtration, the Court ſeemed to incline they might; but it was at a Time when there were no Biſhops. *Style* 168. *Harwood* verſus *Patty.*

13. At a Trial at Bar in *C. B.* the Court delivered for Law, that where Lands are actually extended and delivered upon an *Elegit*, that a Fine levied on thoſe Lands, and Non-claim, will bar the Intereſt of the Tenant by *Elegit*, and that upon the Inquiſition found, the Party is in Poſſeſſion, before actual Entry, becauſe in ſuch Caſe he may bring an Ejectment or Treſpaſs; therefore a Fine and Non-claim will bar his Right. 1 *Mod.* 217. *Ognell* verſus *Lord Arlington. See Saffyn*'s Caſe.

14. An *Elegit* was taken out, and a Motion was made, that the Inquiſition might not be filed becauſe they had found, that the Defendant had twenty Acres, when in Truth he had but ten; ſo that the Whole was taken in Execution, when it ſhould only be a Moiety; ruled, that the Party grieved might file a Declaration, and that the Defendant ſhould plead the General Iſſue; and if it appeared, that he had more than a Moiety in Extent, it ſhould be void. *Sid.* 239. *Lord Stamford* verſus *Hobert.*

15. Judgment againſt Tenant for Life of a Rent-Charge, and a Moiety of the Rent was extended by *Elegit*, and more Rent being in arrear, the Tenant for Life died, and the Queſtion was, whether the *Tenant by Elegit* might diſtrain for the Rent by Virtue of the Statute 32 *H.* 8. *cap.* 37. by which 'tis enacted, that where any Perſon hath a Rent, either for his own Life, or *for the Life of another*, and the Tenant dies, the *Tenant per auter vie*, to whom the Rent is due,

may *diſtrain*; and it was inſiſted, that the Tenant by *Elegit* was the *Tenant per auter vie*, in this Caſe, and therefore might diſtrain; but adjudged, that Statutes which give a Remedy where there was none before, ſhall not have a liberal Conſtruction, but ſhall be taken ſtrictly; and if ſo, then a *Tenant by Elegit is not a Tenant per auter vie*, but a Tenant only till his Debt is ſatisfied, and ſo not within the Meaning or Letter of the Statute; 'tis true, Tenant by *Elegit* may have an Aſſize, but yet his Eſtate is no more than * a Chattel, and ſhall go to his Executors; and the Diſtreſs in this Caſe is founded on an Act of Parliament, and all Perſons who are in by Virtue of ſuch Acts, are in the *Poſt*; and if ſo, then they cannot diſtrain, for that is a Remedy at Common Law; but tho' the Perſon cannot diſtrain, he may bring an Action of Debt for the Rent arrear in the Life-time of the Tenant for Life. 2 *Sid.* 28, 62. *Pool* verſus *Neale*.

* 3 Cro. 895. Turner v. Lee.

16. *Scire facias* upon a Judgment, the Defendant pleaded in Bar, that before that Time the Plaintiff had ſued out an *Elegit* upon the ſame Judgment, and that the Sheriff, *&c.* had delivered more than a Moiety of the Lands in Extent; and upon a Demurrer to this Plea, it was held ill, becauſe the Sheriff had only a limited Authority to extend half, and here he having exceeded his Authority, by delivering more, the Execution is void. 2 *Salk.* 563. *Putten* verſus *Purbeck*.

(C)

Return of Elegit and Inquiſition thereon, and of an Action of Debt after Part is ſatisfied by Elegit.

1. IF upon an *Elegit*, or other Writ of Execution, the Lands or Goods are extended at too high a Rate, the Party hath no Remedy by the Statutes of *Acton*, *Burnell*, or *de Mercatoribus*, to compel the Extenders to take the Lands at the Value to which they were extended, or to pay the Money to the Value at which the Goods were appraiſed, becauſe thoſe are Penal Laws, and extend only to Writs of Execution, upon Statutes Merchant, or of the Staple or Recogniſances. *Bendl.* 15. 4 *&* 5 *Ph. & Mar. Poſtea* Execution. (H) 1. *contra*.

2. The Sheriff return'd, that he delivered to the Plaintiff twenty Acres, which is a Moiety of all the Defendant's Lands *per rationabile extentum*; this was held ill, becauſe he did not return the Inquiſition taken by the Oath of the Jury. *Dyer* 100.

3. The Conuſee of a Statute died, his Executors brought an *Elegit*, and the Sheriff returned on the Inquiſition, that the Conuſor was dead, but that he was ſeiſed of ſuch Lands, and did not ſay what Eſtate in the Lands, yet a *Liberate* iſſued forth on that Return, and the Executors accepted of it accordingly; Now if they ſhould die before the Debt was ſatisfied by the Perception of the Profits, their Executors may have a Re-extent, becauſe the Return of the firſt *Elegit* was void, it being too General, (*viz.*) that the Conuſor was ſeiſed, which he might be, and his Lands not extendable, for he might be ſeiſed for Life, or in Tail; therefore where the Death of the Conuſor appears on the Return, it ought to be found, that he was ſeiſed in Fee only. *Dyer* 299.

4. Judgment was had againſt a Woman, whoſe Name was *Sybill*, and upon a *Fi. fa.* the Sheriff returned a *Deed*, and thereupon an *Elegit* was awarded, and then the Sheriff returned, that *Iſabel* had 4 *l.* *Rent* yearly iſſuing out of certain Lands, a Moiety of which *Rent* he delivered to the Defendant, who in Replevin avowed the Taking the Cattle for Rent due; it was adjudged in this Caſe, that the Judgment againſt *Sybill* was void againſt *Iſabell*, and that the Sheriff delivering only a Moiety of the Rent, *without the Land*, that muſt be a *Rent-Seck*, and ſuch a Rent cannot be delivered in Execution *ut tenementum*. *Cro. Eliz.* 656. *Welſall* v *Heath*.

5. In every *Elegit* the Sheriff muſt return, and ſet out the Moiety of the Land diſtinctly, unleſs where the Defendants are Tenants in Common, and in that Caſe he muſt Return the Special Matter. 1 *Brownl.* 38. *Hutt.* 16. *S. P.*

6. The Plaintiff had Judgment againſt *Edw. Owen.* who died, and upon a *Sci. fa.* the Sheriff returned, that *R. B.* was Tertenant of all the Lands and Tenements in his Bailiwick, *quæ fuerunt præd' Edwardi*; and thereupon Judgment was given, that the Plaintiff ſhould have Execution againſt *R. B.* and he prayed an *Elegit*, which was entered on the Roll, *Elegit ſibi liberari medietatem omnium terrarum & tentorum* (but did not ſay *quæ fuerunt præd' Edwardi*) *in Com. S. tenend', &c. quouſque, &c.* for which Reaſon the Judgment was reverſed, *quoad* the Execution upon the *Elegit*. *Hob.* 90. *Ker* verſus *Owen*.

7. All Writs of Execution may be good, tho' not returned, except an *Elegit*, and that muſt be returned, becauſe an Inquiſition is to be taken upon it, and that the Court may judge of the Sufficiency thereof. 4 *Rep.* 65. *and* 74. *Palmer*'s Caſe.

8. Judgment was had in the County Palatine of *Lancaſter*, in *Michaelmas*-Term, and the Plaintiff moved on the laſt Day of the Term, to have an *Elegit* to the Sheriffs of *London* and *Lancaſhire*, which was granted; afterwards the Plaintiff took an *Elegit* to the Sheriff of *Lancaſhire*, upon a *Teſtatum* by the Sheriff of *London*, that he had nothing there, whereas in Truth there was no ſuch *Teſtatum*; and upon this *Elegit* the Sheriff of *Lancaſhire* extended a Leaſe of Tithes for fifty-nine Years to come, which he delivered to the Plaintiff as the Goods of the Defendant; whereupon a Writ of Error was brought, and the Error was aſſigned *in adjudicatione Executionis*, (*viz.*) that no *Teſtatum* was made or filed by the Sheriff of *London*, and this was adjudged Error; for when he waived the Benefit which the Court had granted to him, and grounded his

Execution upon a *Teſtatum* which was falſe, that made it Error; and it was adjudged, that the Defendant ſhould have his Term again. *Juncè* verſus *Goodyer*, *Yelv.* 179.

9. The Writ was, that *Elegit* Execution of the Goods *& medietatem terrarum, &c. Ideo tibi præcipimus quod bona & catalla* of the Defendant, *&c. deliberari facias*, omitting *& medietatem terrarum*, to hold the ſaid Goods, and the Moiety of the Lands *quouſque debitum levetur*; and thereupon an Inquition was taken and returned, and the Sheriff delivered a Moiety of the Lands; adjudged, that the Extent was wrong, becauſe the Inquiſition was taken without Warrant, but that the Plaintiff might have a new *Elegit*. *Cro. Car.* 116. *Walker* verſus *Rich.*

10. The Sheriff returned on an *Elegit*, that the Party had no Lands, but within the Liberty of *B.* where *R. G.* had Execution and Return of Writs, and that the ſaid *R. G.* upon a Precept directed to him, returned an Extent upon an Inquiſition, and that he had delivered a Moiety of the Lands to the Plaintiff; and it was adjudged, that what was done by the Bailiff of the Liberty was good, and that the Jury muſt ſet forth all the Land, and the Bailiff deliver a Moiety to the Party. *Cro. Car.* 232. *Sparrow* verſus *Materſock.*

11. The Sheriff cannot ſell any Thing but what is found in the Inquiſition; therefore, if he ſell a Term for Years, which is miſrecited in the Inquiſition, as to the Commencement thereof, the Sale is void. 4 *Rep.* 74. *Palmer*'s Caſe.

12. Upon Evidence to a Jury at Bar, to try the Right to the Rectory of *Aſhwell* in *Hartfordſhire*, the Caſe was, a Judgment-Creditor brought a *Fi. fa.* againſt the Rector, upon which 150 *l.* being Part of the Debt of 1600 *l.* was levied; afterwards he brought an *Elegit*, and upon a *Nihil* returned, he brought an *Alias Elegit*, without reciting the *Fi. fa.* or the Money levied on it, and the Sheriff returned, that he *delivered the Rectory of Aſhwell ſine terris præd'* (having mentioned the Lands before) which he returned to be a Moiety of the ſaid Rectory, but did not ſhew the preciſe Value; it was ruled, that if more than a Moiety is delivered on an *Elegit*, the ſame is void for the Whole; but it doth not appear by this Return, that more than a Moiety was delivered, becauſe it ſhall be intended, that the Lands mentioned therein are of an equal Value with the Rectory; but that a Rectory cannot be without Lands, or at leaſt without a Churchyard; for where a Man declares for a Rectory, he muſt prove more than the Tithes, or 'tis ill. *Sid.* 91. *Berry* v. *Wheeler.*

13. Debt upon a Judgment of 2000 *l.* brought for the Reſidue after 500 *l.* had been ſatisfied upon an *Elegit*, the Defendant pleaded, that the Plaintiff had taken out ſeveral *Elegits*, directed to ſeveral Sheriffs, *&c.* that one of them returned, the ſaid Defendant had a Term of Years, which he extended, and by that Extent had ſatisfied 500 *l.* which Term was now expired; and upon a Demurrer to this Plea, it was inſiſted for the Defendant, that ſince the *Elegit* is returned on Record, the Plaintiff hath made his Election, and that ſhall be good againſt him, whether any Lands are extended or not; beſides, here are ſeveral *Elegits* taken out, and but one returned: Now admitting that an Action of Debt would lie for the Reſidue, yet it ought not to be brought before thoſe *Elegits* are returned, becauſe the other Sheriffs may have levied the whole Debt; but adjudged, that in this Caſe the Action of Debt for the Reſidue will lie at Common Law; for the Statute which gives the *Elegit*, gave it to relieve, and not to defraud the Creditors. *Sid.* 184. *Glaſſcock* verſus *Morgan.* Lev. 92.

Emblements.

(A)

Of Corn ſowed, who ſhall have it. See *Heir.* (C) 7.

1. IF a Diſſeiſor ſows the Land, and afterwards cuts the Corn, and before 'tis carried away the Diſſeiſee enters, he ſhall have the Corn. *Dyer* 31. *Saye*'s Caſe 11 *Rep.* 52. *Lyford*'s Caſe.

2. The Leſſor entered on his Tenant at will, who ſtill continued in Poſſeſſion, and afterwards the Leſſor accepted the Rent, and the Tenant at Will ſowed the Land; now, tho' he was Diſſeiſor for continuing in Poſſeſſion, after the Will of the Leſſor was determined, by his Entry; yet by his Acceptance of the Rent he had waived the Diſſeiſin, and made him Tenant at Sufferance, and he ſhall have the Corn. *Dyer* 173.

3. The Husband made a Feoffment to the *Uſe of himſelf and Wife* for Life, Remainder over, then he ſowed the Land, and died; the Wife ſhall have the Corn, becauſe ſhe was a *Joint Purchaſer* with her Husband; but if the *Remainder* had been limited to the Wife, then the Executors of the Husband ſhould have it; ſo, if he ſow the Land which he hath in Right of his Wife, and ſhe dieth, he ſhall have the Corn; ſo if he ſow the Land, and dieth, and Dower is aſſigned of the Third Part of his Land, ſhe ſhall have the Corn. *Dyer* 316. *Noy* 149. *S. C.* by the Name of *Skele* verſus *Arnold.*

Cro. Eliz. 460. Moor 394. Gouldſ. 189. S. C.

4. A Woman Copyholder was entituled to her Widow's Eſtate, and ſowed the Land, and before the Corn was cut, ſhe married, the Lord ſhall have the Corn; for tho' her Eſtate was incertain, yet becauſe it was determined by her own Act, ſhe ſhall loſe the Corn. 5 *Rep. Oland*'s Caſe. 116.

5. Leaſe was made to Husband and Wife, *habendum* during the Coverture; the Husband ſowed the Land, and then was divorced *Cauſa præcontractus*, he ſhall have the Corn; for the Suit is at the Inſtance of the Party, yet the Marriage is diſſolved by Act of Law. 5 *Rep.* 116.

6. A Man made a Leaſe at Will, the Tenant at Will ſowed the Land, and then the Leſſor was outlawed at the Suit of the Tenant at Will; now his Will was determined, and the Crown entituled to the Profits of the Land, yet the Tenant at Will ſhall have the Corn; but if the Tenant at Will had been outlawed, the Crown ſhould have the Crop. 5 *Rep.* 116.

Cro. Eliz. 463. S. C. Gouldſ. 143. S. C.

7. Tenant for Life made a Leaſe for Years, who is diſſeiſed, the Diſſeiſor likewiſe made a Leaſe for Years, and his Leſſee ſowed the Land, and then the Tenant for Life died; adjudged, that the Leſſee of the Tenant for Life ſhall have the Corn, and that he might bring Treſpaſs againſt the Leſſee of the Diſſeiſor, and recover the Profits; for tho' his Intereſt in the Lands was determined by the Death of the Tenant for Life, yet his Right to the Crop remained. 5 *Rep.* 85. *Sir H. Knevitt*'s Caſe.

8. Copyholder ſowed the Lands, and afterwards committed a Forfeiture; the Lord entered, and adjudged, that he ſhould have the Corn. 4 *Rep.* 21. *Brown*'s Caſe.

9. The Leſſor covenanted with the Leſſee, his Executors, *&c.* that he ſhould carry away to his own Uſe ſuch Corn as ſhould be growing on the Land at the End of the Term; afterwards he conveyed the Reverſion to the Plaintiff, and the Executors of the Leſſee ſowed the Land, and ſold the Corn growing on it at the End of the Term, to the Defendant; it was objected, that the Leſſor never had any Property in this Corn, and therefore could not grant it away; but adjudged, that the very Right was paſſed when it ſhould happen; for tho' the Leſſor had not any actual Property in the Corn, yet he had a Right *in poſſe*, becauſe of the Lands out of which it proceeds, and the Words in the Leaſe are ſufficient to paſs the Property, as ſoon as the Corn is growing on the Land. *Hob.* 132. *Grantham* verſus *Hawley*.

10. A Man being ſeiſed in Fee of Land, ſowed it with Corn, and then conveyed the Land to *B.* for Life, Remainder to *C.* for Life, and then *B.* died before the Corn was cut, his Executors ſhall not have it, but *C.* who was the Remainder for Life. *Hob.* 132.

11. Tenant in Fee-ſimple ſowed the Land, and then he deviſed it to *B. G.* for Life, Remainder to *R. L.* for Life, and died before the Corn was ſevered; then the firſt Tenant for Life entered, and he likewiſe died before the Severance; the Queſtion was, whether his, or the ſurviving Tenant for Life, ſhall have the Corn; one Judge was of Opinion, that the Executor ſhall have it as Chattels veſted in his Teſtator; but adjudged, that the ſurviving Tenant for Life ſhall have the Corn, becauſe it paſſed with the Deviſe of the Land, and are not of the Manurance of the firſt Tenant for Life; but if he had granted them another in his Life-time, then it had been otherwiſe, becauſe by the Grant they are in Judgment of Law ſevered from the Land. *Cro. Eliz.* 61. *Mich.* 30 *Eliz.*

12. So where the Teſtator ſowed his Lands, and afterwards deviſed them to *T. P.* for Life, Remainder over to another, and died before the Corn was ſevered; adjudged, that he in Remainder ſhall have it. 18 *Eliz. Allen*'s Caſe.

13. *Tenant* for another Man's Life ſowed the Lands, and they both died before the Corn was ripe, the Executor of the *Tenant* ſhall have the Corn; the Caſe is the ſame where the *Tenant in Tail* ſoweth the Land, and dieth before 'tis ſevered from the Land; his Executors ſhall have it.

14. So where the *Wife* hath an Eſtate for Years, for Life, in Fee, or in Tail, and the Husband ſoweth the Land and dieth, his Executors ſhall have the Corn.

15. The Husband made a Feoffment of his Lands to *T. P.* and his Heirs, *to the Uſe of himſelf and his Wife, for the their Lives*, Remainder to his own Right Heirs; afterwards he ſowed the Lands, and made *W. C. his Executor*, and died; the Queſtion was, who ſhauld have the Corn on the Land; two Judges were of Opinion, that the *Wife, who was the ſurviving Jointenants* ſhould have it, eſpecially, ſince the Jointenancy was made by her Husband during the Coverture; but other Judges were of Opinion, that the Executor was entituled to it; for there being no Judgment given in this Caſe, and it being ended by an Award of two Judges, to whom it was referred, they gave the Executor a fourth Part of it after it was thraſhed. *Dyer* 316.

16. But my Lord *Coke* in his Comment upon *Littleton* tells us, and ſo is the Law, that where Husband and Wife are Jointenants of Land, and the Husband ſowes it with Corn, and dies before 'tis ripe, that the Wife, and not his Executor, ſhall have the Corn. 1 *Inſt.* 199.

17. Tenant *for Life* ſowed his Lands with Corn, and afterwards he granted over all his Eſtate, Right, and Title to another, who afterwards died before the Corn was cut; adjudged, that he in Reverſion ſhall have the Corn. *Cro. Eliz.* 464.

T. S. was bound in a Statute to *R. H.* and having ſowed his Lands, *R. H.* extended them, and they were delivered to him in Execution; adjudged, that *R. H.* ſhall have the Corn ſowed. 2 *Leon.* 54. *Burden* verſus *Withington*. 2 *Bulſt.* 213. *S. P.*

18. The Teſtator being ſeiſed in Fee, *ſowed the Lands*, and then *deviſed them to T. P. for Life*, Remainder to *W. C. for Life*, and died; afterwards the firſt Tenant for Life died before the Corn was ſevered; adjudged, that he in Remainder ſhall have it, becauſe it paſſed to him by the Deviſe of *the Land*, and eſpecially in this Caſe, becauſe it did not come by the Labour or Manurance

of the firſt Tenant for Life; but if the Teſtator had deviſed the Corn it ſelf to another, it would have paſſed, for by ſuch a Deviſe the Corn would be in Nature of a Chattel ſevered from the Land. *Cro. Eliz.* 61. *Spencer's* Caſe 464. *S. P. Gouldſ.* 44. *S. P.*

Engroſſing.

(A)

On the Statute 5 & 6 Ed. 6. cap. 14. for Engroſſing.

1. IT was affirmed on Error in the Exchequer-Chamber, that an Information upon the Statute for *ingroſſing* Apples, is not within the Statute, being dead Victuals, but not ſuch Victuals as the Law intends. 2 *Cro.* 214. *Braddon* verſus *Bowes.*

2. Information on the Statute 2 *Ed. 6.* for Engroſſing *diverſos Cumulos grani*; adjudged ill, becauſe of the Incertainty of the Word *Cumulus*, for it might be heaped, either in Shocks, or thraſhed, and Detinue will not lie *de Cumulo*; ſo an Indictment *de uno Cumulo Tritici*, is not good, therefore this being an Information on a Penal Statute, the certain Quantity of Corn engroſſed ought to appear. 2 *Bulſt.* 317. *Goldsborough* verſus *Whicher.* 1 Roll. Rep. 134.

3. In Debt upon the Statute 5 & 6 *Ed. 6.* for engroſſing two Thouſand Quarters of Oats, upon *Nil debet* pleaded, it appeared on Evidence at the Trial, that they were foreign Oats, and exempted by the Statute 13 *Eliz. cap.* 13. as foreign Victuals, and alſo, that the Defendant was a licenſed Badger, which likewiſe exempts him from the Penalty of the Statute; whereupon the Plaintiff was nonſuit. *Hardres* 231. *Hammond* verſus *Taylour.*

Entry.

Where there muſt be an actual Entry, where not. (A)
Entry and Expulſion, how it muſt be pleaded, and what ſhall be an Entry, what not, and who ſhall enter, and where the Entry is good. (B)

(A)

Where there muſt be an actual Entry, where not. See *Diſſeiſin.* (A) 5.

1. ADjudged, that where Tenant in Tail doth diſcontinue the Tail, and takes back an Eſtate in Fee, and then makes a Leaſe for Years, rendring Rent, and dieth, and afterwards the Iſſue in Tail, before any Entry, levieth a Fine, the Cogniſee ſhall not avoid this Leaſe; for tho' the Iſſue was remitted, yet the Leaſe was not void without his actual Entry. 2 *Mar. Dyer* 119. *Auſtin's* Caſe.

2. A Diſſeiſor of Lands lying in three Towns, levied a Fine of thoſe Lands which lie in one of thoſe Towns, and this was to the Uſe of the Cogniſee and his Heirs; the Diſſeiſee entered on the Lands in the other two Towns, which were then in the Poſſeſſion of the Leſſee of the Diſſeiſor, and this he did within five Years after the Fine levied, and in the Name of the Whole; adjudged, that he had gained the Lands in the third Town by this Entry, becauſe the Cogniſee was in by a Title, and in ſuch Caſe there muſt be an actual Entry. *Mich.* 15 *Eliz. Brook* verſus *Maſon. Keilw.* 213. 1 And. 28. Dyer 237. Bendl. 243. S. C.

3. Where a Bargain and Sale of Lands is made for Years, and the Bargainee never enters, if afterwards the Bargainor makes a *Grant of the Reverſion* expectant upon the Leaſe for Years, and recites the Leaſe in the Grant, which Grant is *to ſeveral Uſes*, this is a good Conveyance of the Reverſion, for the Eſtate was abſolutely veſted in the Bargainee by the Statute, but not to have an Action of Treſpaſs without an actual Entry and Poſſeſſion. *Mich.* 18 *Jac.* 2 *Cro.* 604. *Lutwich* verſus *Mitton.* Revocation. (E) 5. *S. C.* W. Jones 7.

4. Where the Freehold of Lands is in one Perſon, tho' thoſe Lands lay in ſeveral Parts of the ſame County, and are in Leaſe to ſeveral Perſons, yet the Entry into one Acre in the Name of the Whole, is good. *Latch* 71, 82. *Argoll* verſus *Cheyny.* Noy 77. Palm. 402. Gouldsb. 72. S. C. 1 Leon. 36. S. C.

5. In

5. In Ejectment, the Caſe was, a Man had ſeveral Cloſes of Arable, Paſture, and Meadow, and pretending a Right to them, he entered and made a Leaſe of all to the Plaintiff, and ſome of the Defendant's Servants entered into one Cloſe; the Court directed to the Jury to find the Ejectment for the Whole, tho' there was not any *actual Entry* proved into the other Cloſes, for if there had been but one great Cloſe, an Entry and Ejectment in Part of it, is ſo in the Whole. *Trin.* 22 *Jac. Latch* 85. *Caly* verſus *Fiſher*.

1 Lev. 170. Sid. 223, 262, 344.

6. In Ejectment, the Caſe was, Tenant in Fee-ſimple *granted a Rent-charge* out of his Lands, with a Clauſe, that if the Rent was in arrear, *then the Grantee, his Heirs or Aſſigns ſhould enter and enjoy, and hold the Lands until he ſhould be ſatisfied of the Rent*, and ſo *toties quoties* as the Rent was arrear; the Rent was arrear, the *Grantee entered and made a Leaſe to the Plaintiff*, who brought this Ejectment; and all this Matter being found in a Special Verdict, adjudged, that the Grant was good, and that the *Grantee by his Entry had ſuch an Eſtate* as entituled him to make a Leaſe, upon which an Ejectment might be brought; for if Tenant by *Elegit* make a Leaſe to try a Title, 'tis good, tho' he hath an incertain Intereſt in the Lands. See * *Brown and Haggars. Hill.* 13 *Jac. C. B. Rot.* 868, cited in *Price* and *Vaughan*'s Caſe, ſo that the Queſtion is not, whether the Grantee hath a Freehold or Inheritance in the Lands by the Words of this Grant, for the Eſtate which he hath is an Intereſt, which Intereſt is a Chattel created by the Agreement of the Parties; 'tis true, the Thing granted is only a Power to enter, but 'tis a Power which produces a real Effect, for when the Grantee enters, he is intituled to the Pernancy of the Profits. 1 *Saund.* 112. *Jemmott* verſus *Cooley*. *Raym.* 135, 158. *S. C.* See *Havergale* verſus *Hare*.

* Allen 15.

7. The Plaintiff brought an Action of Rent againſt the Leſſee; adjudged, that he may plead *Nil debet*, and give an Entry and Expulſion in Evidence. 1 *Vent.* 258. *Sid.* 151. *S. P.* 1 *Mod.* 35. *S. P.*

8. Ruled upon a Trial at Bar in Ejectment, that where the Statute of Limitations is pleaded, 'tis neceſſary to prove a Claim made upon the very Land claimed, and that it be *animo Clamandi*, and if there is any Exception in the Deed under which the Claim is made, it will be neceſſary to prove an Entry and Claim on the Land not excepted. *Mod. Caſes* 44.

(B)

Entry and Expulſion, how it muſt be pleaded; and what ſhall be an Entry, what not, and who ſhall enter, and where the Entry is good.

1. LEaſe to one for Life, Remainder to another for Life, the Leſſor brought an Action after the Death of the firſt Leſſee for Life, to recover the Poſſeſſion; the Defendant pleaded in Bar, that *after the Death* of the firſt Tenant for Life, he himſelf entered as in Remainder, without averring the Time of his Entry, *(viz.) immediately after the Death of Tenant for Life*; becauſe by Intendment of Law it ſhall be taken, that he did then enter. *Plow. Com.* 28 and 31. In *Colethirſt* and *Bejuſhin*'s Caſe.

2. In Aſſiſe of freſh Force, for a Diſſeiſin in a Cellar, the Defendant pleaded in Abatement, that the Plaintiff had entered into the Cellar *after the laſt Continuance*, and was ſeiſed thereof, *&c.* upon which they were at Iſſue, and the Jury found, that the Plaintiff was ſerved with a *Subpœna*, to be examined upon Interrogatories concerning the Title of this Cellar, and that after the laſt Continuance the Defendant deſired him to dine with him, and the Examiner being there, the Defendant, after Dinner, deſired the Plaintiff and the Examiner to go into the Cellar to view it, which they did accordingly, and when they had viewed it they came up, and the Plaintiff was then examined in the Defendant's Houſe upon the Interrogatories; adjudged, that the Writ was not abated by this Entry; and *Brook* Ch. Juſt. remember'd a Caſe upon a *Formedon*, where the Defendant pleaded in Abatement, that the Demandant entered after the laſt Continuance; and it appeared upon the Evidence, that ſeveral Perſons were cutting down Wood on the Lands, and that the Demandant entered into the Ground, and warned them at their Perils, to do no more than they could juſtify by Law; and this was adjudged no Entry to abate the Writ. *Paſch.* 2 *&* 3 *Mar. Plow. Com.* 92. *Ponett* verſus *Company of Mercers*.

3. Judgment was had in an Aſſiſe and Damages aſſeſſed to 10 *l.* afterwards the Plaintiff brought an Action of Debt for the 10 *l.* and declared upon the Record; the Defendant pleaded in Bar, that after the Verdict, and before the Judgment, the Plaintiff entered into the Land; 'tis put as a *Quære* in *Dyer*, whether this is a good Bar. 2 *Mar. Dyer* 24.

4. Leaſe to *W. R.* at 40 *l. per Annum*, *a Stranger* covenanted with the Leſſor, that the Leſſee ſhould pay 40 *l. for the Farm and Occupation of the Lands*; the Leſſor brought an Action of Covenant againſt the Stranger, who pleaded, that before the Rent became due, the Leſſor put the Leſſee out of the Farm; it was objected, this was no Plea, becauſe the Covenant by the Stranger was, that the Leſſee ſhould pay a collateral Sum, and not the Rent iſſuing out of the Land; but adjudged, that 'tis a conditional Covenant, and that the Conſideration upon which it was founded was taken away by the Act of the Leſſor himſelf, *viz.* by his Entry and Expulſion. 2 *Leon.* 115. *Bedell*'s Caſe.

5. Debt for Rent reſerved upon a Leaſe for Years; the Defendant pleaded, that the Plaintiff *expulit & amovit & adhuc extratenet*, upon which they were at Iſſue; and the Defendant gave Evidence, that there was a Cottage, which was Parcel of the Tenements demiſed, over a Brick Kiln, and that the Leſſor entered and untiled the Cottage; for the Leſſor it was ſaid, that he did not untile

tile the Cottage, but that it fell by Tempeſt, and that he entered on the Land to carry away Bricks which were ready made and reſerved to himſelf at the Time of the Demiſe, and that he did not *continue* on the Land any longer than was neceſſary for carrying off the ſaid Bricks; adjudged, that 'tis not material, whether the Plaintiff *continued* in Poſſeſſion, or not, for when once he had done any Thing which amounted to an Entry, the Rent is ſuſpended, and it may properly be ſaid, that *Extratenet* the Defendant, till he hath done ſomething which amounts to a Re-entry; Judgment was given for the Defendant. *Mich.* 30 *Eliz.* 1 *Leon.* 110. *Cibill* verſus *Hills.*

6. Treſpaſs for Breaking and Entring his Houſe; the Defendant juſtified the Entry, by Virtue of a Warrant on a *Sci. fa.* to levy a Debt *De Bonis Teſtatoris*, which Goods were in the Hands of the Executrix when her Teſtator died, and averred, that ſhe was in the Houſe *cum Bonis ſuis*, and that the Doors being open, he entered to levy the Debt; and upon Demurrer this Plea was held ill, becauſe the Defendant did not *aver, that the Goods of the Teſtator were in the Houſe*, for if they were not, then his Entry was not juſtifiable. *Cro. Eliz.* 759.

7. In a Special Verdict in Ejectment, the Jury found, that one *Eve* had a good Right to enter, and that the Defendant, by Command of the ſaid *Eve*, did enter on the Lands mentioned in the Declaration, and ejected the Plaintiff; adjudged, that the Defendant is not guilty; for when he entered by the Command of him who had a Title, he entered by the Title of him who had it, and by Virtue thereof gained a Title to himſelf, and ſuch Entry being lawful, he had an Intereſt by it on the Land. 1 *And.* 283. *Fryer* verſus *Sumpner.*

8. Debt, *&c.* upon a Leaſe of an Houſe and ſeveral Lands *at W.* and of ſeveral Cloſes; the Defendant pleaded an Entry and Expulſion out of the Lands *at W.* upon which they were at Iſſue, and the Plaintiff had a Verdict; it was moved in Arreſt of Judgment, that the Declaration was ill, for the Plaintiff declared on a Leaſe of Lands *at W.* and did not ſhew where that was; 'tis true, this had been a Cauſe for a Demurrer, but the Defendant having pleaded a collateral Plea, (*viz.* an Entry and Expulſion) he hath made the Declaration good. *Mich.* 21 *Jac.* 2 *Cro.* 692. *Buckland* verſus *Oatly.* 2 Roll. Rep. 396.

9. In Replevin, the Caſe upon the Pleadings was, that the Archbiſhop of *York* made a Leaſe of a Field, rendring Rent: Proviſo, that *ſede vacante* it ſhall be paid to the *Chapter*; the Rent was arrear *ſede vacante*, and afterwards a new Archbiſhop was made; and the Queſtion was, whether he, as Succeſſor, ſhould enter for the Condition broken in the Time of his Predeceſſor, or in the Time of the Vacancy; and adjudged, that this being a Condition in Fact, he might enter for the Breach of it, either in the Time of his Predeceſſor, or in the Time of the Vacancy, as an Heir may enter for a Condition broken in the Life-time of his Anceſtor; but 'tis otherwiſe where the Condition is created by Law, as in Waſte, Forfeiture, *&c.* *Moor* 51. *Eyre*'s Caſe. Proviſo. (A) 12. *S. C.*

10. Leaſe for Years of certain Marſh-Lands in the County of *Cambridge*, in which Leaſe the Defendant covenanted to *drain other Lands* in the ſame County, but not in the Leaſe; and in an Action of Covenant brought againſt him, he (the Defendant) pleaded, that the Leſſor had entered on the Lands leaſed; and upon Demurrer this was adjudged no good Plea, becauſe the Covenant was collateral, and not for doing any Thing on the Lands leaſed. *Moor* 402. *Carith* verſus *Read.*

11. Leaſe for twenty-one Years to *Higgs* and *Doncaſtle* of Lands in *Burghfeild*, rendring 7 *l. per Annum* Rent; the Leſſor, after the Death of *Higgs*, brought an Action of Debt againſt *Doncaſtle*, for four Years in arrear; the Defendant pleaded as to the Rent which incurred in the firſt two Years, whilſt *Higgs* was living, *Nil debet*, and for the laſt two Years he pleaded, that *Higgs* entered into a Statute to one *D.* for 200 *l.* that after the Death of *D.* his Executors ſued out Execution, and *Vachell*, the now Plaintiff, who was then Sheriff of the County, returned the *Liberate*, that *Higgs* was ſeiſed in Fee of theſe Lands, and that he (the Sheriff) had turned out *Doncaſtle*, and put the Executors of the Cogniſee in Poſſeſſion, and ſo prayed Judgment if he ſhould pay any Rent after his Expulſion, *&c.* and upon Demurrer this was adjudged an ill Plea, becauſe the Defendant had not ſet forth any Inquiſition taken upon the Extent; for if there was no Inquiſition, then the Extent was not lawful, and by Conſequence the Eviction muſt be ſo too. *Moor* 891. *Vachell* verſus *Doncaſtle.*

12. Upon Special Pleading, the Caſe was, Leſſee for Years, rendring Rent, upon Condition, that the Leſſor, *&c.* might re enter for Non-payment; afterwards the Leſſee acknowledged a Statute; the Rent was arrear, the Term was extended, but before the Liberate the Leſſor entered and took the Corn; the Queſtion was, whether his Entry was lawful, or hindered by this Extent; it was inſiſted, that an Extent is only a Valuation of the Lands and Goods, it doth not alter the Eſtate, and by Conſequence the Leſſor may enter for a Condition broken; 'tis true, by the Extent the Lands are ſeiſed into the King's Hands, but that is only a Fiction in Law, that the Thing may be done, which Law and Juſtice requires, 'tis not ſeiſed into his Hands by Way of Poſſeſſion, for if it was, then the Entry of the Leſſor would not be lawful: So *per Curiam*, in the principal Caſe the Entry is lawful. 2 *Roll. Rep.* 468. *Nicholas* verſus *Symonds.*

13. Debt upon Bond, the Condition whereof recited, that Copyhold-Lands were to be ſurrendered to *H.* and *G.* and their Heirs, by one *W. R.* when of full Age, and that *G.* ſhould pay to *H.* ſo much Money on ſuch a Day, and that if he did not, then the Surrender ſhould be to *H.* and his Heirs; if therefore *W. R.* at his full Age ſhould ſurrender to the Uſe of *H.* and his Heirs, then the Bond to be void; the Defendant pleaded, that *W. R.* at his full Age did ſurrender; the Plaintiff replied, that it was true, he did ſurrender Part, *&c.* but that afterwards *G.* did enter and

expel him; and upon Demurrer to the Replication it was adjudged ill, becauſe he did not ſhew that the Expulſion was *by Title*, for otherwiſe the Bond doth not extend to it. *Cro. Car.* 3. *Hammond* verſus *Dodd. Tiſdale* verſus *Eſſex. S. P.*

14. *Covenant, &c.* for Non-payment of Rent, the Defendant pleaded in Bar, that the Plaintiff entered into Part of the Land demiſed *before the Rent became due*, for which the Action was brought, and ſo had ſuſpended his Rent; the Plaintiff replied, that the Defendant did re-enter, and ſo *was poſſeſſed of his former Eſtate*; and upon Demurrer to this Replication it was held ill, becauſe the Plaintiff did not alledge that the Defendant *continued in Poſſeſſion* till the Rent became due. *Style* 243. *Page* verſus *Parr.*

15. Leaſe for Years, rendring Rent, with a Clauſe of Re-entry for Non-payment; the Leſſor brought an Action of Debt for Rent arrear, and pending the Action he re-entered on the Land; adjudged, that the Writ being abated by this Entry, cannot be revived. *Style* 260. *Webb* verſus *Willmore.*

16. In Debt upon a Leaſe for Years, the Defendant may plead an Entry into Part, this doth not amount to the general Iſſue, and a Suſpenſion muſt be the Conſequence of ſuch Entry. 1 *Vent.* 2.

1 Lev. 155. 17. In Ejectment, the Queſtion was, if an Entry, *after the Day of Niſi prius*, and before the Day in Bank, might be pleaded in Abatement, or not; and adjudged, that it might, if it had been *before the Day of Niſi prius*; 'tis uſual to plead it at the Aſſiſes, and it ſhall be tried there, and if 'tis omitted the Defendant loſes the Advantage of it; ſo if a Writ of Error is brought, 'tis not aſſignable for Error, becauſe it proves the Writ abatable only, and not abated. *Sid.* 238. *Bois* verſus *Norcliffe.* See 1 *Bulſt.* 5. See 2 *Cro.* 303. *Kerby* verſus *Lovell.*

18. Leaſe for Years, rendring Rent, and in an Action of Covenant brought againſt the Leſſee, the Breach aſſigned was for Non-payment of Rent; the Defendant pleaded, that before any Rent was due, the Lands were ſold by *Bargain* and *Sale* to one *Allen*, who was attainted of Treaſon, and ſo they were veſted in the King, *&c.* and upon a Demurrer to this Plea it was objected, that it was ill, becauſe the Defendant did not ſhew that *Allen*, or any under him, and without an Entry and Expulſion the Defendant is not diſcharged; but adjudged, this being upon the Statute of Uſes, an Entry is not requiſite; but the greater Doubt was, that here is a Title for the King, and he is in Poſſeſſion without Entry, and the Party accountable to him for the meſne Profits. *Sid.* 399. *Banks* verſus *Smith.*

2 Mod. 213. S. C. * *See* Covenants. (D) 6. † 2 Vent. 46. 19. *Aſſumpſit, &c.* in which the Plaintiff declared, that in Conſideration he promiſed to the Defendant ſo much yearly for five Years, *&c.* he promiſed to * *ſave him harmleſs* in *the Poſſeſſion* of it, but that *T. S.* had entered and evicted him, and that the Defendant had not *ſaved him harmleſs*; after a † Verdict for the Plaintiff it was objected, that he had not ſet forth, that he was evicted *by Title*, and all Covenants of this Nature extend only againſt lawful Titles; but adjudged, that this Agreement was only as to the *Poſſeſſion.* 2 *Lev.* 194. *Gregory* verſus *Major.*

20. Treſpaſs for an Aſſault, Battery, and Entring his Houſe; the Defendant, as to all, except Breaking and Entring the Houſe, pleads Not guilty, and as to that he juſtified, by Virtue of *a Writ De homine replegiando*, and a Warrant thereon directed to *P.* who was the Sheriff's Bailiff, to take one *W. Laycock* out of Cuſtody of *Edw. Stanhope*; and that the ſaid *Laycock* being eſloined to the Houſe of *Stanhope*, the ſaid *P.* and the Defendant to aſſiſt him, and by his Command entered the Houſe, the *Doors being open, &c.* and upon Demurrer it was held, that this Plea was ill, becauſe a Bailiff cannot enter the Houſe, *&c.* by Virtue of *ſuch a Writ*, if the Perſon to be replevied was not actually in the Houſe at the Time of the Entry made, which is not averred by this Plea. 2 *Lutw.* 1428. *Stanhope* verſus *Dawſon.*

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